



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 901 OF 2012

IN THE MATTER OF THE ESTATE OF THE LATE N M (DECEASED)

W M.....OBJECTOR/APPLICANT

VERSUS

P N M.....1ST RESPONDENT

M M.....2ND RESPONDENT

RULING

1. By Summons dated 25.9.2014 the Applicant sought revocation of grant that was issued to P N M on 31.01.2013 and confirmed on 4.10.2013 on the ground that the said grant was obtained by concealing essential material facts. The application was supported by W M vide his affidavit filed on 26.9.2014 wherein he stated that when the petitioners filed the petition, they did not disclose the fact that the land parcel **Muthetheni/Utithini/[particulars withheld]** was registered to hold in trust for the 3 wives of N M and the same was divided into three portions vide court case 288 of 1990 at the Machakos Magistrates Court. The grant was obtained by concealment of material facts and there is a suit to obtain eviction orders against him in **Machakos CMCC 440 of 2014**. The Applicant attached copies of the pleadings in the **Machakos CMCC 440 of 2014** and the copy of certificate of confirmation of grant.
2. The Application was opposed by the Respondents who filed a replying affidavit deponed on 25th March, 2015. The 1st Respondent denied that the subject property was held in trust and the same was first registration in favour of N M. Further that N M was married to M M and K M in a woman to woman marriage and that N M was not obligated to hold the subject property in trust for the Applicant.
3. The court directed that the objection be heard via viva voce evidence. Pw1 was W M who sought to rely on his written statement and testified that his father had 3 wives namely M M, M and M . He testified that neither he nor the chief were involved when the petition was being filed. Further that Land Parcel **Muthetheni/Utithini/[particulars withheld]** belonged to his late father N M and that the land had a dispute in the 1990's that was resolved by clan members and divided into 3 portions. In addition that K, the petitioners' mother was a concubine to the deceased and she came in via a woman to woman marriage but no dowry was paid. M also came in via a woman to woman marriage and he witnessed dowry being paid. He testified that the deceased's property was to be shared only among his three wives but now the petitioners have a title to the land and they seek that it be revoked. On cross examination, he stated that his father was M K and he had three wives and that M married N M who was also married to K who is the mother of the petitioners. He testified that he is from the first house and resides on the suit plot and has erected structures but however the same belonged to his late father and he realized that N M had registered the same into her names. He further testified that N M was to hold the land in trust for the third house as per clan deliberations that he did not produce in court.
4. Pw2 was Boniface Mutuku who testified that he is a member of Akanga clan and acted as a secretary to one of the clan meetings involving the property **Muthetheni/Utithini/[particulars withheld]** and that he learnt that the objector had been told to leave the land as he was not recognized as one of the sons of M K. On cross-examination, he stated that M K had three wives, M, M and M and the objector comes from the third house whereas N M came from the M house.
5. Pw3 was Elijah Kiilu who testified that he sought to rely on his witness statement. On cross-examination, he stated that he was the clan secretary for 7 years but did not file the minutes of the meetings. He also testified that **Muthetheni/Utithini/[particulars withheld]** was registered in the names of the deceased, N M and there was no evidence that the property was to be held in trust for others. The Objector's case was thus closed.
6. Pw1 was P N M who testified that the deceased was his grandmother and that his mother had been married by the deceased in a woman to woman marriage. He testified that he and his brother are the administrators to the estate of the deceased. The deceased had two daughters, N K and J but no male child and she thus married his mother. He testified that the objector's great grandfather had 3 wives, M M, M M and M M and his mother is M M whereas he came from the M house that did not have male children and thus M married N M who married his mother. He testified that **Muthetheni/Utithini/[particulars withheld]** was registered in the names of the deceased and he filed a succession in the proper manner and no objection was lodged. When the grant was issued, no protest was lodged. He testified that the green card shows that **Muthetheni/Utithini/[particulars withheld]** was not held in trust for anybody. On cross-examination, he stated that the title is currently registered in his names and the objector cannot inherit the deceased's property. On re- examination he stated that custom allows women in iweto marriages to inherit the property of the woman who married them.
7. Pw2 was B M K who testified that his mother was called T M and was married to the deceased under a woman to woman marriage and that the property **Muthetheni/Utithini/[particulars withheld]** was registered in the names of the deceased who had two daughters who were married away. He testified that the deceased married the mother of the petitioners who filed and obtained letters of administration to her estate and had the property registered in their names. He testified that he had no claim over the suit property.
8. The court directed that the parties file written submissions. The Respondents filed theirs on 5th December, 2018 and the objector on 21st March, 2019.
9. The objector submitted that the petitioners concealed the fact that **Muthetheni/Utithini/[particulars withheld]** was to be held in trust and since the Petitioners concealed these facts and obtained the grant fraudulently, the same ought to be revoked as per the import of Section 76 of the Law of Succession Act. They submitted that the petitioners relied on a letter from an assistant chief in the area and that the said letter contained false information and excluded some dependants of N M. However, he has in his possession a letter dated 8th February, 2018 from the chief of Miu location who drew a family tree that showed that the objector was related to M K who left the property **Muthetheni/Utithini/[particulars withheld]** to be held in trust by the deceased. He cited the case of **Janet Wanjiku Waweru v Teresia Njeri Kimani (2015) eKLR** and submitted that the grant be revoked and the title deed to **Muthetheni/Utithini/[particulars withheld]** be revoked.
10. Learned counsel D.M. Mutinda and Co Advocates for the respondents in their submissions raised 2 issues for determination. Firstly, whether the applicant can raise the existence of customary trust in probate and administration proceedings and secondly, whether the respondents deliberately concealed material information at the time of petitioning for grant of letters of administration intestate.
11. On the first issue, counsel submitted that there was no declaration that the land was trust land. He cited the case of **Re Estate of George**

Macharia Maina (Deceased) (2017) eKLR where the court observed that a claim for a customary trust cannot be canvassed in a probate court. This position was taken also in the case of **In re Estate of the Late Jonathan Kinyua Waititu (2017) eKLR**. Therefore counsel submitted that this issue ought to be addressed by the Environment and Land Court and not the probate court.

12. On the 2nd issue, counsel submitted that the applicant has not proved that the suit land is owned under a trust, yet the petitioners have produced a green card that is evidence of ownership. They further submitted that a chief's letter and the family tree do not touch on ownership of the suit land and cited the case of **Patrick Mathenge Gachui v Katumi Wambugu & Another (2010) eKLR** where the court held that a trust not having been proved, there was no basis for the protests.

13. I have carefully read the contents of the application and the Affidavits and annexures thereto and addressed my mind to the oral evidence of all the parties. I have also perused the court record on which the confirmation proceedings were undertaken and the annexures thereto. The main issue for determination here is whether the objector has demonstrated that the Respondents excluded lawful dependants to the estate of the deceased.

14. The legal basis for confirmation of grants is provided in **Section 71 of the Law of Succession Act, Cap. 160** of the Laws of Kenya. In cases of intestacy, like in this case, *'the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.'*

15. The chief's letter that is sought to be relied upon by the applicant seeks to impute that there are beneficiaries who were excluded from benefiting from the estate. I have noted that the respondent has strongly opposed the protestor's claim and this would necessitate the need for each party to meet their standard of proof as per section 107, 109 and 112 of the Evidence Act.

16. It is the applicant's case that **Muthetheni/Utithini/[particulars withheld]** is held under customary trust, whereas the Respondents have supplied a copy of a title deed as evidence of ownership of the suit land. How then can the applicant convince court that they have met the conditions to defeat the title deed that the Respondents hold? Can they ask the court to sit as an Environment and Land Court?

17. Section 28 of the Land Registration Act provides for the determination of interests in land. Under article 162(2)(b) and 165(3)(a) of the Constitution of Kenya 2010 and Section 13 of the Environment and Land Court Act, 2011 the jurisdiction of the Environment and Land Court is to handle determination of disputes relating to matters including, public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and any other dispute relating to environment and land. Therefore, this court cannot make a determination on whether or not the deceased held the land in trust.

18. It follows that the court is not satisfied that indeed there are beneficiaries who were excluded in the petition for letters of administration. Hence I am not able to find that the respondents obtained the grant fraudulently and through concealment of material facts. As the Objector's claim relates to customary rights then they should approach the relevant court for redress. In the wider interests of justice and in consideration of the provisions of the **Constitution** and the **Law of Succession Act** the objector is free to approach the court that is better suited to handle his complaint.

19. In the result, it is the finding of this court that the Objector's application dated 25/09/2014 lacks merit. The same is dismissed. Each party to bear their own costs.

It is so ordered.

Delivered and dated at **Machakos** this **9th** day of **May, 2019**.

D.K. KEMEI

JUDGE