



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO.37 OF 2001

IN THE MATTER OF THE ESTATE OF PIUS KINGOO

MUTHWA alias WILLIAM KINGOO (DECEASED)

SCHOLASTICA KINGOO.....APPLICANT

-VERSUS-

JOSEPH KIMEU KINGOO.....1ST RESPONDENT

PETER MUSYOKA KINGOO.....2ND RESPONDENT

MUNYAO MAINGI.....3RD RESPONDENT

ABEDNEGO KITHOME MWANZUI.....4TH RESPONDENT

RULING

1. This ruling relates to two applications that shall be addressed chronologically.

a. Application for Confirmation of Grant dated 13.12.2017

2. By an application dated 13.12.2017, **Peter Musyoka Kingoo** the 2nd Respondent/ 2nd Administrator/Applicant sought confirmation of grants made on 7.2.2003 in respect of the deceased estate in the instant matter and it was supported by an affidavit deponed by himself.

3. The application was not opposed by **Joseph Kimeu Kingoo** and **Abednego Kithome Mwanzui** who have not responded to the application. Nevertheless **Scholastica Kingoo** vide her affidavit sworn on 13.12.2018 filed her reply and opposed the application.

4. The 2nd Respondent/2nd Administrator/ Applicant deponed that on 29.9.17, the court directed that a fresh summons for confirmation be filed in respect of the Estate of the Late Pius King'oo Muthwa- Deceased. In the said application, the applicant indicated that the deceased left one property, to wit; Land Parcel No Makueni/ Unoa/20 Measuring 47 acres and sought that the same be distributed amongst the 6 sons and 3 daughters of the deceased as per the schedule of distribution dated 13.12.2017. He attached a copy of a search in respect of the land and a consent to mode of distribution by Lucy Wavinya Kingoo.

5. The applicant in her replying affidavit in opposition to the application for confirmation of grant sworn on 13.12.18 stated that she had authority to swear the same on behalf of other beneficiaries as listed in the affidavit; to wit, Francis Musau Kingoo, John Bosco Wambua Kingoo, Bernard Kingoo Muthwa, John Mwanzia Kingoo and Petronila Nundu Muthoka. She deponed that after the grant that was issued on 25.4.2001 was revoked, and court directed that the parties agree on a mode of distribution, the clan members had a family meeting on 28.10.2017 in which the 2nd Respondent/2nd Administrator/ Applicant refused to attend despite being invited. Copies of the minutes of the meeting were annexed together with minutes of meetings held on 26.5.2018 and 23.6.2018. Subsequent to the said meetings, the mode of distribution was agreed hence she averred that the mode indicated by the 2nd Respondent/2nd Administrator/ Applicant is not the agreed mode.

6. This court gave directions that the application be canvassed by way of written submissions.

7. The Applicant's prayers to this honorable court are to allow the summons for confirmation of grant issued on 25.4.2001.

8. The applicant submits that the summons has provided for a mode of distribution in accordance with Section 38 of the Law of Succession Act and no objection by the beneficiaries has been raised and thus the summons be allowed as prayed.

9. The 1st and 4th Respondents herein in opposition to the summons for confirmation of grant filed by the 2nd Respondent/2nd Administrator/Applicant herein submitted that the application should not be allowed for the consent of mode of distribution is signed by only one beneficiary. The said 1st and 4th Respondents pray that the all the beneficiaries should appear before the court and be heard with regard to the summons for confirmation of grant.

10. It is the applicant's submission that the acreage of the property is in dispute and as such the beneficiaries feel that a surveyor do survey the plot to establish the size of the property. Further that the proposed mode of distribution by the 2nd Respondent/2nd Administrator/Applicant is not the agreed mode and thus should not be adopted; however the agreed mode is as per paragraph 11 of her affidavit and it should be adopted after the beacons have been placed by a surveyor, reason being that some of the property has been sold off.

11. After going through the pleadings and the parties submissions, I find the issues for determination are;

i. Whether this court can determine the 4th respondent's claim of estate of deceased estate

ii. What portions of the deceased parcel of land subject herein are the respondents, the applicant and the beneficiaries entitled to or whether the mode of distribution proposed by the applicant can be adopted.

iii. Whether the grant should be confirmed.

12. The core dispute is anchored in the fact that there are two modes of distribution that are presented by the opposing parties. Entangled in the distribution is the allegation by the 4th respondent that part of the estate had been sold off to him and he is claiming entitlement. Further there is the allegation that the deceased distributed his estate before he died and therefore all the family members are aware of that distribution.

13. In the **Matter of Estate of Gachuru Kabogo NBI Succ No. 2830 of 2001** the court held that, during confirmation of grant hearing, of ownership of a property of an estate is contested, the property not contested is confirmed and the contested one is heard under **Order XXXVI (36) CPR** as separate.

14. In another matter **Charles Muriithi Kungu –Vs- Ann Njoki Njenga NBI HCCC No. 19 of 2004** the court ordered that a dispute as to whether a particular asset formed part of the estate of deceased or belonged to the applicant be dealt with through an originating summons brought under **ORDER XXXVI RULE 1**.

15. Thus the issue as to whether this court can determine the 4th Respondent's claim of estate of deceased is answered in the negative. The issue of his entitlement can only be determined in a separate cause outside this cause. The 4th Respondent's claim would best be ventilated before the Environment and Land Court.

16. This leaves the court with the issue of confirmation of the grant. There is no dispute that the Land Parcel No Makueni/ Unoa/20 is the estate of the deceased but there is a dispute on the mode if distribution. In the premises, the court will go ahead to make a decision on whether to confirm grant later in the decision; on the issue of distribution, any part of the estate in occupation and contested herein shall be preserved to await the cause to be lodged over same claim in the next 3 months in the Environment and land court. Failure to lodge same as ordered within the next 3 months from the dates herein, the same disputed acreage will be subject to distribution thereof. Further, I note that on 29.9.17 the court gave the applicant and the petitioners 60 days to agree on the mode of distribution and file the same, however there is no agreement as yet. In the premises, the same is to be done within 60 days, failing which the court shall proceed to distribute the same

b. Application for Contempt of Court dated 10th August 2018.

17. The Applicant **Scolastica Kingoo** filed Summons on 10th August, 2018 and sought leave to institute contempt proceedings against **Joseph Kimeu Kingoo, Peter Musyoka Kingoo, Munyao Maingi and Abednego Kithome Mwanzi**.

18. The Applicant sought that **Joseph Kimeu Kingoo, Peter Musyoka Kingoo, Munyao Maingi and Abednego Kithome Mwanzi** are in contempt of the Court orders made in Court on 29.9.17 and issued on 22.3.2018 and the Court do issue eviction orders against the 3rd and 4th respondents, the court do make appropriate orders preserving the estate of the deceased and the OCS Wote police station do offer assistance in the eviction process.

19. The application is grounded on the following facts;

a. The Court on 29.9.17 issued orders preventing the 1st and 2nd respondent herein and any other person from intermeddling or wasting the estate of the deceased pending the filing of fresh summons for confirmation of grant.

b. The 1st and 2nd respondent divided 10 acres and sold it to the 3rd and 4th respondent

c. The respondents were served with the said orders but have continued with their actions in disregard of the orders issued on 22.3.18.

20. The 1st Respondent herein through his affidavit sworn on **17/09/2018**, deponed that his late father named **Pius Kingoo Muthwa** (deceased) who had passed on 21.11.1998 was the registered owner of Land Parcel No **Makueni/ Unoa/20** Measuring 47 acres and who had informed all the nine siblings, how his estate was to be distributed before his demise. He avers that all the family members are aware of the manner of distribution.

21. He further deponed that the 2nd respondent did not involve him in the instant succession suit but however added that the beneficiaries of the estate of the deceased had already developed their portions of land.

22. The 4th Respondent deponed vide his affidavit sworn on **17/09/2018 that in 2017** he entered into an agreement with the 1st respondent to purchase an acre of land from his share of the estate that is the subject of the will. He averred that the sale was witnessed by the 2nd respondent and he has developed the said land. He denies being served with a letter in 2015 by the applicant and he also denies unlawfully acquiring the land or wasting it and thus the application be dismissed with costs to the respondents. He annexed a copy of the sale agreement.

23. The 2nd respondent vide his affidavit filed on 10.8.18 deponed that the order issued on 22.3.18 was never served on him. He further deponed that the order is overtaken by events since by the 29.1.18 he had already filed an application for confirmation of grant that is slated for hearing. He averred that the applicant failed to notify him of the alleged family meeting that took place on 23.6.18 and issues of eviction are within the jurisdiction of the court. He deponed that the 3rd Respondent occupies his portion of land as a caretaker since 2015 and further that the applicant has not brought proof of sale. The 3rd deponent avers that an order for eviction cannot be issued unless his portion is demarcated and hence the instant application is unfounded.

24. In her further affidavit filed on 18.12.18, the applicant deponed that the court issued an order on 22.3.18 and all the respondents were served with the same. She deponed that the 4th Respondent has admitted having bought a parcel of land in 2017 despite the existence of the dispute, and the purchase is illegal for the 2nd respondent has no capacity to dispose of the suit property before a certificate of confirmation of grant has been issued. She further avers that the respondents continue to intermeddle with the deceased's property before distribution and should be compelled to stop until distribution and confirmation of grant has been done. In addition, she avers that the allegation that the 3rd Respondent is a caretaker is false.

25. This court gave directions that the application be canvassed by way of written submissions.

26. Mukai Mutemi and Associates Advocates submitted on behalf of the applicant herein that while in the process of distribution of the estate, the 1st and 2nd Respondent sold 20 acres from the estate to the 3rd and 4th Respondents without the consent of the other beneficiaries, that the family meeting held on 23.6.18 decided that the 3rd and 4th Respondent be evicted. Further that the 3rd and 4th Respondent defied a notice that the suit property was not for sale and purchased the same.

27. Counsel submitted that the 3rd and 4th Respondents do not fall under the category of an innocent purchaser as they have been aware of the dispute between the beneficiaries. He submitted further that the 4th respondent admits to intermeddling in paragraph 5 of his replying affidavit.

28. The 1st and 4th Respondents submitted that the 4th Respondent is a bonafide purchaser for value and protected under Section 93 of the Succession Act. They relied on the case of **Katende v Haridar & Co Ltd (2008) 2 EA 173** that lists out what a purchaser must show to rely on the bona fide doctrine.

29. The 2nd respondent submitted that the case of **Kasturi Limited v Kapurchand Depar Shah (2016) eKLR** gives the ingredients for contempt of court, and the applicant has not proved to the required standard that the respondents are guilty of contempt for the order that is said to have been disobeyed was valid until the filing of a fresh application for confirmation of grant and thus the instant application is overtaken by events as the application for confirmation of grant has already been made. Further that the applicant has not demonstrated that the respondents are in breach of the order. Further the order was not served and thus it has not been demonstrated that the respondents were aware of the existence of the order hence the applicant has failed to meet the threshold required for proof of contempt and thus the application should be dismissed with costs to the respondents.

30. Section 4(1) of the Contempt of Court Act, 2016 defines contempt as:

“civil contempt as willful disobedience of any judgment, decree, direction, order or other process of a court or willful breach of an undertaking given by a court.

To prove contempt, it must be proved that; the contemnor was aware of the court order or rule which was violated, that the contemnor was able to comply with the order and that the contemnor failed to do so.”

31. In the case of **Sam Nyamweya & Others –v- Kenya Premier League Ltd and Others [2015] eKLR** it was held as follows:-

“contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

32. From the above definitions of contempt of Court the questions which emerge for scrutiny are as follows:-

a) Were the orders issued on 22.3.2018 valid orders of the Court?

b) Were these orders served upon contemnors and were they aware of the said order?

c) Are **Joseph Kimeu Kingoo, Peter Musyoka Kingoo, Munyao Maingi and Abednego Kithome Mwanzui** guilty of contempt of the above stated orders?

d) What are the requisite orders to be made in this regard?

33. From the Court record, the pleadings and able submissions by Counsel for all parties it is not disputed that the impugned orders are valid Court orders in Succession Proceedings pertaining to the suit property Makueni/ Unoa/20 which is the deceased's estate.

34. With regard to the 2nd issue, whether the said Court orders were served to the Contemnors", the Court of Appeal in **Shimmers Plaza Ltd v NBK (2015) eKLR** Hon. Mwera Karanja, Mwilu JJA adopted the decision of the High Court and approved the growing jurisprudence that reiterated that knowledge of a Court order suffices to prove service and dispenses personal service for purposes of contempt proceedings. In **Basil Criticos Vs A.G. & 8 Others (2012) eKLR** Hon. Justice Lenaola(as he then was) stated;

"The law has changed as it stands today, knowledge supersedes personal service....."

35. In the case of **Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 Others [2017] eKLR** it was held thus:-

"...There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard which in civil contempt cases the burden of proof is higher than a balance of probabilities required in civil cases and provides that:

- i. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;*
- ii. the defendant had knowledge of or proper notice of the terms of the order;*
- iii. the defendant has acted in breach of the terms of the order; and*
- iv. the defendant's conduct was deliberate..."*

36. In the instant case, the 3rd and 4th Respondents were not party to the Succession Cause 37 of 2001. Though the 3rd Respondent has filed no response, the 4th Respondent has indicated that they were not involved in the succession proceedings.

37. As to specific Court orders; there is no evidence that the respondents were served with Court order of 22.3.18. In any event, the order was issued almost a year later from when the alleged sale took place and the 1st, 3rd and 4th Respondents were not party to these proceedings and were not granted opportunity to be heard. The totality of the evidence on record is that the 1st, 3rd and 4th Respondents were not served with the Court orders to ensure compliance.

38. With regard to the 2nd Respondent, he was always party to these proceedings. He obtained grant that was confirmed on 10.2.2003 and revoked. He is also one of the beneficiaries of the estate of the deceased. He was privy to and had knowledge of these proceedings right from the beginning to date. Infact the applications that culminated to non-compliance directly concern and involve him as administrator and witness. In the proceedings that gave rise to orders of 22.3.2018, he was one of the parties as administrator.

39. The application which culminated to the court order made on 22.3.2018 was to prevent dealings in the property pending the filing of fresh summons for confirmation of grant and the order shows that the 2nd Respondent was represented by Counsel.

40. So as per the above cited cases on actual knowledge *vis a vis* personal service of the Court orders, the 2nd Respondent had/had personal knowledge of these proceedings and particularly the Court orders as a party to the Succession Proceedings. The 2nd Respondent participated in all proceedings and therefore the issue of personal service is not relevant or practical in the present circumstances since he was deemed to be on top of things through his learned counsel.

41. Is the 2nd Respondent guilty of contempt of the above stated orders?

42. In **Re Bramblevale (1970) 1 Ch. 128** Lord Denning, affirmed this position when he stated as follows:

"Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond all reasonable doubt."

43. The burden of proof is that the Contempt of Court is proved beyond reasonable doubt that the 2nd Respondent willfully disobeyed Court orders cited above and instead proceeded with the sale of the suit property despite an injunction in place.

44. What constitutes Contempt of Court in the instant case is as follows;

- The suit property Makueni/ Unoa/20 the estate of the deceased and subject of Succession Proceedings in the instant Court file.
- According to the applicant, contrary to existing valid Court orders that stopped any intermeddling or wasting of the estate of the deceased the 1st and 2nd respondent sold 20 acres from the estate to the 3rd and 4th respondents.
- The 2nd Respondent fully aware of the Court orders of 22.3.2018 as a participant in these proceedings, negotiated and signed the Agreement for sale with the 4th Respondent to the exclusion of beneficiaries, yet the suit property is family property.
- The Agreement has not acknowledged the existence of the Machakos Succession Cause 37 of 2001 as condition precedent to the conclusion of the sale and payment of the Purchase price.
- While the Court orders of 22.3.2018 was to prevent dealings in the property pending the filing of fresh summons for confirmation of grant, the 2nd respondent went ahead and filed the application for confirmation of grant.

45. The next issue to establish is whether the contempt proceedings were legally and lawfully instituted.

46. The application for contempt of Court was filed on 10.8.2018 whilst it is not indicated the date when the Court orders were alleged to have been disobeyed. However it can be imputed that one example is the sale agreement dated 9th May, 2017.

47. The Contempt of Court Act 2016 prescribes at Section 34 that;

No court shall initiate any proceedings for contempt of court either on its own motion or otherwise after the expiry of a period of 6 months from the date on which contempt of Court is alleged to have been committed.

48. Therefore, although the conduct complained of amounts to contempt of the Court's orders cited above, if the act relied upon is the one dated 9.5.2017 then there is limitation of action since the proceedings ought to commence before 6 months are over. The Applicant discharged their legal duty to prove beyond reasonable doubt the contempt by the administrator/executor. However, any other actions have not been identified and the date of the complained actions are not indicated. Therefore this court cannot make any finding from allegations that have no basis.

49. On the other hand, the 2nd Respondent failed to carry out his statutory mandate as Administrator of the deceased's estate as provided in Section 79, 82 & 83 and more particularly Section 82 (b) of Law of Succession Act Cap 160 which provides;

82. (b). to sell or otherwise turn to account, so far as seems necessary and desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

i. any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

ii. no immovable property shall be sold before confirmation of the grant;

50. In **Re Estate of David Kyuli Kaindi (Deceased), Succession Cause No. 3403 of 2005**, it was pointed out that:

“[18] The most potent remedy in the hands of a beneficiary is that of calling personal representatives to account. Beneficiaries who are not personal representatives have no control over the estate. The property of the deceased does not vest in them. They have no power over it; neither do they have any obligations with respect to it. When aggrieved by the manner the estate is being run their remedy lies in seeking accounts from the personal representatives, and, in extreme cases of maladministration and misconduct by the personal representatives, in applying for revocation of the grant.”

[19] The obligation to account is tied up with the fact that personal representatives are also trustees. They are defined as such in the Trustee Act, Cap 167, Laws of Kenya, at Section 2. This is so as property belonging to another vests in them in their capacity as personal representatives, and they hold the same for the benefit of others – beneficiaries, heirs, dependents, survivors, creditors, among others. They stand in a fiduciary position in relation to the property and the beneficiaries. As they hold the property for the benefit of others or on behalf of others – they stand to account to the persons for whose benefit or on whose behalf they hold the property. It is an equitable duty and a statutory obligation.”

51. The 2nd Respondent is party to all proceedings with regard to the deceased's estate. He is privy to all cases that interrogate the administration of the estate for the benefit of beneficiaries in the deceased's estate. In the instant case admittedly, there has been no agreement between the applicant and the respondents on the distribution of the suit property. It appears that the 2nd Respondent conducted sale of the suit property contrary to Court orders and failed to explain the necessity and desirability in selling the suit property in execution of

his duty without consulting and obtaining consents from the beneficiaries. Such conduct amounts to contempt of Court orders. It also amounts to derogating from statutory duty as Administrator. Although the 2nd Respondent's conduct confirms civil contempt by wilful disobedience of Court orders, the application is time barred.

52. From the above circumstances it is clear the 2nd Respondent is no longer able and willing to distribute the estate as per court order of 22.3.2018 and safeguard the beneficial interest of all beneficiaries.

53. In the result the following orders are hereby made:-

(a) The Application for contempt of Court dated 10/8/2018 is dismissed no order as to costs.

(b) The earlier grant issued herein and confirmed is revoked and a Fresh/New grant shall be issued in the name of Scholastica King'oo, Francis Musau King'oo and Peter Musyoka King'oo as Co-administrators` of the deceased's estate.

(c) In consultation with ALL beneficiaries, the Administrators to discuss and agree on the way forward in distribution of the suit property within 60 days and file the summons for confirmation of grant failing which the court shall direct the mode of distribution.

(d) The Administrators to pursue and ensure they obtain records to the suit property in readiness for distribution among the beneficiaries.

(e) A conservatory order is hereby issued to the effect that there will be no sale, transfer of property LR MAKUENI/UNOA/20 until the confirmation of the grant herein.

(f) Peter Musyoka Kingoo to file accounts on the running of the estate of the deceased from the date of appointment as Administrator which should be done within 60 days from the date hereof.

(g) Any part of the estate in occupation and contested herein shall be preserved to await the cause to be lodged over same claim in the next two (2) months in the Environment and Land Court. Failure to lodge same as ordered within the next two (2) months from the date hereof, the same disputed acreage will be subject to distribution thereof.

(h) Matter be mentioned within 60 days (5th April, 2019) to confirm compliance, progress and further directions.

(i) Each party to bear their own costs.

Orders accordingly.

Delivered and Dated at Machakos this 5th day of February, 2019.

D.K. KEMEI

JUDGE