



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 518 OF 2012
IN THE MATTER OF ESTATE OF MUTISYA KIVINDA – (DECEASED)
BETWEEN
MARTIN KIVINDA NZIOK.....APPLICANT
VERSUS
ROSE NZISA MUTUA.....RESPONDENT

RULING OF THE COURT

The application

1. The Summons for Revocation of Grant before the court is dated **10th January, 2013** pursuant to **Section 76 of the Law of Succession Act and rule 44 of Probate and Administration Rules.**
2. The Summons prays for the following orders;
 - a. **The grant was issued upon concealment of the value of the estate.**
 - b. **The petitioner failed to disclose the true beneficiaries of the deceased.**
 - c. **The petitioner is not a beneficiary to the deceased as claimed in the petition and did not seek the consent of the true beneficiaries.**
 - d. **The grant was obtained through untrue allegation of facts.**
3. The summons is supported by affidavit of **Martin Kivida Nzioka** sworn on **10th January, 2013**. The applicant's case is that the above named **Mutisya Kivinda**, died on the **27th June, 1987** and a grant of Letters of Administration Intestate was made to **Rose Nzisa Mutua** on the **22nd August, 2012** by the High Court Machakos. It is alleged that the said grant was obtained fraudulently in that:
 - i. **The petition was defective in substance by failing to disclose that there were creditors to the deceased yet it was indicated that the estate did not have liabilities.**
 - ii. **The value of the estate was grossly under estimated as appears in the valuation report attached hereto and marked MKN1.**
 - iii. **The grant was obtained by means of untrue allegations that the petitioner was a sister-in-**

law to the deceased yet the deceased had sold the said property to family members including the applicant.

iv. The petitioner despite knowledge that the applicant had already purchased most of the land being Kangundo/Isinga/1255 and had constructed a permanent structure in Kaliwani plot 197 valued at 10 million on the said property.

4. The applicant's case is that the grant had not been confirmed, and if the administration of the estate proceeds as proposed, the applicant stands to lose the entire consideration and development in the sum of Kshs. 10 million.

The Response

5. The application is opposed vide a replying affidavit sworn by **Rose Nzisa Mutua**, the respondent herein, on **4th March, 2016**. The respondent's case is that Mutisya Kivinda (deceased) passed on, on 27th June, 1987 intestate, and the respondent is the deceased's daughter-in-law. The respondent's husband **John Mutua Mutisya** (deceased) was the biological son of Mutisya Kivinda (deceased) and therefore a heir and beneficiary of the estate of the deceased person herein. The applicant petitioned in this court for Letters of Administration intestate of the estate of Mutisya Kivinda (deceased), in her capacity as the daughter-in-law of the deceased and with the consent of the *bona fide* beneficiaries of the deceased estate. The respondent denies that the Letters of Administration issued to her on 22nd August, 2012 were obtained fraudulently as the statements made in support of the petition were all truthful and no material fact was concealed. The respondent denies the allegations that she failed to disclose in the petition that there were creditors to the deceased and indicated that the estate did not have liabilities. The respondent states that there is no evidence before this court to controvert her averments accompanying the petition. The respondent is a stranger to the allegations in paragraph 2 (c) of the applicant's affidavit that the parcel of land known as title number Kangundo/Isinga/1255 had been sold to the applicant herein. There is no evidence of a sale agreement executed between Mutisya Kivinda (deceased) and the applicant before this court. The respondent is also a stranger to the allegation that the applicant had constructed a permanent structure at Kaliwani Plot No. 197 valued at Kshs. 10 million. The respondent's case is that the parcel of land known as Land Reference Number Kangundo/Isinga/1255 was and still is registered in the name of one Mutisya Kivinda (deceased). On 22nd February, 2012, the respondent visited the District Lands Registry, Machakos in a bid to conduct an official search, and discovered that a person calling himself 'Mutisya Kivinda' had on 31st July, 1990 procured registration of a lease in respect of land reference number Kangundo/Isinga/1255 and on the same date a certificate of lease was issued therefrom. That on 18th February, 1992, a charge was registered in the above parcel of land in favour of Development Bank of Kenya Ltd allegedly by 'Mutisya Kivinda' who had passed on, on 20th June, 1987. That it is for this reason that the respondent petitioned for Grant of Letters of Administration *Ad Litem* on 29th May, 2012, to institute civil proceedings against Development Bank of Kenya Limited, to protect the estate of the deceased, though the same was declined prompting the filing of the current Petition. The parcel of land known as Land Reference Numeral Kangundo/ Isinga/1255 is the subject of a Civil Suit No. 199 of 2012 in the High Court of Kenya at Machakos.

Submissions

6. On **11th October, 2016** the court directed parties to file submissions to the application. The applicant was not present in court and so the court directed that the applicant's counsel be served with the notice of orders of that day. There is an affidavit of service filed herein on **17th November, 2016** showing that indeed the applicant's counsel was served with the orders. However, the applicant did not file submissions by **17th November, 2016**. On that date when the matter came up for mention to confirm the filing of submissions the applicant's counsel were not in court. Since the applicant's counsel were served with the notice of mention, the court reserved the date for ruling herein for **21st February, 2017** upon request by the respondent's counsel who had filed submissions.

7. The respondent submitted that the application was as a result of a Civil Suit No. 199 of 2012 filed by the respondent who is the administrator of the estate of the deceased against the Development Bank of Kenya Limited and the District Land Registrar, Machakos. The aforementioned suit was premised on fraud and or misrepresentation by the defendants therein to the estate of the deceased.

8. The particular therein were;

- i. Obtaining of forged certificate of lease.**
- ii. Obtaining of certificate of lease fraudulently using the deceased's name at the Land Registry in Machakos.**
- iii. Purporting to charge a non-existent lease by the purported Mutisya Kivinda (deceased) to the first defendant therein.**
- iv. Misrepresentation by 'Mutisya Kivinda' as the lessor of plot No. Kangundo/Isinga/1255.**
- v. Purporting to obtain a lease certificate from the Land Registry without any genuine supporting documents.**
- vi. Failure of the 1st defendant to exercise due diligence when furnishing a loan to 'Mutisya Kivinda'.**

9. As a result of the above foregoing the plaintiff sought for orders;

- i. Declaring that the certificate of lease for plot No. Kangundo/Isinga/1255 firstly registered in the name of Mutisya Kivinda (deceased) and charged in favour of the defendant as a forgery.**
- ii. An order directing to the Registrar of the titles at Machakos to issue; that the certificate of lease registered in the name of Mutisya Kivinda (deceased) for plot No. Kangundo/Isinga/1255 be cancelled and or nullified.**
- iii. order that there be a permanent injunction restraining the defendant, its servants and or agents from advertising for sale the aforesaid property or committing any acts of waste or in any adverse manner interfering with plot No. Kangundo/Isinga/1255.**
- iv. Costs of the suit and interests**
- v. other relief the court deem fit to grant.**

10. I have considered the application and submissions. In my view, the issues for determination are as follows;

- a) Whether the Grant of Letters of Administration was illegally obtained;**
- b) Where the petitioner had a right to petition for the Letters of Administration;**
- c) Whether the petitioner failed to disclose the liabilities of the estate of the deceased.**

11. On the first issue as to whether the Grant of Letters of Administration was illegally obtained by the respondents, the laws and procedure applicable under this context is the **Law of Succession Act** as read together with the **Probate and Administration Rules**. Under the Probate and Administration Rules (P&A 80), the respondent legally petitioned for Letters of Administration Intestate. In her Petition the respondent complied to the requirements under **form 5 and rule 7 of the Probate and Administration Rules**. In addition, the respondent complied with forms **12, 57 and 11 of the Rules**. In precision, the required consents were sought from all the beneficiaries and the same confirmed from the letter from the

Chief's office attesting to the rightful beneficiaries. The applicant, by virtue of being a grand-child of Mutisya Kivinda (deceased), it would be wrong to state that his consent was to be directly sought. In fact, the **Law of Succession Act**, under **sections 34-40** gives a procedure to bequeath property thus in turn, the hierarchy of beneficiaries. The same rule tries to stipulate the order under which property is to devolve and the priority thereto. **Sections 40** of the **Act** gives the procedure where the deceased is polygamous. The property first devolving to the wife, kids, grand children in that order up to the sixth consanguinity. With the strict procedure under **sections 34 -40**, it would not be honest to say that the consent of the applicant was a dire requirement despite the existence of the children. **Section 29** of the **Act** provides for the order of priority, thus consent emanates from the wife, children and lastly the grand children and in an instance where the wife (to the deceased) or children (to the deceased) consents, the same is presumed to cover the grand children in that order. It will be an act of direct contravention of the law for the applicant to say that he was not independently consulted for the consent to the petition for Letters of Administration. There was a gazette notice before the same grant was issued to her and at no point did the applicant object to the same or raise any issue to that effect.

12. From the foregoing, it is the finding of this court that the application for Revocation of Grant is not merited. There are no grounds put forth to merit the revocation. The application is dismissed with costs to the respondent.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF FEBRUARY, 2017

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DAVID KEMEI

JUDGE

In the presence of:

Court Assistant – Munyao

No appearance for Applicant and Respondent