



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO 270 OF 2001

IN THE MATTER OF ESTATE OF WANZA MULI (DECEASED)

IN THE MATTER OF AN APPLICATION BY NICHOLAS MUTUA MULI FOR REVOCATION OF GRANT

BETWEEN

NICHOLAS MUTUA MULI.....2ND ADMINISTRATOR/OBJECTOR

KISESI MULI MUTUA.....3RD ADMINISTRATOR/RESPONDENT

VERSUS

PETER KITHUKA MULI.....1ST ADMINISTRATOR/RESPONDENT

RULING

1. By Summons for Revocation or Annulment of Grant dated 16th April, 2018, though date stamped 16th February, 2018, the Objector/Applicant herein seeks an order that the Letters of Administration granted to the Respondent herein, **Peter Kithuka Muli**, be revoked and the same be issued to the applicant.

2. According to the applicant, he is one of the sons of the late **Wanza Muli**, the deceased. According to him, as a family they applied for letters of administration in respect of the estate of his deceased mother in these proceedings. However, the said letters have not yet been confirmed. Despite that his brother, one of the administrators has proceeded to sell some of the properties to third parties who have begun construction thereon.

3. The applicant averred that he was never consulted and that the estate is at the risk of being wasted to the detriment of the other beneficiaries. Based on legal advice the applicant contended that the said disposition of the estate's properties ought to be revoked and a fair share and distribution be determined by this Court.

4. In response to the said Summons, the 1st Administrator swore a replying affidavit in which he averred that they filed this cause on 17th September, 2001 but before the Grant could be issued, the then 3rd Administrator, **Ndungulu Muli**, passed away on 17th March, 20017 and was substituted by **Kisesi Muli**, the 3rd administrator herein on 4th July, 2014. Consequently, on 15th march, 2017, a Grant of letters of Administration Intestate was made to them in the name of **Peter Kithuka Muli, Nicholas Mutua Muli**, the Objector herein, and **Kisesi Muli Mutua**.

5. According to the 1st administrator, on 24th April, 2017, they sat as a family, a meeting attended by the Objector herein, and agreed on the mode of distribution of the deceased's estate with a view to applying for confirmation of the Grant. It was deposed that the Objector appended his signature to the said agreement in which it was agreed that a surveyor should proceed to produce a sketch of the said distribution so that this cause can be finalised. Pursuant thereto, a surveyor duly produced two sketch maps for the two parcels of lands Nos. Masii/Mbaani/3 and Masii/Mithini/305.

6. It was deposed that thereafter the Objector became not only uncooperative, but reneged on the said family agreement thus delaying the filing of an application for confirmation of the Grant. The 1st administrator confirmed that he only sold three pieces of the portion that he is entitled to as per the said agreement to cater for the medical bills arising from indisposition, a fact the Objector was well aware of. He accepted that he was ready and willing to have the aforesaid pieces of land carved from his share.

7. According to the 1st administrator, the 3rd administrator/Objector is at liberty to file an application for confirmation of grant instead of just

going to sleep.

8. In a rejoinder, the Objector denied that he has ever agreed with the 1st administrator to sell any portion and that he has never been expressly consulted. He disclosed that their clan, **Atangwa**, had already decided on how the plots were to be subdivided between them but the 1st administrator went ahead and devised methods to defeat the equitable distribution. It was averred that despite attempts in several forums to equitably distribute the estate the 1st administrator has refused to comply because the grant is in his name hence the application for revocation of the grant.

Determination

9. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

10. Section 76 of the **Law of Succession Act** provides as hereunder:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

11. However, it is not in every situation where transgressions are alleged that the grant must be revoked.

12. I therefore agree with the position adopted by **Muigai, J** in **Mary Wangari Kihika vs. John Gichuhi Kinuthia & 2 Others [2015] eKLR**, that in exercising its discretion the Court ought to take into account the effect of either revoking the grant or relieving all the administrators of their duties and where more injustice would be caused by such action to instead opt for an alternative that would ensure that the estate is properly administered.

13. Similarly, in **Re The Estate of the Late Suleman Kusundwa [1965] EA 247**, it was held that:

“The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased’s property as he was entitled to dispose of by will under the applicable law of inheritance.”

14. This position was clearly appreciated by **Khamoni, J** in **Re Estate of Gitau (Deceased) [2002] 2 KLR 430** where he expressed himself as hereunder:

“Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the Law of Succession Act should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.”

15. In this case it is clear that the administrators have for reasons that are best known to them unable to agree on the mode of distribution, which is what is pending. Though the Objector complains bitterly against the 1st administrator, it is clear that the Objector, himself, is an

administrator of the estate of the deceased. Nothing bars him from initiating the process and making his own proposals as to the manner in which he feels the estate ought to be distributed for the court's consideration. Revoking the grant and issuing the same to the Objector herein will not in my view solve the issues herein but will only compound the problems. The 1st administrator concedes that he has disposed of some of the assets of the estate. Whereas such action is clearly not in accordance with the law, the ultimate action ought to be to fairly and justly distribute the estate and bring the matter to a close taking into consideration the concession by the 1st administrator.

16. In the premises, the process of distribution of the estate ought to be moved forward rather than backwards. Just like Mutende, J in Eric John Mutemi & Another vs. Agnes Mumbanu Kinako [2016] eKLR it is my view that parties ought to be given a time frame within which to comply with section 83(e) of the *Law of Succession Act* and to show commitment towards diligently administering the estate of the deceased for the benefit of all the beneficiaries, failure to do which this Court would be left with no alternative but to replace the administrators.

17. In the premises while I disallow the instant application, I hereby direct that this matter be referred to mediation in order to enable the parties arrive at an amicable solution. During the said process further dissipation or disposal of the estate is hereby prohibited.

18. It is so ordered.

G V ODUNGA

JUDGE

Read, signed and delivered in open Court at Machakos this 4th day of June, 2019.

Delivered in the presence of:

Mr Makori for the Applicant

Mr Muumbi for Mr Kisongo for the 1st Administrator

CA Geoffrey