



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 251 OF 2007

IN THE MATTER OF THE ESTATE OF MBAI KATHUKYA (DECEASED)

BETWEEN

LEONARD KATHUKYAPETITIONER/RESPONDENT

VERSUS

NZILANI MUENDO.....APPLICANT

RULING

1. By Summons for Revocation or of Grant dated 22nd November, 2013, the Applicant herein seeks in substance an order that the Grant of Letters of Administration (intestate) made to the Petitioner/Respondent herein on the 13th February 2008 and confirmed on the 9th March, 2012 be revoked and/or rectified to reflect all the beneficiaries. She further seeks an order that the subsequent dealings in the deceased's estate and in particular the transfer of land parcel no. Nzai/Mumbuni/329 to the petitioner/respondent be reversed and or annulled.

2. According to the applicant, the deceased herein, **Mbai Kithukya**, was the son of **Kathukya Kathusi** who was married to **Mbithe Kathukya** and **Ndila Kathukya**. **Mbithe Kathukya** was the mother of **Mbai Kathukya**, the deceased while **Ndile Kathukya** was the mother of **Muendo Kathukya** (also deceased). **Muendo Kathukya** was the husband to the applicant, **Nzilani Muendo**

3. According to the applicant, **Mbai Kathukya** died on the 22nd day of November 1991 and a grant of letters of administration intestate was made to **Leonard Kyengo Kathukya** the petitioner/respondent herein on 13th November, 2008. It was averred that Land parcel Nzai/Mumbuni/329 was registered in the name of petitioner/respondent herein to hold in trust for members of the two houses of **Mbithe Kathukya** and **Ndila Kathukya**.

4. According to the applicant, the Petitioner herein hails from the first house by virtue of being the son to the **Mbai Kathukya** the deceased herein, while the applicant herein being the wife of **Muendo Kathukya**, hails from the second house. Accordingly, **Muendo Kathukya** her husband is a step brother to the deceased herein **Mbai Kathukya**.

5. It was averred that after a clan meeting held on 26th August, 2004 at the petitioner/respondents home, it was agreed that land parcel Nzai/Mumbuni/329 be divided into two equal portions between the two houses of **Mbithe Kathukya** and **Ndile Kathukya**. However, without any prior consultation, the petitioner herein cited members of the house of **Mbithe Kathukya** to accept or refuse letters of administration intestate without citing members of the 2nd house and fraudulently obtained letters of administration misrepresenting to the Court that they were the only beneficiary to the estate of the deceased. It was revealed that the members of the 2nd house that were not cited and that have been disinherited are **Nduku Kathukya**, **Kisavi Kathukya**, **Nzilani Kathukya** and **Katumi Kathukya**. According to the applicant, the homes and gardens of the 2nd house (the disinherited family herein) are situate on the land in dispute. However, the petitioner/respondent herein has obtained Land Control Board Consent to sub-divide the parcel into two to the exclusion of the 2nd house.

6. In the applicant's view, the said grant should be revoked and the subsequent transactions and dealing in the estate of the deceased are annulled and or reversed, then the same should be equally distributed to the two houses otherwise the 2nd house stands to be disinherited. It was her case that this would have the effect of reflecting all the beneficiaries of the said parcel and their rightful shares.

7. In his reply to the summons, the petitioner averred that the applicant was not a party to the estate of the later **Mbai Kathukya**, his later brother. According to him, he petitioned for the letters of administration legally and with knowledge of all family members of **Kathukya**, namely **Kyengo Kithukya** and family and **Ngunya Mbai** and her family – the applicant's husband one late **Muendo Kathukya** – clan members **Lawrence K. Mbaya**, **Daniel Mungui**, the late **Joshua Masila**, **Benjamin Kithom** among others.

8. According to the Respondent, the applicant knows nothing concerning the land in question and has never been a party to the proceedings in respect thereof being Land Parcel No. Makueni/Mumbuni/325. It was his case that he settled on the said land with his late brother the late **Mbai Kathukya** and their late father's two wives since 1947. He therefore prayed that the summons be dismissed with costs.

9. In a further affidavit, the respondent averred that he acquired land parcel at Nzau/Mumbuni in June 1947 and the deceased, **Mbai Kathukya**, who initially lived in Mbooni went and settled on an adjacent piece of land having been given it by one **Nzioka Ngeto**. During that period the Respondent worked as a conductor and was mostly away working and in 1972 surveyors went to the ground and parties had their boundaries rectified and each party got satisfied with the subdivision. Two months after the survey was done, the numbers were issued and to his surprise his number was not issued and upon further inquiries he was informed that the number had been issued as Nzau/Mumbuni/329 in the name of his late brother, **Mbai Kathukya** in his absence. When he confronted his said brother it was agreed that he would give the deceased three (3) acres to be excised from the said land parcel while he would retain the remaining acreages. However, the deceased passed away before that was done and the land was left with his wife and sons.

10. Following the death of the deceased, the Respondent petitioned the Court for letters of administration in this cause and was issued with the Grant on 13th February, 2008 which was confirmed on 9th March, 2012 with the said land being divided into two portions between himself and the deceased's wife, **Ngunya Mbai**. It was his evidence that prior to the filing of the said petition, he sued the deceased's wife and his son **Mutuku Mbai** vide Land Disputes Tribunal Case No. 2 of 2006 seeking the subdivision of the same land and a decree was enforced by the Makueni SRM's Court in a ruling delivered on 14th February, 2007 which decision was never appealed against. According to him, following the subdivision of the said land, he was given titles Nzau/Mumbuni/700 and Nzau/Mumbuni/752 and that presently, he is residing, cultivating and carrying on his business on land parcel No. Nzau/Mumbuni/752 while the beneficiaries of the Estate of Mbai Kathukya, being his wife, **Ngunya Mbai** and his sons reside on land parcel Nzau/Mumbuni/700 which was subdivided from Nzau/Mumbuni/329. Accordingly, Nzau/Mumbuni/329 does not exist. He reiterated that the applicant herein has no interest in the Estate of Mbai Kathukya since the real beneficiaries thereof have already benefited and her actions are just an afterthought as the application is filed five years after the petition was commenced.

11. It was therefore the Respondent's case that by granting the orders sought herein, it will render an injustice as the rightful beneficiaries stand to be disinherited.

12. It was submitted on behalf of the applicant that the grant was confirmed without the applicant family as beneficiaries therein is, per se sufficient proof of fraudulent misrepresentation (in the absence of a plausible explanation from the respondents for the same). It was submitted that evidence has been availed to prove the fact that since the land parcel Makueni/Mumbuni/329 was held in trust by the deceased for the two families by seeking to subdivide the suit land into to the exclusion of the 2nd family, the respondent's main aim is to disinherit the second family which ought to have a share of the suit property herein.

13. It was submitted that the supporting affidavit deposed by the applicant herein proves without any prior consultation, the petitioner/respondent herein cited members of the house of **Mbithe Kathukya** to accept or refuse letters of administration intestate without citing members of the 2nd house and fraudulently obtained letters of administration misrepresenting to the Court that they were the only beneficiary to the estate of the deceased. The petitioner/respondent then went ahead and obtained Land Control Board Consent to sub-divide the parcel into two to the exclusion of the 2nd house. Meanwhile, the respondents secretly confirmed the grant in his names in a blatant attempt to permanently deprive the 2nd family of the disputed land as and disinherit them of what lawfully belongs to them.

14. It was submitted that as evidenced by paragraph 7 of the applicant's affidavit filed on 6th December, 2013, the respondent did not inform, notify or seek consent of the house of **Ndila Kathukya** prior to filing this cause and confirming the grant as required by law, given that the land in dispute is registered in the name of the deceased. Fair play would at least require them to inform others even if they thought only them were entitled to the same.

15. Based on section 47 and 76 of the **Law of Succession Act** it was submitted that this Court jurisdiction to entertain any application and determine any dispute under the said Act and to pronounce such decrees and make such orders therein as may be expedient. She also relied on the case of **Re Estate of Leah Jelagat Miscellaneous Civil Application 302 of 2008** and contended that the applicant has made a case of the 2nd family's interest in the deceased's estate and therefore the 2nd family (herein referred to as the disinherited family) is a party interested in the deceased's estate. The applicant herself also has an interest in the estate of the deceased by virtue of being a beneficiary to the subject estate but she is petitioning for the revocation of the grant in her capacity as beneficiary for the benefit of the disinherited family. The respondents knew just as much and ought to have disclosed that fact for it is material. On that score alone, the subject grant should be revoked. According to the applicant, in **Succession Cause 1958 of 2003 and 1781 of 2004**, the Court held that it was a must for all the houses of a deceased person to be involved and failure to notify any one of them is concealment of material facts amounting to fraudulent misrepresentation and as such a ground for revocation. Applying the same holding to this cause, it was submitted that the house of **Ndila Kathukya** was not involved at all by the respondent as its consent was not sought nor were citations issued against its members, on which score alone the grant should be revoked.

16. It was however submitted that if the court is nonetheless inclined to follow the mode of distribution as provided by the law, the deceased father was polygamous and his estate should therefore be distributed according to section 40 of the Law of Succession which provides:-

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the next intestate estate shall in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

17. Therefore, the subject estate should be divided amongst the two houses.

18. The applicant submitted that in the light of the foregoing, it has been established beyond reasonable doubt that the disinherited family and its members has an interest in the deceased's estate as an interested party in terms of section 76 of the subject Act and the house of **Ndila**

Kathukya was not involved in confirming the subject grant. Given that the foregoing was well within the knowledge of the respondents they ought to have disclosed just as much and their failure to do so amounts to obtaining grant by fraudulent concealment of material facts so that on those two scores alone, the subject grant should be revoked. Accordingly, the court was urged to find for the applicant as submitted.

Determination

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

20. 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;

21. In this case the applicants' contention is that the suit parcel of land belonged to her father in law, one **Kathukya Kathusi** who had two wives. Her husband **Muendo Kathukya** was from the 2nd house while the deceased whose estate is the subject of these proceedings, **Mbai Kathukya**, was from the 1st house. It would seem that the Petitioner herein was the deceased's brother. It is not in doubt that the members of the 2nd family were left out when the proceedings in respect of the estate of **Mbai Kathukya** were being undertaken.

22. The question that this court is called upon to determine is whether the members of the 2nd house ought to have been joined to the said proceedings. In my view if the property the subject of the said proceedings was the property of **Kathukya Kathusi**, then the members of the 2nd house being beneficially entitled to the same ought to have been joined to the said proceedings. That would be so since pursuant to section 3 of the **Law of Succession Act** "estate" means "the free property of a deceased person" while "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose of during his lifetime, and in respect of which his interest has not been terminated by his death." It is therefore clear that the only property that form part of the estate of a deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by that time his interests had not been terminated. It would follow that in that event either the suit property ought not to have comprised the estate of **Mbai Kathukya** and if it was to so comprise his estate then the 2nd house ought to have been involved in the administration or distribution of the estate.

23. The Respondent however contends that the suit property was his property which was improperly registered in the name of the deceased, **Mbai Kathukya**. He has relied on alleged proceedings in Makueni Land Disputes Tribunal Case No. 2 of 2006 in which the suit land was supposed to have been subdivided and whose decision was enforced by the Makueni SRM's Court in a ruling delivered on 14th February, 2007. However, neither the proceedings in the Tribunal matter nor the Court's proceedings were exhibited despite the same being purportedly annexed.

24. In the premises the alleged proceedings cannot be a basis for the determination of these summons.

25. According to the letter from the Chief dated 9th May, 2007, which letter the Respondent relied on in the petition, prior to the death of the deceased, they were living in their father's land which was surveyed under the deceased's name. From that letter it would seem that the applicant's claim that the land in dispute belonged to the said **Kathukya Kathusi** is, from the Area Chief's point of view, the correct position.

26. In his affidavit sworn on 9th September, 2014, an affidavit which has not been withdrawn and forms part of the record of these proceedings, the Respondent herein deposed that he petitioned for grant with the knowledge of all family members of Kathukya. It is therefore clear that the Respondent appreciated the need to involve all the members of the Kathukya family in the administration. He in fact went further and deposed that he settled on the said land together with his deceased brother, **Mbai Kathukya** and their late father's 2 wives since 1947. To my mind the only explanation for this must have been his appreciation that all the members of the Kathukya family had an interest in the said land. However, there is no evidence that the members of the 2nd house of Kathukya, from which the applicant herein hails were involved in the said process.

27. Having considered the material placed before me, it is my view that the applicant herein and the 2nd house of the late **Kathukya Kathusi** ought to have been involved in the administration or at least they ought to have been notified of the said proceedings. Section 51 of the **Law of Succession Act** provides as follows:

(1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) An application shall include information as to-

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.

28. In the premises, I am satisfied that the grant herein was obtained and confirmed by the making of a false statement or by the concealment from the court of something material to the case and that further the same was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation could have made in ignorance or inadvertently.

29. However, the dispute herein is with respect to the distribution of the estate rather than its administration. 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.”

30. 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.”

31. In the premises the summons for revocation of grant succeeds to the extent that the confirmation of the grant herein is hereby revoked. Accordingly, the subject land’s title prior to its subdivision is to be restored in the name of the deceased **Mbai Kathukya** but in trust for all the beneficiaries entitled to it.

32. I further direct that this dispute be referred to mediation for the purposes of proper distribution of the estate of the deceased.

33. There will be no order as to costs.

34. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 8th day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Ms Mutuku for Mr Mulei for the Applicant

CA Geoffrey