



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 1035 OF 2012

IN THE MATTER OF THE ESTATE OF DOMINIC MUTUKU MWOLE (DECEASED)

URBANUS MUINDE MUTUKU.....OBJECTOR

VERSUS

DANIEL MBITHUKA MBINDA.....ADMINISTRATOR

RULING

1. The deceased, **Dominic Mutuku Mwole**, passed away on 4th June, 2001, aged 84years. Subsequently, the Petitioner/Administrator herein, **Daniel Mbithuka Mbinda**, petitioned for the grant of letters of administration of the estate of the deceased following an order issued on 25th June, 2012 in Citation proceedings in commenced vide Succession Cause No. 453 of 2009. The basis of the said proceedings was that the deceased had sold to him a parcel of land but died before transferring the same to him.
2. On 11th February, 2013 this court issued a Grant of Letters of Administration Intestate of the estate of the deceased to the said **Daniel Mbithuka Mbinda** which Grant was confirmed vide a Certificate of Confirmation of Grant issued on 23rd January, 2014. In the said certificate, Land Parcel No. Machakos/Mua Hills/650 was confirmed to the Petitioner.
3. By Summons dated 2nd June, 2015, the subject of this ruling, the Objector/Applicant herein seeks an order that the said Grant be revoked and/or annulled. According to the Objector the Petitioner gave false information and deliberately misled the court and concealed material facts to wit the lawful beneficiaries of the estate of the deceased. It was averred that the deceased had three wives and 19 children and left a property known as Machakos/Mua Hills/650. However, while petitioning for the grant the Petitioner deliberately left out the said lawful beneficiaries of the estate of the deceased for his own ulterior motives and proceeded to obtain a grant of letters of administration and confirmation of the same based on the said misleading and concealed facts.
4. According to the Objector, the Petitioner then proceeded to register the said grant with the County Registrar, Machakos and procure registration of the said property in his sole name disregarding the interests of the deceased's beneficiaries yet the deceased's children and surviving wife have built permanent homes in the said property and the deceased and his other deceased wives and children were interned thereon.
5. In opposing the Objection, the Petitioner denied the allegations made against him and averred that all necessary legal/succession procedures were adhered to in both the Citation and in these proceedings. It was his averment that the Chief, Mua Location failed to respond to the required information regarding the deceased as requested by the Petitioner through the County Commissioner, Machakos. According to him, the Chief's belated list to the Registrar attached to the application cannot be relied on as the same does not exhibit certified ID copies and includes the list of the deceased.
6. It was contended that apart from land parcel Machakos/Mua Hills/650 the deceased also left three other properties being Machakos/Mua Hills/502, 503 and 654. The Petitioner therefore averred that there is no motive to conceal any material facts as the interests of the hitherto known kin of the deceased were fully made known as far as possible in spite of the Objector's non-action and hostility.
7. It was disclosed that following the issuance of the grant, a Title Deed for Machakos/Mua Hills/650 has already been issued to the Petitioner and twelve new parcels Numbers 1053 to 1064 allotted follow up to consent for subdivision issued by the Land Control Board and that a new map of Machakos/Mua Hills Adjudication Area has already been drawn up as reflected in Area Sheet No. 6 at the Lands Office. It was averred that the consultant surveyor and the county survey officer concerned were in the process of going to Machakos/Mua Hills to confirm the coordinates and to put in the beacons with a view to requesting for a preliminary court's assessment.
8. It was the Petitioner's case that he has suffered great mental and material anguish arising from the loss of property which was fraudulently

sold and registered by the deceased. To him the Objector has not raised any special grounds to warrant the cancellation of the grant.

9. In a further affidavit, the Petitioner reiterated that pursuant to section 71(1) and (30) of the **Law of Succession Act**, he followed the laid down legal steps to subdivide and surrender the original title deed for Machakos/Mua Hills 650.

10. By Summons for Rectification of Confirmed Grant dated 9th July, 2018, the Petitioner herein sought an order that the Grant herein be rectified to reflect the correct acreage to be administered by him as 15 acres of the said Land Parcel Machakos/Mua Hills/650 instead of the entire parcel which measures 39.22 acres and that the remaining portion of the same measuring 24.22 acres revert to the estate of the deceased. The basis for the said application was that the Petitioner entered into an agreement with the deceased for purchase of 15 acres from the then Land Parcel Machakos/Mua Hills/95 which was subdivided in 2007 into two parcels, Machakos/Mua Hills/650 and Machakos/Mua Hills/651 with the part purchased by the Petitioner falling within Machakos/Mua Hills/650 which was 39.22 acres. However, until his death the deceased never transferred the said portion to the Petitioner despite several promises to do so. In 2004 the Petitioner filed a case before the Tribunal being Case No. 27 of 2004 which was decided in his favour and the deceased was compelled to transfer the said portion to him, a decision which was adopted in Misc. Appl. No. 71 of 2007 but the deceased died before effecting the same.

11. After the death of the deceased the Petitioner cited his widow, **Katunge Mutuku Mwole** to take out letters of administration and when she failed to do so, the Petitioner was granted the leave to do so which he did. However, when the Grant was confirmed it was erroneously indicated that the entire Machakos/Mua Hills/650 was to be registered in his name instead of the 15 acres he was entitled to hence the said application.

12. The application was however opposed by the Objector herein who averred that the Grant was obtained fraudulently and in secrecy and that the beneficiaries of the deceased estate were kept in dark as regards these proceedings. According to him there was no agreement between the deceased and the Petitioner as alleged.

13. In his oral evidence, the Objector adopted the contents of his statement filed herein in which he stated that his deceased father had married three wives, **Lucia kalekye Mutuku, Esther Mamboleo Mutuku** and **Katunge Mutuku Mwole**, his mother. According to him the other step mothers are deceased and the first family has 6 children two of who are deceased, the second family has six children one of whom is deceased whereas his family has seven children. According to him all those beneficiaries were not disclosed in this petition. According to him the Petitioner is a mere stranger with no valid claim to the estate and failed to disclose the existence of the other properties. According to him the family was never notified about this petition yet they reside on the suit property.

14. While reiterating the foregoing the petitioner testified that the father never informed them about the alleged sale and he was unaware of any proceedings between the Petitioner and the deceased. According to him the deceased had other properties apart from the suit property in Kangundo and in Mwala where some of the family members reside.

15. In cross examination he stated that he was 42 years old and that in 1988 he was 10 years old and could not have been consulted then. He could not tell if his adult siblings were consulted then.

16. The second Objector's witness, **David Katumo Mutuku**, a son of the deceased supported the evidence of the Objector that the Petitioner is not from their family and is a stranger to them. According to him, in 1988 he was 30 years and his father never informed him of the sale. Similarly, he was never notified of the citation. He however stated that he was unaware if his mother was consulted when the land was being sold. He admitted that he heard that his father sold some other parcels from the neighbours but he was not consulted nor did he hear the same from his father. In his evidence he was not aware whether either the surviving mother or his brothers were involved in the transaction.

17. The third witness for the Objector was **Francis Mulinge Mutuku**, a brother of the Objector. According to him, the Petitioner took the deceased's death certificate when the deceased died and it was only after they conducted a search from the Lands Registrar that they came to learn that the Petitioner owned plot no. 650. He also asserted that they are not related to the Petitioner and that he was not aware that the said plot had been sold by the deceased to the Petitioner. Similarly, he was not aware of the proceedings before the Land Disputes Tribunal. He however disclosed that the deceased had other plots in Kangundo where some family members reside.

18. According to him, in 1988 he was 11 years having been born in 1977. He agreed that he would not have been consulted in the sale of the land and he would not have known if the deceased sold the said land. He conceded that he could not challenge the sale of the said land due to his age at that time. He stated that if shown an agreement entered into between the deceased and the Petitioner and duly witnessed he would have no problem with the sale of the same.

19. At the close of the Objector's case, the Petitioner relied on his statement which he filed herein. According to his statement, in 1988 he was interested in purchasing land and in November, 1988 he was introduced to the deceased who was desirous of selling his land. In the presence of the deceased, his wife, **Jane Katunge** and son **Nzivo** they viewed the land after which it was agreed that the deceased would sell to him land at Kshs 28,000.00. A sale agreement was later entered into in the presence of witnesses from both sides and part payment made by him. According to the Petitioner, the deceased had a lot of land and agreed to sell to him a total of 15 acres. Though the deceased undertook to transfer the said land to him, he did not do so compelling the Petitioner to file the Tribunal case against him.

20. According to the Petitioner, the deceased's said wife and son were aware of the transaction and testified to that fact before the Tribunal. The Tribunal ruled in his favour a decision which was adopted in court. However, a search on the land showed that the deceased sold part of the land to **Hastings Kiala Ngave** and **Musyoka Wambua** in 2006.

21. While reiterating the contents of his affidavit, the Petitioner averred that he included the estate of the deceased in every step he was taking despite meeting with life threatening hostility and denied that he perpetrated fraud.

Determination

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

23. Rule 40(6) of the *Probate and Administration Rules* provides that:

Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.

24. It is therefore clear that an affidavit of protest ought to be filed in cases where there is a proposed confirmation of grant and not after the grant has been confirmed. After the grant is confirmed I agree with Muigai, J in **Serah Njeri Muthoni vs. Florence Muthoni Njoroge & Another [2017] eKLR** that section 76(a), (b) and (c) of the *Law of Succession Act* kicks in and any person aggrieved by the confirmation ought to move for the revocation or annulment of the grant.

25. That notwithstanding, it is clear that the protest herein is based on the ground that the Petitioner is not related to the deceased and that he petitioned for grant of letters of administration without notice to the deceased beneficiaries and in so doing did not disclose all the beneficiaries and the assets of the estate. It is true that the Petitioner is not related to the deceased. However, section 66 of the *Law of Succession Act*, Cap 160, Laws of Kenya provides as follows:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

26. The Petitioner herein claimed that he was a creditor to the estate of the deceased having bought land from the deceased but no transfer had been effected to him. He was therefore a person entitled to apply for letters of administration subject to the priorities. Rule 22(1) of the *Probate and Administration Rules* provides that:

A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.

27. In this case the Petitioner avers that after the death of the deceased the Petitioner cited his widow, **Katunge Mutuku Mwole** to take out letters of administration and when she failed to do so, the Petitioner was granted the leave to do so which he did. The court proceeded to grant the Petitioner the authority to petition for the grant of the estate of the deceased. The proceedings before me do not seek to set aside the said decision. Accordingly, I am not called upon to determine whether or not the said decision was properly made.

28. From the evidence on record, it is clear that the Petitioner's case is based on the sale of a portion of the deceased's land to him. He exhibited copies of the agreement to that effect. Following the failure by the deceased to transfer the said portion to him he commenced before the Land Disputes Tribunal in Case No. 27 of 2004, a suit against the deceased. During those proceedings the deceased and his witnesses confirmed the existence of the said transaction. After hearing the matter, the Tribunal found in favour of the Petitioner herein. The said decision was adopted in Machakos Chief Magistrate's Court Misc. Civil Application No. 71 of 2007. There is no evidence that the said decision was set aside.

29. According to the objector herein, at the time of the said transaction he was too young to have been consulted and therefore was not aware if any of the family members was consulted. His second witness was away from home during the said period while his third witness was similarly too young to have been aware of the said transaction.

30. The Objector further contended that the Petitioner did not disclose all the beneficiaries and the assets of the deceased. In my view a petition made by a Citor must be distinguished from one made by a beneficiary. A citor's interest in the estate when a purchaser is only restricted to protecting his interest as such. He may not necessarily be concerned with the whole estate of the deceased and therefore ought not to be saddled with the burden of administering the whole estate of the deceased. Secondly, unlike the beneficiaries of the estate of the deceased he may not be seized of all the information regarding the assets of the deceased and the beneficiaries save for the one he is interested in. According to the petitioner herein, despite his efforts to get the required information regarding the deceased from the Chief through the County Commissioner, Machakos he received no response. In my view unless it is shown that the Petitioner who has petitioned, by virtue of a citation, based on his interest as a creditor or purchaser, is shown to have deliberately omitted to include in the petition some assets known to him and the beneficiaries whose particulars have come to his knowledge, the omission cannot be the basis of an application to revoke or annul an otherwise properly issued grant.

31. It is therefore clear that based on the evidence adduced herein as well as the past legal decisions, the protest cannot be sustained assuming that it was competent before the court in the first place.

32. Accordingly, the protest fails and is dismissed.

33. Based on the foregoing I also find merit in the Summons for Rectification of Confirmed Grant dated 9th July, 2018. Accordingly, I direct that the Confirmed Grant herein be rectified to reflect the correct acreage to be administered by the Petitioner as 15 acres of the said Land Parcel Machakos/Mua Hills/650 instead of the entire parcel which measures 39.22 acres and that the remaining portion of the same measuring 24.22 acres revert to the estate of the deceased.

34. There will be no order as to costs.

35. It is so ordered.

Read, signed and delivered in open Court at Machakos this 6th day of November, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Thiongo for the Administrator/Respondent

Mr Musyimi for Mr D M Mutinda for the Applicant

CA Geoffrey