



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO.84 OF 1991

THE MATTER OF THE ESTATE OF THE LATE MUINDU MUTUA NGOVE

1. JONATHAN KATIKU MUINDU

2. SERAH NDUKU MUTEI.....PETITIONERS/RESPONDENT

-VERSUS-

MARY MWIKALI MAINGI.....OBJECTOR/APPLICANT

RULING

1. The application by way of chamber summons under Section 47 and 76 of the Law of Succession Act CAP 160 and dated 3rd August 2005 is brought by the applicant who avers that she is a wife of the son of the deceased. She wants the certificate of grant issued on 23rd June 1992 and confirmed on 18.2.1994 as well as reissued on 9.11.2009 be revoked and the title deed for land parcel number Machakos/Kitanga/159 being the share of Muteti Muindu from the deceased estate be cancelled and a fresh one issued to Serah Nduku Mutei, Mary Mwikali Maingi and Nduge Mutuku for eventual sharing.

2. The applicant explains in her affidavit that she is a wife to Muteti Muindu, who was a son to the deceased. She averred that her late husband petitioned for letters of administration to the estate of the deceased, being his son and the same were granted to her late husband and the 1st petitioner on 21.2.1994 and in the confirmed grant each petitioner was to get 33.24 acres of land. However before the grant could be effected, her husband died on 25.6.2005 and then the 1st petitioner conspired with the 2nd petitioner to have the name of her deceased husband substituted with that of Serah Nduku Mutei, and which application failed to disclose that her deceased husband had a wife, son and a sister by the name of Nduge Mutuku. She averred that Serah Nduku Mutei was substituted in place of her deceased husband to hold his share for herself and in trust for other beneficiaries of the estate of the deceased husband. However plot 48 that was divided to obtain parcel number Machakos/Kitanga/159 measuring 14.4 hectares was registered in the names of the 2nd petitioner who sold the land to third parties and instituted a civil suit to evict the bonafide purchasers of the land who purchased the same from the deceased. She averred that she was entitled to a share in parcel number Machakos/Kitanga/159 as a wife to a son of the deceased and sought that the title to the same be cancelled and a fresh one issued in the names of Serah Nduku Mutei, Mary Mwikali Maingi and Nduge Mutuku for the grant that was issued on 19.11.2009 was obtained through concealment of material facts and the same ought to be revoked and in addition the title to parcel number Machakos/Kitanga/159 was obtained through fraud and the same ought to be revoked. She attached a letter from the chief to demonstrate that she was the wife of the son to the deceased, a copy of the search in respect of parcel number Machakos/Kitanga/159, copies of pleadings in respect of the petition for letters of administration and the application for substitution and sale agreements in respect of the said parcel number Machakos/Kitanga/159.

3. In opposition to the application, the 2nd Petitioner filed a replying affidavit dated 10th December, 2015 wherein she averred that the objector had never been a wife to Muteti Muindu and the objection herein is misplaced because the instant suit does not relate to the estate of Muteti Muindu and the application for substitution was made to enable the administration of the estate of Muindu Mutua Ngove to proceed. The 1st petitioner in support of the application deponed vide affidavit on 15th January, 2016 that the objector was married to Muteti Muindu and had a son and the substitution of Muteti Muindu for the 2nd petitioner was on the understanding that she was to share the land with the objector and therefore it was wrong for her to appropriate the whole portion and in that regard the title deed to parcel number Machakos/Kitanga/159 should be cancelled and the land shared according to the beneficiaries of that house.

4. On record are witness statements by **Agnes Mune Kioko**, and the **2nd Respondent** that were filed on 7th March, 2016. **The 2nd petitioner** stated that she moved to court seeking rectification of grant that was issued in the names of her late brother and that the objector had never been married to her late brother but cohabited with him from 1994 to 2005. She also stated that no material had been concealed from the court with regard to the beneficiaries of the estate of the deceased. Agnes Mune Kioko stated that the objector had never been married to Muteti Muindu and there was no ritual performed in respect of a traditional marriage to the objector.

5. The court directed that the application be canvassed vide viva voce evidence.
6. The objector marshalled 4 witnesses in support of her case. Pw1 was the objector who testified that Muteti Muindi was her husband with whom they were married under Kamba Customary law and that the said Muteti took 3 goats to her parents. She testified that they were not divorced and at the time of his demise she resided on his portion of Plot 48 Kitanga and when the 2nd petitioner took over the administration of the estate of her father in law, instead of holding the land in trust for her, she took everything and sold it. She testified that Plot 48 Kitanga is now parcel number Machakos/Kitanga/159 and she seeks that the said title be cancelled so that distribution is done properly. She testified that the 2nd petitioner had not disclosed that she was a wife to Muindu and thus the grant should be revoked. On cross-examination, she testified that Beth Kithuku was present during the dowry negotiations and there was a book that recorded the same but however it was stolen. She admitted not having filed succession proceedings in respect of the estate of her late husband.
7. Pw2 was Theresa Maingi who testified that she was the mother to the objector and had received 3 goats as dowry in respect of the marriage of the objector to Muindu and on cross examination, she testified that the 2nd petitioner was not present during the dowry negotiations that were recorded in a book that had not been availed to court.
8. Pw3 was Beth Kavesu Kitiku who testified that the 1st petitioner is her husband and that the objector was married to Muindu Muteti in 1990 and were never divorced. She testified that the family land was plot 48.
9. Pw4 was Reverend Titus Mutuku who testified that the objector was married to Muteti Muindu under customary law but however did not participate in the dowry negotiations.
10. The petitioner called 3 witnesses in opposition to the objection. Pw1 was the 2nd petitioner who testified that the objector is merely a neighbor and that her late brother was never married to the objector. She testified that the objector emerged 13 years after the death of her brother and there was no dowry negotiations that were done with the parents of the objector. On cross-examination, she testified that her brother was not married to the objector.
11. Pw2 was Agnes Muneo Kiio who testified that the Kamba customs required her to be involved in the marriage of her sister's children, however she does not recall being involved in any marriage ceremony relating to the objector and thus she is a stranger to the family for she was never married to Muteti Muindu. She testified that the objector is not a child of the deceased and thus ought to have filed letters of grant in respect of her alleged husband and further that the property of the deceased had already been distributed among the beneficiaries.
12. Pw3 was Jonathan Kituku Muindu who testified that Muteti had a wife called Mary who was married under customary law. He testified that Paul Kiliu and Muthembwa took 3 goats to Mary's father Kiilu. However he was not present when the dowry was paid. On cross-examination, she testified that the 2nd petitioner is from the same house of Muteti Muindu and that Mary is to get Muteti's share. The witness maintained that the 2nd petitioner should surrender the title deeds to the land parcel number Machakos/Kitanga/159.
13. The court directed that the parties to file submissions. The objector filed her submissions on 15th April, 2019 while the 2nd Petitioner filed hers on 7th May, 2019. The Counsel for the objector submitted that the main issue for determination is whether the objector was a wife of Muteti Muindu (deceased) and thus entitled to get the share her husband would have inherited from the estate. Learned counsel submitted that the 1st petitioner, testified that the objector was a wife to the deceased and the petitioners failed to disclose the same. Further that the 2nd petitioner registered land parcel number Machakos/Kitanga/159 in her names and failed to give a share of the same to her sister and to the objector and in this regard urged the court to cancel the title to the said plot and order that it be registered in the names of Serah Nduku Mutei, Mary Mwikali Maingi and Ndunge Mutuku and allow the application.
14. The 2nd petitioner submitted that the objector lacks locus to represent the estate of Muteti Muindu for she has no grant of letters of administration to the estate in terms of Section 79 of the Law of Succession Act and hence cannot institute the revocation proceedings without obtaining the said grant. Counsel further submitted on the issue whether there was a valid Kamba customary marriage that the evidence falls short of proving the same and concluded that the court ought not to entertain the application for revocation and the same be dismissed with costs.
15. The issues for determination are whether the objector had locus to bring this application in respect of the estate of the deceased and whether the court can grant the orders sought.
16. The petition herein was filed in respect of the deceased. The objector is claiming an interest in a share of land from Muteti Muindu, a beneficiary of the estate of the deceased and is also deceased. There is no order on record showing that she has the authority to claim the same, however her justification is that she is a wife to the deceased. She has attached a copy of a letter from the chief as indicative of the said marriage.
17. Section 82(a) of the Law of Succession Act provides that;

“Personal representatives shall, subject only to any limitation imposed by their grant, have powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”

In interpreting the above provision of law, the Honourable Court in the case of Alexander Mutunga Wathome v Peter Lavu Tumbo & Another [2015] eKLR (Machakos Succession Cause No. 80 of 2011) noted that;

“In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the

estate of such deceased person under the Law of Succession Act. In addition section 82 of the Law of Succession Act provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person.”

18. The matter in issue in this case is the omission of the objector from benefitting from what is the estate of Muteti Muindu. It is this court's view that the objector is not yet an administrator to the estate of the deceased. She had the option of filing for a limited grant or to file for letters of administration in respect of the estate of her late husband so as to seek the instant orders. She has not provided the court with orders in respect of the same. Therefore the court finds that the objector was not properly before court in the first place to seek the orders sought.

19. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the Law of Succession Act.

Applying the test of law in section 76 of the Law of Succession Act, the applicant alleges that she is a wife to the son of the deceased. However in respect of my finding above, the orders sought cannot be granted. The objector ought to obtain the requisite locus standi so as to enable her prosecute her objection. Her status is made more precarious in that her marriage to the said Muteti Muindu is disputed by one of the petitioners. In that regard I find the objector's application dated 3rd August 2015 lacks merit.

20. In the result it is my finding that the Objector's application dated 3rd August 2015 lacks merit. The same is dismissed. Each party to bear their own costs.

It is so ordered.

Dated, signed and delivered at Machakos this 3rd day of July, 2019.

D.K. KEMEI

JUDGE