



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT SUCC CAUSE NO. 194 OF 2017

IN THE MATTER OF THE ESTATE OF JOSEPH KILONZO MUSYOKA (DECEASED)

PIUS KILONZO.....APPELLANT

VERSUS

JONES MUKITI KILONZO & ANOR.....OBJECTOR

RULING

INTRODUCTION

1. By an Application dated 30/04/2014 and filed on 30/04/2014 the Applicant/Objector seeks the orders for revocation of grants issued on 26/04/1999 and confirmed on 06/10/2000 and that an order for prohibiting any transactions that may be commenced by one of grant and or disposal of any of estate properties plus costs.
2. Same is based on Section 76 of Cap 160 Land succession Act and is premised on the grounds that they were obtained via fraud and concealment of material facts, 1st and 2nd Objector's interests were not taken care of. Their consents were not sought in lodging the matter for letters of Administration and that the existence of the 1st house was not disclosed.
3. The Application is supported by affidavit of Joshua Ndaka Kilonzo sworn on 30/04/2014.
4. The Application is opposed by the Petitioner and he has filed an affidavit sworn on 05/06/2015 and reinforced by a further affidavit sworn by Francis Musyoki Kitungo on 25/01/2017.
5. Both the deponents conceded that the 1st house and children thereof were omitted in the petition herein and so is in the grants as confirmed.
6. The parties agreed to dispose the matter via viva voce evidence which reiterated the content of the affidavits.
7. The parties also agreed to file and exchange written submissions as by today 13/08/2018 when the ruling was being prepared, only Objectors had filed their submissions on 05/07/2018. The Petitioner was given 21 days to file and serve the submissions but he seems to have squandered the opportunity.
8. Thus court will proceed with ruling without his submissions.

OBJECTOR'S SUBMISSIONS

A. CONCEALMENT OF MATERIAL FACTS

9. It is not in dispute that the deceased herein had two wives, namely Tabitha Nthenge Kilonzo (first wife) and Beth Katiti Kilonzo (2nd wife).
10. Both the wives of the deceased were blessed with issues which have been outlined in paragraph 2 of the supporting affidavit sworn by Joshua Ndaka Kilonzo, the 2nd Objector herein. The house of Tabitha Nthenge had eight children while the house of Tabitha Katiti Kilonzo was blessed with 5 children of which two have already passed. Neither of them were outlined and/ or mentioned in the grant. **As the Petitioner was cross-examined, he conceded to the fact that he never included the family of the 1st wife.**

11. The petition only outlined that the deceased was the proprietor of all that parcel of land in Makueni/Unoa/256. The Petitioner further failed to disclose to your Lordship that the deceased had another parcel of land situated in Katuanyaa known as Matungulu/Kambusu/2020. As a matter of fact, the court was informed that both wives prior to their demise resided on that parcel of land known as Matungulu/Kambusu/2020 and were all buried there.

12. The Petitioner as well during cross-examination conceded to the fact that he did not include the other property because he thought the petition ought to include the property that they were living on.

13. Section 76 (b) of the Law of Succession Act provides as follows:

“A grant of representation whether or not confirmed may at any time be revoked or annulled at any time if the court decides either on 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 to the case.” (emphasis added.)

14. Statutory law is therefore quite clear that concealment of material facts from the court is a ground for the revocation of a grant which had been issued to a party in a succession matter. The court in the case of JAMLECK MAINA NJOROGI –VS- MARY WANJIRU MWANGI (2015) eKLR at paragraph 11 of its ruling in revoking a grant reiterated the grounds upon which a grant can be revoked. It stated as follows:-

“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.” (emphasis added.)

15. It is their submissions that the concealment of the fact that one of the houses of the deceased was not included in the succession cause. Further to this, some of the properties of the deceased were also left out of the succession cause being the whole of that parcel of land known as Matungulu/Kambusu/2020.

16. It is their submissions that these grounds are material and sufficient to warrant this Honourable court to revoke and/or annul the grant of letters of administration made on the 26th day of August 1999 to Pius M. Kilonzo and confirmed on the 6th day of October, 2000.

B. THE PROPERTIES

17. During examination of the witnesses, it became apparently clear that the deceased had two properties being Matungulu/Kambusu/2020 and Makueni/Unoa/256.

18. It further came out clearly that there is a dispute with regards to that property known as Makueni/Unoa/256 between the two families. The family of Beth Katiti avers that its family was given the said land by the deceased herein for them to occupy and utilize wholly to the exclusion of the family of Tabitha Mbenge Kilonzo.

19. On the other hand, members of the family of Tabitha Mbenge Kilonzo averred that the deceased wishes were that the two properties known as Makueni/Unoa/256 and Matungulu/Kambusu/2020 ought to be shared between two families and not the use of one property to the exclusive use of the other family.

20. Joshua Ndaka Kilonzo testified and confirmed that Paul Kilonzo and Syokau Kilonzo who is now deceased used to live in that parcel of land known as Matungulu/Kambusu/2020 together with other family members from the house of Tabitha Mbenge Kilonzo. As a matter of fact, the aforementioned property known as Matungulu/Kambusu/2020 is being shared by the two families.

21. This therefore begs the question as to why the family of Beth Katiti has not disclosed this fact to this Honourable court that part of their family members also live in Matungulu/Kambusu/2020 and they do not want to share the parcel of land known as Makueni/Unoa/245.

22. The aforementioned witness produced tribunal proceedings from the Makueni District Lands Dispute Tribunal Case Number 38 of 2001 sitting at the DO’s office in Wote Division as **Objector’s Exhibit Number 1.**

23. The claimant therein was Tabitha Mbenge Kilonzo where she averred in her evidence and documents therein that the whole of that parcel of land known as Makueni/Unoa/256 ought to be shared by the two families since all the other parcel of land known as Matungulu/Kambusu/2020 has been shared by the two families.

24. After hearing both parties in the matter, the tribunal gave an award in favour of the claimant with costs in that the said parcel of land be shared by the two families of the deceased.

25. The Objectors further produced a letter dated the 14th day of December 1994 authored by the District Commissioner of Makueni directed to the Senior Chief of Wote Location indicating that the Eombe’s clan ruling that the property known as Makueni/Unoa/256 ought to be shared by the two families ought to be adhered and adhered to the two families herein are the families of Tabitha Mbenge and Beth Katiti.

26. He further outlined that any party who is dissatisfied with the said ruling ought to appeal the said ruling of the clan. The said letter dated the 14th day of December 1994 was produced as Objector’s Exhibit Number 2.

27. The Objectors further produced a letter dated the 17th day of May 1994 from one Stephen to the Chairman of the Eombe clan informing them that as per the decision of the tribunal, they would be proceeding to sub-divide the land known as Makueni/Unoa/256 and establish boundaries in which the two families would share and live on their respective portions of land. The said letter and its translation were produced as Objector's Exhibit Number 3A & 3B respectively.

28. The Senior Chief in charge of Wote Location known as JMB Ngwili did write to the District Commissioner through a letter dated the 6th day of December 1994 informing the District Commissioner that the aforementioned plot number Makueni/Unoa/256 would be sub-divided.

29. This was in reference to the ruling of the Eombe clan that the parcel of land be subdivided. The letter from the chief was produced as **Objector's Exhibit Number 4.**

30. The last document produced by the Objectors herein was a letter dated the 29th day of July 1994 by the Assistant Chief of Wote Location informing the clan that a meeting would be held on the 31st day of July 1994 for purposes of sharing and/or distributing the properties of the deceased being land parcels numbers Makueni/Unoa/256, and Matungulu/Kambusu/2020.

31. The properties were to be shared by all the members of the two families and not the use and/ or occupation of one property to the exclusive use of the other. The letter dated the 29/07/1994 was produced as **Objector's exhibit Number 5.**

32. The grant that was obtained by the family of Beth Katiti had the whole of that parcel of land known as Makueni/Unoa/256 to be wholly shared amongst the family members of the said family to the exclusion of the Tabitha Mbenge's family.

33. It was never disclosed to this Honourable court that the said property ought to be shared between the two families. The certificate of confirmation of grant dated the 6th day of October 2000 indicated in the schedule that the property therein of description Makueni/Unoa/256 was wholly go to Pius M. Kilonzo who was the Petitioner therein.

34. The Petitioner therein had not disclosed to the Honourable court therein that as per the ruling of the clan and directions of the Makueni district Land disputes tribunal sitting in Wote in case No. 38 of 2001 that the aforementioned property ought to be distributed amongst the two houses of Beth Katiti and Tabitha Mbenge.

35. It is clear that the deceased herein had intended that the two houses do share the properties comprised in his estate. The court sitting in Bungoma in Succession Cause number 89 of 2002 in the matter of SBS (deceased) stated as follows in paragraph 13 of its ruling:-

“It is for this reason that, in situations where there are more than one house, the court would and indeed should be very slow to uproot and remove the widows from the properties and/or spots where they have been living and/or settled by the deceased during his lifetime. This is so because, if during his lifetime the deceased had made a conscious decision that his widows would be settled and live in a particular manner, place or area, why should such a conscious decision be interfered with upon his demise? In my view, what the family court should do, is to take into account such circumstances when carrying out distribution so as to be equitable in the circumstances.” Emphasis added.

36. The above court being faced with a similar scenario as the present one in determining the mode of distribution of the deceased's properties confirmed that it is imperative that the wishes of the deceased on how he/she wished his properties be distributed be taken into account. It further went on to state that if the distribution is per the law, then there ought to be no reason to interfere with the mode of distribution upon his demise.

37. It is submitted that for this court to truly ascertain whether the properties of the deceased known as Makueni/Unoa/256 and Matungulu/Kambusu/2020 ought to be distributed amongst the beneficiaries of the deceased herein in equality, the grant herein issued to the Petitioner ought to be revoked.

ISSUES, ANALYSIS AND DETERMINATION

38. After going through the evidence and the record, the pleadings and submissions filed, I find the only issue is whether the threshold for revocation of grant under Section 76 (b) LSA has been established?

39. The provisions of Section 76 (b) supra is that:-

“A grant of representation whether or not confirmed may at any time be revoked or annulled at any time if the court decides either on Application by an 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 court of something material to the case”.

40. In the case of JAMLECK MAINA NJOROGE –VS- MARY WANJIRU MWANGI 2015, eKLR, the court rendered the following holding:-

“The circumstances that can lead to the revocation of grant have been set out in Section 76 LSAnamely;

- **Making false statement.**

- **Concealment of something material.**

- **Untrue allegations.**

41. In the instant case, it is agreed by both sides that the deceased had two homes namely:-

- **The house: The house of Tabitha Mbenge Kilonzo with 8 children and;**

- **The house of Beth Katiti Kilonzo with 6 children.**

42. One house of the deceased was omitted in grant that is the **house of Tabitha Benge Kilonzo and her children.**

43. Further, Joshua Ndaka Kilonzo testified that deceased had two parcels of land No. 2020 and 256. Only 256 was included in the grant.

44. The Petitioner agrees as much but tries to justify the acts of omission aforesaid.

45. Of course the court was not to conduct two probate processes in respect of the same deceased person's estate but one.

46. The parties cannot be given liberty to be selecting the properties and the beneficiaries to include in the exercise of Application for administration of estate matter.

47. The law commands full disclosure of estate assets and beneficiaries and short of that grant cannot stand.

48. Thus in the instant matter the threshold for setting aside revoking and annulling grant has been established thus court makes the following orders:-

1) The grant of letters of Administration made on 26/08/1999 and confirmed on 06/10/2000 are hereby revoked and annulled.

2) The letters of administration shall be granted to two beneficiaries nominated by the two houses to represent the house they come from within 21 days.

3) Thereafter, parties will put agreed mode of distribution and in disagreement separate mode of distribution of Estate within 30 days after grant of letters of Administration (1) above is issued.

4) No orders as to costs.

SIGNED, DATED AND DELIVERED THIS 4th DAY OF October 2018, IN OPEN COURT.

.....

C. KARIUKI

JUDGE