



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.723 OF 2013

IN THE MATTER OF THE ESTATE OF NDUKU SAMSON MULWA (DECEASED)

DONALD ATHA MULWAPETITIONER

VERSUS

FLORENCE MWIKALI NZOMBE)

SAMMY MULWA NZOMBE).....PROTESTORS

RULING

1. The Protestors herein filed an affidavit of protest dated 21/1/2016 opposing the confirmation of grant issued to the Petitioner herein on the ground that the Petitioner secretly and fraudulently proceeded with the process of distributing the estate of the deceased without involving the protestors and further omitted their names from the list of beneficiaries. The Protestors therefore suggest that the property known as **MAVOKO TOWN BLOCK 3/2970** be subdivided equally amongst all the beneficiaries.
2. The protest was vehemently opposed by the Petitioner who maintained that the distribution of the land parcel **MAVOKO TOWN BLOCK 3/2970** was in accordance with the decision of the deceased herein which was reached after many years of consultation and consideration between her and her family who included the 1st Protestor's husband Wilson Nzombe Mulwa on the 17/11/2009 as per annexure "D.A.M.2" It was the Petitioner's case that the 1st Protestor herein used to despise the deceased who was her mother in law and as a result the deceased made a solemn declaration under a curse that the 1st Protestor should not participate during her burial or have any of her properties. It was finally contended by the Petitioner that the Protestors are actuated by malice against the deceased whom they had despised during her lifetime.
3. Parties agreed to canvass the protest by way of written submissions.

Protestors submissions

It was submitted that the Petitioner had deliberately locked out the Protestors from the estate yet they are family members of the deceased and should benefit. The failure to list them as beneficiaries implied that the Petitioner had concealed a material fact which act or omission is a material ground for the annulment of the grant pursuant to the provisions of Section 76(b) of the Law of Succession Act. It was further submitted that the Protestors dispute the claim that the property had been owned absolutely by the deceased and further dispute the assertion that the deceased had sold a portion to her daughters. Reliance was placed in the case of **TAU KATUNGI =VS= MARGRETHE THORNING KATUNGI [2014] eKLR** where Musyoka J held that life interest confers a limited right to surviving spouse over the intestate estate and does not enjoy absolute ownership over the property and can only dispose subject to the consent of all the adult children.

Petitioner's submissions

It was submitted for the Petitioner that the protest herein is geared towards including the Protestors as beneficiaries contrary to the wishes and acts executed and undertaken by the deceased during her lifetime. It was further submitted that the Protestor's husband and father respectively had already been given their shares by the deceased in her lifetime and therefore the same has already been taken care of and Protestors should not seek to obtain double benefits to the prejudice of the other beneficiaries. It was also submitted that the deceased had made her decision during her lifetime and none of the protestors raised any objection then and therefore their present claim is nothing but meant to mock the deceased whose wishes should be respected. Reliance was placed in the case of **PAUL KIRUHI NYINGI & ANOTHER =VS= FRANCIS WANJOHI NYINGI [2009] eKLR** where Makhandia J (as he then was) held that if the beneficiaries were aware of the declarations of the deceased during the deceased's lifetime then they would have taken any issues regarding the distribution with the deceased when he or she was alive. The learned Judge went ahead to adopt the scheme of the distribution as per the wishes of the deceased as declared in a certain black book.

4. I have considered the rival affidavits regarding the protest as well as the annexed documents and witness statements. I have also

considered the submissions of the learned counsels for the parties herein. It is not in dispute that the only property disclosed for distribution is land parcel **MAVOKO TOWN BLOCK 3/2970**. It is also not in dispute that the names of the protestors were not listed among the beneficiaries by the Petitioner. The issues I raise for determination are as follows:-

(i) Whether or not the deceased had distributed the assets comprised in Mavoko Town Block 3/2970 to the beneficiaries during her life time.

(ii) Whether the grant should be confirmed.

5. As regards the first issue, it is noted that the Protestors have rejected the Petitioner's claim that the deceased had already distributed her property during her lifetime and as far as they are concerned, the Petitioner is guilty of material concealment of facts. The protestors are seeking for an order of revocation pursuant to Section 76(b) of the law of Succession Act which provides as follows:-

“ A grant of representation, whether or not confirmed may at any time be revoked or annulled if the court decides, whether an application by any interested party or of its own motion that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material in the case.”

The Petitioner in his replying affidavit sworn on 25/8/2016 has annexed two documents marked as “D.A.M 1” and “D.A.M 2” which comprised of the deceased's wishes and subdivision of land parcel **MAVOKO TOWN BLOCK 3/2970** which was witnessed by Wilson Nzombe Mulwa who was the husband of 1st Protestor and father of the 2nd Protestor. Incidentally the protestors are family members of Wilson Nzombe Mulwa. The subdivision was also witnessed by other family members. It also transpired from the rival affidavits and statements of witnesses filed herein that the Petitioner and the Protestors family reside in Kailulini area of Iveti location where each one of them were allocated lands. It has also transpired that the deceased had been a member of Lukenya Ranching and Farming, Co-operative Society and her memberships number was 718. This then seems to be contrary to the Protestors claim that the deceased held the land **MAVOKO TOWN BLOCK 3/2970** in trust for one Samson Mulwa since the deceased herself in the declaration (wish) she had made stated categorically that the said property had been acquired by her own sweat. It was in that declaration that she had decreed that the 1st protestor and her family was not to get any share. Indeed the said declaration was made prior to the demise of the deceased and was made known to all the family members including the 1st Protestor's husband and father to the 2nd Protestor and that there is no evidence that any of the Protestors or any other family member raised any issue with the deceased during her lifetime. It has also transpired from the affidavits and statements of witnesses that the 1st Protestor did not get along well with the deceased during her lifetime and the deceased directed that the 1st Protestor was not to participate in her funeral. As no evidence has been tendered by the Protestors to the claim that the deceased held the property namely **MAVOKO TOWN BLOCK 3/2970** in trust for them, I am persuaded by the Petitioner's evidence and the documents presented as well as the statements of witnesses that the said property was rightly owned by the deceased and that the deceased had subdivided the said property during her lifetime to the beneficiaries. There is no evidence that any of the beneficiaries were left destitute since most of them including the Petitioner and Protestors have land at Kailulini area of Iveti location. The Petitioner has stated that he is only executing the wishes of the deceased. As the property belonged to the deceased, the submission by counsel for the Protestors that the deceased only owned a life interest is not convincing and therefore the deceased had the right to deal with the property during her lifetime as she wished for she was the rightful owner thereof. Again I find there was nothing wrong for some of the beneficiaries being left out of the specific property **Mavoko Town Block 3 /2970** as they have been adequately catered for in the family lands at Kailulini – Iveti location and again this specific property had been subdivided by the deceased herself during her lifetime in the presence of her family members. I find the deceased had the discretion to decide whom to give a portion of her property and anybody aggrieved was at liberty to confront her over the same. No evidence has been tendered to show that any of the family members raised any objection to the subdivision aforesaid. It would be proper to give effect to the wishes of the deceased which had been expressly made in the presence of her family members. None of the family members raised any objections or issues to the subdivision as unfair, discriminatory or unjust with the deceased while she was still alive. Why did the protestors have to wait until the deceased passed on to raise issues? The only observation that can be discerned is that the protestors had no issue with the deceased's mode of distribution during her lifetime and therefore the present objection is in bad faith. Suffice to add here that even the Petitioner and a majority of the family members are not beneficiaries to this specific parcel of land and have not challenged the wishes of the deceased. I am satisfied that the deceased had distributed the property namely Mavoko Town Block 3/2970 to the specific beneficiaries during her lifetime.

6. As regards the second issue, I am persuaded by the proposal on distribution by the Petitioner since the same is in accord with the wishes of the deceased. The deceased had during her lifetime carried out the subdivision of parcel number **Mavoko Town Block 3/2970** for some of her family members and also settled others at Kailulini – Iveti location. The protestors have not convinced me that the Petitioner concealed any material facts from the court since he has availed the declaration and subdivision by the deceased and further backed with comprehensive witness statements. Consequently I will confirm the grant in terms proposed by the Petitioner in the Application for confirmation of grant.

7. In the result, I find the protest not merited and is accordingly dismissed. The summons for confirmation of grant dated 23/04/2014 is allowed and that the estate of the deceased shall be distributed as proposed vide paragraph 5 of Donald Atha Mulwa sworn on 23/4/2014. As the parties herein are family members there shall be no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 18th day of July, 2018.

D. K. KEMEI

JUDGE

In the presence of:

Mrs Mutua for Kisongoa - for the Petitioner

Loko for Makundi - for the protestors

Josephine - Court Assistant