



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 398 OF 2012

IN THE MATTER OF THE ESTATE OF EUTYCHUS MUTHUI (DECEASED)

MYRIAM MUTHUI KENDI.....1ST APPLICANT

CATHERINE KINYA MUTHUI.....2ND APPLICANT

-V-

JAMES KIMATHI MUTHUI.....1ST RESPONDENT

LINCOLN MUTHUI MWITA.....2ND RESPONDENT

JUDGEMENT

1. Before me are Summons dated 4th July 2018 and brought pursuant to the provisions of Section 47 and 76 of the Law of Succession Act CAP 160 of the Laws of Kenya and Rules 44 and 73 Probate and Administration Rules, in which the Applicants seek inter alia revocation of the of the grant issued to James Kimathi Muthui and confirmed on 22nd May 2018. The Applicants further seek a conservatory order to issue restraining the 1st and 2nd respondents their agents, servants, employees and whomsoever acting on their behalf or instructions from entering, constructing, cultivating, erecting any structures, trespassing, using, selling or in any manner whatsoever from dealing with Land Parcel numbers Nyaki/Kithoka/1449,1450,1476,1732,1842,2279 and 1529.

2. The gist of the application was the Applicants were children of the Estate of Eutyclus Muthui (deceased), that the certificate of confirmation was obtained by concealment of material facts and that there were other properties listed which were already transferred by the 2nd respondent to his company namely; Linco stores limited without the knowledge of other family members prior to the demise of the deceased.

3. OW1 was Myriam Muthui Kendi. Her evidence was that the 1st Respondent together with their mother Emily Karambu Muthui had sued the 2nd respondent and his company Linco stores limited in Meru ELC NO. 131 of 2011, over fraudulent breach of trust and unlawful transfer of the their father's parcels of land, after they discovered that the same were transferred when the deceased was so sick and had no capacity to contract and that the 1st respondent never informed them about the proceedings in the said land case. It was his further evidence that what was contained in the certificate of grant was in dispute since they had not agreed on the mode of distribution and that land parcel numbers MERU MUNICIPALITY/BLOCK II/28, NYAKI/KITHOKA/460, NYAKI/GIAKI /KIBURINE/6, NTIMA/IGOKI/44668.NYAKI/KITHOKA 1529, NYAKI/KITHOKA/1726,NYAKI KITHOKA 183, AND NYAKI/KITHOKA/1495 registered under Linco store limited were already transferred by Lincoln Muthui Muita (the 2nd respondent) just before the demise of the deceased when he was sick and with no mental capacity transfer the said properties.

4. It was her further evidence that they had been given a very small portion of the estate of their father on account of gender and consequently urged the court to re-distribute the estate of the deceased fairly and equitably regardless of the gender of the children of the deceased and in accordance with the constitution.

5. OW 2 was Catherine Kinya Muthui. While relying on her supplementary affidavit dated 31st July 2018, it was her evidence that she was in court so that the court could assist her in re-distribution of the estate and that they had never discussed the same.

6. The petitioner's case on the other hand was as follows; PW1 James Kimathi testified that the deceased herein was his father while the 2nd respondent was his brother whereas the applicants were his sisters. He further sought to rely on his affidavits sworn on 19th July and 28th September 2018 respectively. It was his evidence that the applicants had been always kept abreast of the developments in these succession cause and that further they had signed the proposed mode of distribution accompanying the application for confirmation of grant and that the instant application was an afterthought and was only meant to delay the finalization of this suit.

7. PW2 was Lincoln Muthui Muita. He adopted his statement dated 2nd August 2018 and testified that the applicants had always been aware of this succession cause from its inception to its conclusion and that on several occasions they had attended hearing of the same and that land parcel numbers NYAKI/KITHOKA/1529, NYAKI/KITHOKA/1726, NYAKI/KITHOKA/1823 AND NYAKI/KITHOKA 1495 had never been part of the deceased's estate.

8. Joel Kithinji Muthui on the other hand while adopting his witness statement sworn on 4th October 2018, testified that the 1st respondent who was the estate administrator had been always promising that they will meet as a family to discuss the mode of property distribution and that this never materialized. It was his further evidence that as per Meru ELC CASE number 131 of 2011, the 1st respondent had sued the 2nd respondent for fraudulently transferring properties to himself while their father was sick and that when the case was settled on 29th March 2018, the two respondents met secretly and colluded to transfer and exchanged properties amongst themselves as per the consent by Hon Justice Cheroni which was never discussed by the family members. Consequently, he contended that he was seeking for a fair, reasonable, just and equitable distribution of the estate of his father as per the Constitution of Kenya.

9. After close of the respective parties' case, the court intimated to the parties that they were at liberty to file written submissions within 14 days. Briefly, it was submitted for the applicants that statutory law was quite clear that concealment of material facts from the court was a ground for revocation of a grant issued to a party in a succession matter and that the respondents had not disclosed to the court that they had benefited from the estate of the deceased prior to the grant being confirmed. It was submitted thus that the threshold for revoking a grant had been established. It was further submitted that section 29 of the Law of Succession Act did not discriminate beneficiaries on any grounds be it gender or marital status and the 1st respondent who is the administrator of the estate had failed in his duties and colluded in Meru ELC NO. 131 of 2011 with the 2nd respondent and ended up gaining more properties.

10. I have carefully considered the evidence on record and the submissions by the applicants. It is not indeed that all the parties in this cause are children of the deceased. OW1 Myriam Muthui Kendi evidence was that the 1st Respondent together with their mother Emily Karambu Muthui had sued the 2nd respondent and his company Linco stores in Meru ELC NO. 131 of 2011 over fraudulent breach of trust and unlawful transfer of the their father's parcels of land after they discovered that the same were transferred when the deceased was so sick and had no capacity to contract and that the 1st respondent never informed them about the proceedings in the said land case. Her evidence towards this respect was not challenged even under cross examination. She further stated that in ELC NO. 131 OF 2011, she never attended court when the consent was being recorded.

11. This court has considered the application for revocation of grant dated 4th July 2018 and inconsideration that consent entered into between the plaintiff and defendant in Meru H. C. ELC C NO. 131 of 2011 transferred LR Nyaki/Kithoka/1726, Nyaki/Kithoka/1823 and Nyaki/Kithoka/1495 to 1st Plaintiff and inconsideration that these properties initially belonged to the deceased herein and that was the complaint. In the ELC and in consideration that 1st plaintiff sued the defendant as Administrator of the estate of the deceased, this court is of the view that their benefits inter vivos to the estate of the deceased ought to have been brought to the attention of the court. It is apparent that Lincoln Muita Muthui had just before death of the deceased managed to secure transfer of Municipality Block 11/28, Nyaki/Kithoka/460, Nyaki/Kiburine /6 and Nyaki/Kithoka/1529 either into his name or in the name of his company. The plaintiff's in ELC C NO 131 of 2011 complained that he did it fraudulently taking advantage of the deceased persons health without their knowledge. Having been able to square out the dispute in the Environment and Land court by consent, the other beneficiaries to the estate of the deceased ought to have been updated and involved in the mode of distribution of the estate. This was obviously not done. The 3 beneficiaries complaining to this court have been given tokens out of the vast estate and it can't be by coincidence that they say they were duped into believing that they were yet to agree on distribution and the exchange of text messages is proof of the stalemate.

12. There are also a majority of shares which certificates were not availed for the court to confirm if the deceased had appointed any nominee before making an order as to who should benefit from which shares.

13. In consideration of the evidence adduced and submissions made this court finds that the grounds upon which the application is made are valid.

14. The mode of distribution proposed by the administrator James Kimathi didn't disclose that he and Lincoln had benefitted inter vivos and such concealment warrants the court to find that the orders confirming the grant herein made on 22.5.2018 is revoked. The assets shall revert to the name of the deceased.

15. The parties are further directed to file an acceptable/equitable mode of distribution within 60 days from the date of this ruling

16. This being a succession cause involving close family members, there will be no order as to costs.

HON. A.ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 15TH MAY 2019.

In the presence of:

C/A: Kinoti

1st Applicant:

2nd Applicant:- Mr Nyenyire advocate for applicant

1st Respondent:-

2nd Respondent:- N/A

Mr Kariuki for 1st Respondent –N/A –informed

Ms E.G. Mwangi for 2nd Respondent – N/A –

Certified copy of ruling to be supplied upon payment of copying charges.

HON. A.ONG'INJO

JUDGE