



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 294 OF 2015

IN THE MATTER OF THE ESTATE OF REUBEN WALTER MUYVA MUIU (DECEASED)

FLORENCE NDUKU MUIU.....OBJECTOR

VERSUS

VICTORIA TATU MUIU.....1ST RESPONDENT

ROBERT MUNYAO MUIU.....2ND RESPONDENT

AND

MILCAH KALONDU MUIU

& 7 OTHERS.....PROPOSED INTERESTED

PARTIES/APPLICANTS

RULING

1. The applicants herein who claim to be sisters to the deceased have filed a Notice of Motion dated 23rd August, 2018 seeking to be joined in the proceedings as interested parties.
2. The grounds of application for joinder of the proposed interested parties are that they are sisters of the deceased herein and their presence in the matter is necessary to let the court be aware of any irregularity, impropriety and/or interference with the proper distribution of the estate of the deceased contrary to the law and the wishes of the deceased. In an affidavit deponed by **Betty Nguli**, the 1st respondent and her children are accused of sidelining the 3rd Administrator and the entire household of the 1st wife and hence seeking to distribute the family property amongst themselves contrary to the law and the deceased's wishes. Further that the property that was passed on to the deceased by the interested parties' late father had specific instructions not to be sold and yet the 1st respondent and her children keep on selling the property.
3. The Respondents' opposition to the Interested Parties' application for joinder is primarily based on the usual procedure in that the Law of Succession Act has no provision for intending interested parties and thus the court has no basis for entertaining the application.
4. Substantively, the Respondents opposed the joinder of the interested parties and stated that there has never been interference in the estate of the deceased, for there is no confirmed grant. Further, that the objector is one of the administrators of the estate and therefore the 1st wife's family is properly represented and this application is a waste of time and hence the application be dismissed with costs.
5. The Court directed that the application be canvassed via written submissions.
6. Counsel for the Proposed Interested Parties, M/S Nzavi & Co. Advocates and M/S Koki Mbulu & Co. Advocates for the Respondents - filed written Submissions on 7th November, 2018 and 20th November, 2018 while counsel for the Respondent filed theirs on the 20/11/2018. I have considered the said submissions.

Issues for determination

7. Having considered the pleadings, affidavits and submissions of the respondents and the proposed interested parties, I consider that the issue for determination in the application the subject of this ruling is one, namely:

a. Should this court join the Applicants as parties in these proceedings?

Analysis

8. At the outset, it may be observed that the dispute between the parties involved in this suit depends on the determination of two alternate questions, namely: whether the objectors had a beneficial interest, and to what extent, in the estate of the deceased, in which case such property would not be part of the deceased's free property capable of disposal by administrators; and two, whether there has been distribution of the estate in the absence of confirmed grant and in contravention of the wishes of the deceased's father. If however, there has been sale, subdivision of the estate of the deceased, there will be a further question that if the grant herein is not confirmed but is revoked, whether the transitions on the estate of the deceased in the absence of a confirmed grant shall not be vitiated by the import of section 93 of the Law of Succession Act, which provides as follows:

“93. Validity of transfer not affected by revocation of representation

*(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act **by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.***

*(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased **have not been discharged nor provided for.**”*

9. In all the above situations it cannot be denied that the proposed Interested Parties have an interest in the suit: if the unnamed property of land are part of the deceased's free property and therefore not available for distribution hence the proposed interested parties will lose their right to the property to which they have an interest in. In these circumstances, if it can be said, as urged by the respondents, that the dispute can be resolved as between the administrators and the objector who is also an administrator, then there is no need to allow the application. I am alive to the fact that the proposed interested parties are also entitled to be heard for to deny them such opportunity would be to violate their right to fair hearing under Article 50 (1) of the Constitution, which entrenches the right to be heard as follows:

“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

10. The **finding** that that the dispute herein can be resolved as between the administrators and the objector who is also an administrator must be a conclusion of fact (and law) upon hearing of the parties involved who wish to be heard on the matter.

General principles for joinder of parties

11. It is well settled that an applicant for joinder as a party to a suit need only demonstrate sufficient interest in the suit which justifies his being heard before an adjudication in the matter, and such interest need not be one that must succeed at the trial. The matter of joinder of parties is governed by recent authority of the Court of Appeal at Malindi in ***Civicon Limited v Kivuwatt Limited & 2 others*** [2015] eKLR where in considering an application for joinder in a regular civil suit it was held as follows:

*“From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in **Order I rule 10 (2)** bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. **We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.**”*

12. A similar Court considered an application for joinder in a constitutional application in ***Benjamin K. Kipkulei v County Government of Mombasa & Another*** [2015] eKLR and held as follows:

19.The test for joinder of a party as an interested party is not that the applicant must show a stake or interest that must prevail in the suit, as that is not possible before the full hearing of the matter; the applicant should demonstrate a legal interest that calls for hearing before a decision on the dispute before the court is adjudicated. In common judicial parlance, I would say that the applicant ought to show on ‘an arguable case’ basis that he has an interest recognized in the law and capable of protection. As a registered proprietor of the suit property upon public auction which is subject of challenge in these proceedings, the proposed party has an identifiable stake and legal interest in the property the subject of, and therefore an interest in, the proceedings before the Court.

20. In keeping with Article 159 of the Constitution of Kenya 2010, for the promotion of substantial justice without undue regard to technicalities of procedure, I would find that to require the proposed interested party to wait for the determination of the petition between the petitioner and the respondent to find out whether it shall, if the petition is defeated, keep the suit property or sue the respondent for damages if the petition is successful, is breach of the substantial justice principle as the entire dispute between the parties could be heard and determined as one whole after hearing all the parties.”

Interested Parties under the Law of Succession

13. With respect to succession proceedings, the need to give a hearing a person who has an interest in the suit is recognized, for instance, under section 76 of the Law of Succession Act, which gives locus to “any interested party” to move the court for revocation or annulment of grant. Similarly, Rule 60 of the Probate and Administration Rules provides as follows:

“Every interested person (whether or not he has been served with notice thereof) who wishes to be heard upon or to oppose any application, and has not already appeared in the proceedings, shall enter an appearance in Form 26 in the Registry in which the application is made giving his address for service, and may file such affidavits as he considers proper, to each of which the applicant may with leave of the court file an affidavit in reply.”

14. The Intended Interested Parties’ substantive right to be heard is recognized both under the Constitution and the Rule 60 of the Probate and Administration Rules, therefore it is incorrect for the respondents to aver that the court has no basis for entertaining the applicants or granting their prayers. Having established that this court may entertain the instant application, I shall go to the substantive claims by the applicants in the affidavit and the application.

15. It is trite that allegations of illegality attracts a higher standard of proof above the regular civil standard of balance of probabilities. The applicants have not adduced evidence to the required standard that there has been distribution of the estate and on a balance of probabilities, application fails because of lack of evidence.

16. At paragraphs 4 and 5 of the supporting affidavit of **Betty Nguli**, the 1st Intended Interested Party herein, sworn on 23rd August, 2018, it is averred that the deceased indicated how his property was to be distributed and the 1st respondent has gone against those wishes. There is nothing to show the wishes therein or the acts of the respondents that are being complained of by the Interested Parties. Indeed if there were Certificates of Search attached as Exhibits in the supporting affidavit the court would have had reason to act on the actions complained of and therefore the application is without merit.

17. Whether or not of the estate of the father of the deceased is part of the deceased’s estate for inheritance by the administrators and disposal to the Intended Interested parties is a matter for determination at the trial of the application for revocation of grant that is pending and at such hearing the Court is at liberty to call for *viva voce* hearing and call for the testimony of the intended interested parties where the situations demands it as provided for under Rule 41 (1), (2) and (3) of the Probate and Administration Rules in the case of hearing of application for confirmation of grant as follows:

“41. Hearing of application for confirmation

1. At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative”

18. In the circumstances of this case, the concerns of the intended interested parties shall be catered for during hearing of the application for revocation. In any case the Applicant have indicated that they seek no claim to the estate of the deceased. Further the Applicants could be invited as witnesses if need be during the hearing of this matter between the administrators. I find therefore the application if entertained is likely to throw a spanner in the works and hereby delay the fair determination of this matter. Clearly the Applicants have no locus standi to seek to be enjoined when they are not dependants of the deceased in any way unless they are out to intermeddle in the estate. The administrators have already filed two applications regarding the issue of the estate and which are now pending determination and the Applicants are at liberty to attend and follow the proceedings if they so wish.

Determination

19. Accordingly and for the reasons set out above, the Interested Parties application for joinder dated 23.8.18 lacks merit and the same is dismissed with no order as to costs. The administrators herein are directed to set down the matter for hearing of the two applications dated 3/1/2016 and 11/7/2016 by way of *viva voce* evidence as directed on the 27/07/2017 on priority basis.

Orders accordingly.

Dated, Signed and Delivered at **Machakos** this 4th day of **February, 2019**.

D.K. KEMEI

JUDGE