



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 566 OF 2011

IN THE MATTER OF THE ESTATE OF MUTISO MBAWA MUNZU alias MUTISO MBAWA (DECEASED)

MUSILI MUTISOPETITIONER/APPLICANT

VERSUS

WAMBUA MUTISO.....1ST OBJECTOR/RESPONDENT

MUSYOKA MUTISO.....2ND OBJECTOR/RESPONDENT

RULING

1. The background to this petition is fully set out in the submissions filed by the petitioner herein. The deceased **Mutiso Mbawa Munzu** alias **Mutiso Mbawa** died intestate 21st June, 2008 and his wife **Elizabeth Kalekye Mutiso** died soon thereafter on 4th April, 2011. On 8th July, 2012 two (2) of the deceased's sons **Musili Mutiso** and **Patrick Mutua Mutiso** presented a Petition herein jointly seeking a Grant of Letters of Administration *intestate* to the estate of their late father confined to the administration of one property being L.R. No. Kangundo/Kitwii/1121. Pursuant thereto, on 12th October, 2011 this Court issued a Grant of Letters of Administration to the two Petitioners. However, the Co-Petitioner **Patrick Mutua Mutiso** had died on 24th July, 2011, leaving the Applicant **Musili Mutiso** as the sole surviving Administrator.

2. By a Summons for Revocation or Annulment of Grant dated 30th November, 2011 **Wambua Mutiso** and **Musyoka Mutiso** in their capacities as sons of the deceased lodged their Protest to the issuance of the Grant and sought its revocation on grounds of fraud, concealment and non-disclosure of material facts, particularly the omission of other dependants from the proceedings. In his response, the Petitioner/Applicant conceded to the existence of innocent mistakes but sought to regularize the on 26th March, 2012, for non-attendance on the part of the Protestors. A subsequent application seeking to reinstate the dismissed application was on 24th October, 2012 withdrawn by consent of the parties who agreed to pursue a Confirmation of Grant whilst attempting to negotiate the dispute.

3. In the meantime, the Petitioner had on 29th May, 2012 to lodge in Court a Summons for Confirmation of Grant dated 21st May, 2012 seeking the issuance of a Confirmed Grant. The said application sought the removal of the name of the late Co-Administrator **Patrick Mutua Mutiso** and substitution thereof with **Domitila Ndungwa Mutua alias Ndungwa Wambua** as Co-Administratrix; the Inclusion of two L.R. No. Kangundo/Katitu/891 (kwa Ngui) and L.R. No. Kangundo/Katitu/876 (Maanzoni) in the Estate; and the inclusion of four other dependants, **Wambua Mutiso** (son), **Musyoka Mutiso** (son), **Domitila Ndungwa Mutua** a.k.a. **Ndungwa Wambua** (daughter in law) and **Anna Nzisa Mutuku** (daughter).

4. The said summons was supported by three affidavits sworn by **Musili Mutiso**, **Domitila Ndungwa Mutua** and **Anna Nzisa Mutuku**, the latter who renounced her entitlement to inheritance. In response to the summons a replying affidavit was sworn by **Wambua Mutiso** on his behalf and on behalf of **Musyoka Mutiso**, addressing only the mode of distribution and proposing that Maanzoni Plot 876 be confirmed to **Musili Mutiso**, Kwa Ngui Plot 891 be confirmed to **Wambua Mutiso**, Homestead Parcel No. 1121 (Miu) be confirmed to **Musyoka Mutiso** and **Patrick Mutua Mutiso** (deceased). There was a further affidavit by 1st Protestor **Wambua Mutiso**, accusing the 2nd Objector of having unilaterally sold off the two (2) –acre Maanzoni property to one **Paul Kioko** in 2011 and disclosing the existence of yet another property, L.R. No. Kangundo/Kitwii/1120. The existence of this property was confirmed by Petitioner's further affidavit by **Musili Mutiso** and disclosing that the 2-acre land Parcel No. 876 (Maanzoni) had been alienated by **Musyoka Mutiso** in favour of one **Paul Kioko** who had permanently settled therein with his family.

5. In their joint affidavit, sworn 14th February, 2018 by **Anna Nzisa Mutuku** and **Domitila Ndungwa Mutua**, confirmed the proposed mode of amendment and distribution in **Mr. Musili's** further affidavit of 26/01/2018 and a consent letter dated 19th September, 2017 and filed in Court on 11/06/2018 and partially adopted in Court on 16th July, 2018. However, **Musyoka Mutiso** in his further affidavit of Protest disowned the Consent letter and proposed that only Parcel No. 1121 be shared equally between himself, **Mr. Musili** and **Domitila**. In his

further Supplementary Affidavit sworn 12th September, 2018 (filed 13th September, 2018) the petitioner put the proposed mode of distribution in context in terms of acreage portions, so that the apportionment will be as follows:-

- 1) **Wambua Mutiso** (1st Protestor) – 4.2 acres
- 2) **Musyoka Mutiso** (2nd Protestor) – 3.7 acres
- 3) **Musili Mutiso** (Petitioner) – 3 acres
- 4) **Domitila Mutua** – 3 acres
- 5) **Anna Nzisa Mutuku** – renounced/waived.

6. In his Further Supplementary Affidavit of 18th September, 2018 the 1st Protestor agreed with the Petitioner so that the only person protesting was **Musyoka Mutiso**. It was therefore directed that the hearing to proceed *viva voce* on the basis of Affidavit evidence on record. Parties were subsequently granted leave to file further evidence. On 16th September, 2017 the parties and their respective Advocates visited the estate properties as confirmed in Court on 21st September, 2017.

7. The 2nd Protestor having apparently disowned the Consent on Amendment, Confirmation and Distribution filed in Court on 11/06/2018, a hearing was thereby necessitated. Evidence was heard from all the five dependants on various dates. Save for **Musyoka Mutiso**, the rest of the dependants are in agreement on the way forward per the Consent letter which they signed, adopted and supported in Court on 20th June, 2018, 25th September, 2018 and 4th June, 2019.

8. In his evidence the petitioner, the eldest son of the deceased, confirmed the contents of the affidavits filed and particularly that all the dependants were agreeable to his summons for confirmation of grant and his proposed mode of distribution. In fact, according to him, on 24th April, 2018 after the matter failed to take off, they gathered outside the court room and agreed to resolve the matter. In that gathering the 2nd protestor was present as he was not in hospital and even his wife, **Janet Musyoka** was present. He identified the said **Janet** who was in court during the hearing. According to him, he sat with the 2nd protestor and asked him why he was selling land without the knowledge of the petitioner and the 2nd protestor retorted that the land was his. The petitioner further testified that the buyer, who was present in court, confirmed to him that the 2nd protestor told the buyer that the land was his. According to the petitioner, the said buyer, **Kioko**, produced an agreement entered into between him and the 2nd protestor in which a total sum of Kshs 253,000/- was paid by him and the agreement was witnessed by the said 2nd protestor's wife.

9. The petitioner therefore contended that the 2nd protestor's protest had no merit and should be dismissed and the grant confirmed in terms of his proposals.

10. The petitioner's evidence was supported by two other witnesses.

11. On his part, the 1st protestor testified that the deceased was his father who had 4 properties. After the deceased's death the petitioner and his deceased co-petitioner went to court without consulting them. They however talked and agreed on the mode of distribution at home and signed a consent which they filed in court. According to him the consent was signed by all beneficiaries including the 2nd protestor in the presence of the 2nd protestor's wife, Janet.

12. The 2nd protestor in his evidence relied on his affidavit wholly. In cross examination he agreed that the signature in the consent was his but stated that he signed it at Kenyatta Hospital. Referred to his affidavit he agreed that he stated that the consent was taken to him by **Musili** though the admission document he relied on was dated 25th July, 2017. Though he was transferred to Kangundo Hospital, he was not admitted there but was treated as an outpatient. According to him he was diabetic and had liver problems and he was not aware of what was happening. Referred to the agreement annexed to his supplementary affidavit, he insisted it was in respect of a loan he took from the said **Kioko** though he admitted the agreement bore his signature and that of his wife as a witness. Though he stated that he had no problem with being given plot 1121 where he stays, he stated that it was too small though he admitted that without it being surveyed, he could not know its size.

13. In his cross-examination by **Mr Nyakundi**, he stated in his affidavit that he had been admitted at Kenyatta Hospital for 2 weeks though the admission document is dated 25th July, 2017. He could not however remember the period he was admitted. While admitting that they visited the parcels, he insisted that they never agreed. He stated that the agreement between him and **Kioko** was for lease of land but admitted that they did not share the money. He however admitted that his wife witnessed the agreement.

14. In the submissions of the Petitioner, it is contended that the 2nd Protestor confirmed in his sworn evidence on 04/06/2019 the signature of the "Seller" **Onesmus Musyoka/Mutiso** appearing on the Sale Agreements of year 2011 regarding Sale of Parcel No. **876 (Maanzoni)** is his. The Agreements were witnessed by his wife **Janet Mwikali**. He received the consideration from **Paul Kioko** the "Buyer" and he did not share it with any of his siblings. He stated that Parcel 876 Maanzoni is vacant. When challenged why he should not take it as his inheritance, he confessed that one **Paul Kioko** is residing in it and has built a permanent house there, so that this land is no longer available for distribution. It was noted that he had no problem with accepting Parcel No. **1120 (Nthongoni)** measuring 0.7 acres. While admitting that he signed the Consent letter on record and filed on 11th June, 2018, in his Affidavit filed on 11th July, 2018 he swore that he signed it while at Kenyatta National Hospital Nairobi. At the hearing, however, he stated that the document was brought to him at Kangundo District Hospital. He however, had no proof of his admission to hospital and incapacity to comprehend the nature of the Consent letter at any one time was

tendered. He did not deny having been in the Court precincts on 24th April, 2018 when the parties found that the Court was not sitting and, in the discussion that ensued, the parties signed the available draft consent letter that had earlier been prepared in the year 2017. The Petitioner **Mr. Musili** denied that he took the Consent letter to **Mr. Musyoka** to sign in any hospital.

15. According to the submissions, the 2nd protestor contradicted himself in evidence and came across as an unreliable witness who thrives on confusion and is hell bent on sabotaging any progress in the matter. He already recognized Parcel No. 876 as his own and proceeded to alienate it way back in 2011 without disclosing who allocated it to himself. What is clear is that the parties have proceeded to occupy, farm and settle on the properties that are generally accepted to belong themselves respectively.

16. In all the circumstances the Court was urged to find that the proposed scheme of rectification, apportionment and distribution in the Consent letter and Petitioner's Affidavits filed on 29th January, 2018 and 13th September, 2018 is the fairest and most practical in the circumstances. There are no known liabilities of the estate.

17. According to the petitioner, the total acreage of the deceased's landed estate is $(7+4.2+2+0.7) = 13.9$ acres. Even if it were to be distributed equally among the acknowledged four (4) beneficiaries, each would get approximately 3.475 acres barring any access roads to be surveyed. As it is, the consented matrix of apportionment gives the 2nd Protestor 3.7 acres of land which is more than his fair share. The other beneficiaries are not complaining and are not opposed to **Musyoka** getting 3.7 acres of land as his inheritance, which would necessarily include the 2.0 acres he alienated to **Mr. Paul Kioko** and appropriated its proceeds exclusively to himself in cahoots with his wife. The Court was urged to exercise its discretion in the circumstances and to approve the amendments and apportionment.

Determination

18. I have considered the issues raised in the summons for confirmation and the protest by the 2nd protestor. At the centre of the matter is the issue whether the Consent letter on record and filed on 11th June, 2018 was signed by all the beneficiaries of the estate of the deceased. While all the beneficiaries agree that that was the position, the 2nd protestor contends that though his signature appears in the said document, he did not sign it of his free will since he was not aware of its contents as he was hospitalized. He however did not disclose the period of his hospitalization and the hospital documents produced by him did not bear the period when the said consent was executed by the beneficiaries. Further it was not clear in which hospital he was hospitalized. While he stated that he was hospitalized at Kenyatta National Hospital and not Kangundo Hospital, his evidence was that the petitioner took to him the consent at Kangundo Hospital. On the date that the consent was signed within the court precincts on 24th April, 2018, he did not deny that he was in court. The other witnesses testified that the 2nd protestor together with his wife, Janet, were present in court and during the signing of the said consent. The 2nd protestor did not call the said **Janet** to support the fact that he was admitted and signed the consent elsewhere other than within the precincts of the court.

19. In this case by an agreement dated 13th October, 2011, the 2nd Protestor herein agreed to sell to one **Paul Kioko** a piece of land known as Plot No. 891, the said plot was part of the estate of the deceased. While the 2nd protestor claims that he only leased the same in order to get a loan from the said **Kioko**, the said agreement is clear that the 2nd protestor was selling the same. He admitted that the money he received from the said **Kioko** was not shared with the other dependants. That agreement was witnessed by his wife. He admitted that the said plot now belongs to the said **Kioko**. He does not explain the circumstances under which the same became **Kioko's** property. According to the petitioner, taking into account the said plot which was disposed of by the 2nd protestor, the 2nd protestor's share in the estate now exceeds that of any other beneficiary to the estate. In his evidence, the 2nd protestor stated that he does not know the acreage of the plot given to him though he claimed it was smaller. It may well be that the 2nd protestor finds himself with a much smaller portion than he expected to get. However, this is of his own making having decided to unilaterally dispose of part of the estate and benefiting therefrom alone to the exclusion of all the other beneficiaries of the estate.

20. From the evidence, it is clear that the 2nd protestor converted the proceeds of the sale of plot 891 to his own use and benefit though he was not entitled to do so. In distribution of the estate of the deceased section 28 of the **Law of Succession Act** (Cap 160), Laws of Kenya enjoins the Court to consider (1) the nature of the deceased's property (2) any past, present or future capital or income from any of the source of the dependant (3) the existing and future means and needs of the dependant (4) whether the deceased had made any advancement or other gift to the dependant during his lifetime (5) the conduct of the dependant in relation to the deceased (6) the situation and circumstances of the deceased's other dependants and beneficiaries under any will and (7) the general circumstances of the case including so far as can be ascertained the testator's reason for not making provision for the dependant. Under sections 42 of the **Law of Succession Act**, previous benefits should be brought into account during distribution.

21. It was therefore proper for the petitioner to take into account the fact that the 2nd protestor had disposed of plot 891 belonging to the estate and pocketed the proceeds therefrom alone. By so doing the petitioner was simply following the law.

22. Therefore, having considered the material placed before me I find that the consent filed on 11th June, 2018 was properly executed by the beneficiaries including the 2nd protestor herein. I further find that the summons for rectification/amendment and confirmation of grant is merited and that the proposed mode of distribution accords with the law and is reasonable in the circumstances. Accordingly, the 2nd protestor's protest is disallowed while the said summons is hereby allowed.

23. There will be no order as to costs.

24. It is so ordered.

Read, signed and delivered in open Court at Machakos this 11th day of December, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kipruto for Mr Maweu for the Petitioner

2nd Protestor in Person

CA Geoffrey