



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 31 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE MALUSI KAIA KITAA-DCD

AND

IN THE MATTER OF;

TERESIA MIKAYO MALUSI AND NICHOLAS WAMBUA MALUSI.....PETITIONER/ADMINISTRATORS

VERSUS

PATRICK MBWIKI MUTISO.....OBJECTOR

AND

DOUGLAS MUTUA MALUSI.....PROTESTER

RULING

1. The deceased, **Malusi Kala Kitaa**, passed away on 31st August, 2009, aged 73 years. Subsequently, the Respondents herein, **Teresia Mikayo Malusi** and **Nicholas Wambua Malusi** in their capacity as the widow and son respectively of the deceased petitioned for letters of administration in respect of the deceased's estate, a grant which was issued on 30th May, 2011. The said grant was confirmed on 18th November, 2013 and a certificate of confirmation of grant is dated 26th November, 2013. By the said grant, Land Parcel No. Mua Hills/728 was confirmed to **Collins Kitaka Kaloki** and **Patrick Muthoka Kisingú** while Machakos/Mua Hills/731 was confirmed to **Teresia Mikayo Malusi** to hold in trust for herself and the other beneficiaries.
2. However, by Summons for Revocation/Annulment of Grant dated 11th March, 2015, **Patrick Mbika Mutiso**, the applicant herein seeks an order that the grant of letters of administration issued herein to **Teresia Mikayo Malusi** and **Nicholas Wambua Malusi** on 30th May, 2011 and confirmed on 18th November, 2013 be revoked and/or annulled.
3. According to the applicant, the said petitioners deliberately gave false information and misled the court by concealing material facts from the court to wit that he is a lawful beneficiary of the deceased's estate through purchase. According to him, he entered into a sale agreement with the deceased pursuant to which the deceased sold to him 1 acre parcel of land to be hived from Plot No. 98 which subsequently became Machakos/Mua Hills/731 upon the issuance of the title deed.
4. It was the applicant's case that all along the administrators of the deceased gave him false promises that they would transfer to him the said parcel of land but proceeded to obtain the letters of administration intestate and confirmed the same by omitting to disclose his said claim.
5. On 22nd February, 2017, the court directed that the said summons be heard by way of viva voce evidence.
6. **Patrick Mbwika Mutiso**, OW1, testified that filed his witness statement in which he stated that he was the holder of ID No. 3544850 and that the deceased was his neighbour. On 5th January, 2002, he entered into a sale agreement with the deceased pursuant to which the deceased sold to him one acre of land to be hived from plot no. 98 and that he duly paid the entire agreed consideration which was Kshs 85,000/=. According to the Objector the sale agreement was witnessed by the deceased's nephews, **Maweu Matheka** and **Joel Nzioka** as well as **Onesmus Mutua** who died. He testified that he has been in open and continuous occupation of the said 1 acre piece of land since the time of the said transaction. In support of his case, he produced a copy of the said agreement.

7. In cross-examination by **Douglas Mutua**, one of the beneficiaries, herein referred to as the Protestor, the Objector stated that the deceased's wife and children knew that he bought the land and used to cultivate the same. It was his evidence that the said wife together with the elders accompanied the deceased during the transaction though the children and the wife did not sign. It was his case that he was paying for the land in instalments to the deceased and through his wife receipt of which were acknowledged. When he completed payment they started the process of transfer but the deceased died before the same could be finalised.

8. The Objector called **Joseph Alexander Nzioka** alias **Joseph Nzioka**, who testified as OW2. According to him, he knew the deceased who hailed from his village. On 5th January, 2002 the deceased and the Objector entered into a Sale Agreement pursuant to which the deceased sold to the Objector one acre of land to be hived from the deceased's plot No. 98 in the sum of Kshs 85,000/= a sum which he was informed by the deceased that the Objector duly paid. It was his testimony that he was present when the agreement was being entered into and he wrote the agreement and attested the same as a witness.

9. In cross-examination by the Protestor, OW2 stated that he knew the deceased from 1963 when the deceased went to the area. According to him the deceased had a family but the Protestor's mother had left and returned to her home though she later returned back by the time of the sale of the said land. She however did not sign the sale agreement. Similarly, the children of the deceased did not sign the same. It was his testimony that it was the deceased to decide on who were to be the witnesses and he was called by the deceased as an elder and because he knew how to write. According to the witness the money was used to educate the Protestor who by then was unmarried.

10. At the close of the Objector's case, the 1st Administrator, **Teresia Mikayo Malusi**, testified that the deceased was her husband. According to her the said union was monogamous and that they were blessed with five children. Prior to the death of the deceased, the deceased entered into a written agreement pursuant to which he sold one acre of land to **Patrick Mbwika Mutiso**, the Objector. Though she could not remember when the land was sold, it was her testimony that she was there when the same was sold and that the Objector started using the land. It was therefore her wish that the court ensures that the interest of the Objector are taken care of as the deceased had notified her of the said sale and the said sale was meant to raise fees for their children including the Protestor. It was her evidence that the purchase price was fully paid and there was no balance outstanding from the Objector. She stated no other child of the deceased was opposing the sale save for the Protestor. She therefore sought that the court ought to distribute the estate in accordance with the summons dated 21st March, 2017.

11. In cross-examination by the Protestor, the 1st Administrator, stated that she called the Protestor together with the Protestor's brother to witness the sale but the Protestor said that he did not want to be involved in matters of land. At that time the Protestor was not married. She stated that the Protestor went to court without knowing that there were buyers of the said land. She confirmed that there were signatures when she was receiving the money.

12. At the close of the Petitioner/Administrators' case, the protestor, **Douglas Mutua Malusi**, testified that the said agreement for sale was not consented by the beneficiaries; that neither the Assistant Chief nor a lawyer consented to the same. According to him, at the time of the alleged transaction he was 29 years old yet he was not involved in the transaction and all of them were unaware of the said transaction yet their consent was needed.

13. In cross-examination, stated that his father bought the said land from the settlers through a settlement scheme. He stated that the deceased had a title deed for Plot No. 31. According to him at 29 years he was married and was staying in the same place and insisted that since he was over 18 years old, he ought to have been involved in the transaction. According to him, his father passed away in 2010 and the agreement is dated 2002 during which time the father was alive. He however admitted that by then his father had already sold two properties to **Patrick Kiloki** as indicated in the Certificate of Confirmation of Grant. It was however, his evidence that he was present and consented hence he has no issue with that transaction.

Determination

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

15. Section 76(a), (b) and (c) 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;

16. In this case the Objector's case was based on grounds (b) and (c) above. His contention is that that the Petitioners did not disclose the fact that as purchaser of one acre of plot no. 98, he had an interest in the deceased's estate. According to him, he entered into an agreement of the sale of the said property and duly paid the purchase price. However, the deceased passed away before he could effect the transfer of the said portion of land to him. In support of his case he called a witness who drew the agreement and witnessed the same. That there was a sale of the said portion was supported by the 1st Administrator and there are consents in the court file signed by all the beneficiaries save for the Protestor herein that the Objector actually entered into such transaction and his interests ought to be protected.

17. The Protestor's challenge to the said transaction is however based on the fact that he was never consulted and hence never gave his consent. Apart from that the Assistant Chief of the Area was not involved and no lawyer was involved.

18. The 1st Administrator however countered that during the said transaction, she notified the Protestor to attend the same but he declined stating that he had no role in the sale of the said land and was not interested.

19. To my mind parties are free to enter into a sale agreement as long as they meet the necessary conditions. An agreement does not necessarily require to be drawn by an advocate. As long as it is executed and attested and the purchase price paid or agreed to be paid the agreement is valid. As regards the consent of the Protestor, that is required where the parties seek the consent of the Land Control Board. In this case what is sought is the recognition of the fact that the Objector has an interest in the estate of the deceased, the deceased having agreed to sale to him a portion of his land.

20. In the case of Johnson Muinde Ngunza & Another vs. Michael Gitau Kiarie & 12 Others (2017) eKLR, the Court stated that:

“[T]he Law of Succession Act recognizes the purchaser's rights and in support of these submissions the said (sic) the Law of Succession defines a “Purchaser”. Purchaser according to the Act means a purchaser for money or money worth.”

21. In dealing with a similar matter, **Makhandia, J** (as he then was) in Titus Muraguri Warothe & 2 Others vs. Naomi Wanjiru Wachira Nyeri HCSC No. 122 of 2002 held that:

“In the instant case the applicants are purchasers for value of a portion of the deceased's estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land to the applicants and he had been fully paid and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them. The respondent who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased, pursuant to the sale agreement and as required by law made an application to the Land Control Board for necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However, he passed on just before he could attend the board meeting. Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises...Had the applicants been made aware of the application for the confirmation by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of these interests. Further, had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is, therefore, the grant was obtained fraudulently by the making of a false statement and concealment from court of something material to the cause. The respondent knew of the applicants' interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for confirmation of the grant. In her distribution proposal she completely ignored the part of the estate that was purchased by the applicants yet she was aware of the purchase as she was present when the transactions were concluded. In any event the applicants were put in possession of their portions of the suit premises by the deceased before he passed on and with full knowledge of the respondent and since then they have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years.”

22. Similarly, the Objector gave unchallenged evidence that he has been in occupation of the portion that was sold to him since the time of the said transaction.

23. It is therefore clear that the grant herein was obtained and subsequently confirmed without disclosure of the Objector's interest and that constitutes concealment from the court of something material to the case. It does not however, necessarily follow that in that event the grant and certificate of confirmation must be revoked or annulled. 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.”

24. As appreciated by **Khamoni, J** in Re Estate of Gitau (Deceased) [2002] 2 KLR 430:

“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.”

25. Accordingly, since the omission herein can be cured by simply rectifying the certificate of confirmation of grant in terms of the Summons dated 21st March, 2017 filed herein on 5th June, 2017, I hereby direct that the letters of administration and certificate of confirmation of grant issued by this Court to the Petitioners herein be rectified with respect to the name of the deceased to read **Malusi Kaia Kitaa** and that the schedule of distribution be rectified to give **Patrick Mbwika Mutiso** one (1) acre from land parcel no. Machakos/Muia Hill/731 and a fresh Letter 41 and Certificate of Confirmation of Grant do issue accordingly.

26. There will be no order as to costs, the parties herein being substantially family members.

27. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 9th day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Musyimi for D M Mutinda for the Objector

Protestor in person

CA Geoffrey