



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**SUCCESSION CAUSE NO. 6 OF 2017**

**KYENGO KISINI.....1<sup>ST</sup> PETITIONER/ADMINISTRATOR**

**DAVID MUTUA KISINI.....2<sup>ND</sup> PETITIONER/ADMINISTRATOR**

**VERSUS**

**MUTISO KISINI.....OBJECTOR/APPLICANT**

**RULING**

1. By summons dated 15/7/2015 the Objector/Applicant sought to revoke grants issued to Kyengo Kisini and David Mutua Kisini on 9/7/2013.
2. The same was opposed by the petitioners and thus my sister **Nyamweya J** heard the same via affidavits evidence and the written submissions.
3. By a ruling of 12/7/2016 the court ordered that **“summons dated 15/7/2015 for revocation of grant of Letters of Administration Interstate to the petitioners on 9/7/2013 with respect to the estate of Ngina Kisini Ngati is hereby denied.”**
4. Petitioners were given 60 days from date of the ruling to file further affidavits to the summons for confirmation listing all beneficiaries and creditors of the deceased and their consent to the proposed distribution of deceased estate.
5. Pursuant to aforesaid ruling on 12/1/2017 the petitioners lodged an affidavit sworn by Kyengo Kisini on his behalf and that of the 2<sup>nd</sup> petitioner listing the survivors/beneficiaries of the deceased including the objector. Annexed to it was a consent which objector did not sign. The court notes that no reason was assigned to the failure of the objector to append his signature to the said consent.
6. On 30/3/2017 the petitioner appeared in court in absence of the objector and informed court that the objector was informed by to attend court but he was not in court. The court proceeded to confirm grant and directed that the 4 beneficiaries to share deceased estate equally.
7. On 16/8/2017 the objector moved court via summons dated 15/8/2017 seeking to revoke grant of 9/7/2013 as confirmed on 30/3/2017. This time round he claimed that he and named 13 alleged buyers were being disinherited. Now in the supporting affidavit he claimed that the deceased with clan help subdivided the estate to ;
  - Kyengo (himself) 30 acres
  - Mutiso 19 acres
  - Maweu 16 acres
  - Mutua 14 acres
  - Plots (2) acres not stated to who.
8. He only annexed a letter purportedly issued by clan dated 28/11/2015 addressed to his advocate confirming alleged subdivision. Same was only signed by secretary and member.
9. The matter was agreed to be heard via **vivo voire** evidence. The objector case was via 2 objector witnesses.

10. OW1 was Kioko Malungu secretary of Awilu Mbaa Clan in 1991. He said in the said year the deceased called the clan an family members and stated how she wanted to share her land to her 4 sons that is;

- Kyengo 17 acres
- Mutiso 30 acres
- Maweu 16 acres
- Mutua 14 acres (he gave 2 acres for expenses)
- Plots 2 acres.

11. The next day the division was done on the ground. it was agreed those with no money to give Mutiso Kisini 13 acres for his expenses on survey. All were present. Beneficiaries were given 6 months to raise objection but none was raised.

12. When matter went to court clan issued letter stating the division of 1991 authorised by the clan dated 28/11/2015. The witness produced minutes of 13/8/2013 as translated and hand written copy of cross examination. He said there was no document showing what deceased said on division of land. There was no signature of Kyengo on the minutes. These minutes were for looking for boundaries of Kyengo and Mutiso.

13. On re-examination he said the minutes of 1991 were with chairman.

14. OW2 Joseph Mutisya Mutiso son of Mutiso Kisini said that out of 4 deceased's sons, 2 were alive and 2 deceased David Mutua Kisini and Maweu Kisini. He said they were called for division of land in 1991. His father Mutiso had spent Kshs.108,000/= in marking boundaries. Thus deceased how same was to be recovered. The next day division was done and witness's father was compensated with 13 acres. The balance of land was divided. Kyengo 17 acres, Mutiso 17 acres, Maweu 16 acres, Mutua David 16 acres.

15. Objection was to be raised within 6 months but none raised it at the end of 6 months. He said consent of 30/12/2016 was not signed by Mutiso. 13 people have sought return of suit land and say they should be recognised.

16. On cross examination he said there was no document showing what deceased said or did. He saw there was no evidence to support his father spent 108,000/= as expenses on suit land. He stated that there was no sale agreement signed by alleged purchasers.

17. The objector case was closed and administrators' case commenced. 2 witnesses were called.

18. DW1 Jackson Wambua Kyengo testified that his father was Kyengo Kisini and deceased was his grandmother. He testified on behalf of his father and he had Power of Attorney. He denied knowledge of any meeting of 1991 to subdivide suit land. He stated that deceased died before sharing suit land. There was no known expenses incurred by Mutiso Kisini thus no justification for him to get 13 acres compensation. On buyers he said that court stated that buyers will get portions they bought from the seller. He said he had signed consent to lodge petition herein. The land is 80 acres and should be shared 20 acres per deceased children. Maweu Kisini had 2 wives thus will get Maweu share.

19. On cross examination he said that court can visit scene to see there are no boundaries fixed on the ground. He said on 13/8/2013 he never called meeting over land. The land was surveyed 1969 – 1970s. He said grant was confirmed on 30/3/2017 and all beneficiaries were notified but some failed to attend court.

20. On re-examination he said Mutiso signed consent in file succession case. He says the minutes of 13/8/2013 have no signatures of those who attended.

21. DW2 John Mutuku Maweu son of Maweu Kisini son of deceased testified that deceased never shared land as alleged.

22. On cross examination he stated that the deceased never shared land.

23. On re-examination he said the purchasers of land never bought from the deceased. Further he said Mutiso signed consent to file matter herein in court. The administrators also closed their case.

24. Parties agreed to put written submissions but by this 24/6/2019 when ruling was drafted, only objector had filed the same.

25. After going through the evidence on record, affidavits by parties and submissions, I find the issue is:

***i) Whether objector/applicant has proved his case on balance of probability?***

26. First the court notes that the objector move to revoke the grant of 9/7/2013 flopped vide ruling of 12/7/2016. He was not able to prove that he had not signed the consent which initiated the lodging of the succession matter herein. Thus this court will not interfere with the finding of ruling of my sister **Nyamweya J** on refusing to revoke the grants issued on 9/7/2013.

27. On distribution of the estate vide confirmation of grant of 30/3/2017, the court notes that the objector did not sign the consent on

distribution. However he never filed a contrary proposal or protest to the same proposal anchored on the consent. He laments that he is being disinherited together with other people he calls the “buyers”.

28. Of course no person testified as a buyer nor lodged a claim to that effect. No documents have been availed to court to show any of the alleged buyers had a valid agreement with the deceased as provided by the provisions of the Contract Act and Land Control Act. Thus as such the court holds that there are no known creditors to the estate of the deceased. It has been stated in the testimony of DW2 that the buyers bought land from beneficiaries not from the deceased. If that is the position, their recourse is to claim from the sellers once the sellers get their shares on distribution herein.

29. As for proposed subdivision of suit land on directions of the deceased, the evidence by OW1 leaves alot to be desired. He produced only a letter suggesting that in 1991 deceased subdivided land as desired by the objector. There is no oral or written Will which can pass the validity test of a Will. Nothing to show the words or action of the deceased in 1991. Nor are there minutes of 1991 signed by clan, deceased, and the beneficiaries. In any case where is the evidence of the expenditure of the alleged Ksh.108,000/= by Mutiso Kisini to warrant 13 acres compensation? When was the amount expended? Where are the supporting documents?

30. It is also strange how the proposed division was arrived at. How was it decided Mutiso Ksh.108,000/= is equal to 13 acres and that Kyengo to get 17 acres, Maweu 16 acres, David 14 acres and 2 acres for plots? It is not rational even on the face of the above proposal. Though Mutiso had not signed distribution proposal, he was listed as a beneficiary and was assigned on confirmation of grant to get equal shares with his brothers. He has not proved he deserves more share than his brother and thus to revoke confirmed grant would be academic exercise.

31. The court upholds the confirmed grant and dismisses application dated 15/8/2017 with no orders as to costs as parties are family of the deceased.

**DATED, DELIVERED AND SIGNED IN OPEN COURT AT MAKUENI THIS 12<sup>TH</sup> DAY OF JULY, 2019.**

.....

**C. KARIUKI**

**JUDGE**