



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 221 OF 2009

IN THE MATTER OF THE ESTATE OF MUIVA SILA MUTIE (DECEASED)

SERAH MBULWA MUTIE.....PETITIONER

VERSUS

JOSEPH SILA MUIVA.....1ST OBJECTOR

MUTIE MUIVA.....2ND OBJECTOR

RULING

Introduction

The sequence of events leading to the various applications before this Court for determination are as follows. On 24th September 2010, a grant of letters administration intestate was made the Petitioner herein, who is the 3rd wife of the deceased Muiva Sila Mutie (hereinafter referred to as “the Deceased”). The Deceased died on 1st January 1998. The Objectors herein who are the sons of the 1st and 2nd wives of the Deceased, thereupon filed their first summons for revocation of grant on 11th August 2011.

While the said summons was pending, the Petitioner filed a summons for confirmation of grant on 28th May 2012, whereupon the 1st Objector filed an Affidavit of Protest to the said confirmation which he swore on 24th October 2012. A perusal of the record of proceedings shows that the grant was confirmed by this Court (Mutende J.) on 17th January 2014, after the Objectors failed to appear for the hearing.

The Objectors then filed their second Summons for revocation of grant dated 23rd January 2014. The Objectors and the Petitioner subsequently filed a consent and agreement on 17th August 2015, in which they *inter alia* agreed to mark the matter as fully settled and that the entire estate belongs to the deceased. On 29th September 2015, the Petitioner filed a Chamber Summons dated 25th September 2015 seeking to set aside the said consent and agreement, and for the dismissal of the summons of 23rd January 2014.

The Petitioner then filed another application by way of Notice of Motion dated 27th January 2016 seeking to stay the proceedings in Civil Suit No. 2 of 2008 before the Senior Resident Magistrate’s Court in Kilungu, and the transfer of that suit to this Court. The 1st Objector thereupon filed a Preliminary Objection dated 5th February 2016 to the application for stay.

On 10th October 2016 this Court directed that the Summons dated 23rd January 2014, Chamber Summons dated 25th September 2015, Notice of Motion dated 27th January 2016 and Preliminary Objection dated

5th February 2016 would be heard and determined together by way of written submissions. There are three issues arising from the said applications and objections:

- a) Whether the confirmed grant issued herein to the Petitioner should be revoked.
- b) Whether the consent and agreement entered into and filed herein by the Petitioner and Objectors should be set aside.
- c) Whether the proceedings in Civil Suit No. 2 of 2008 before the Senior Resident Magistrate's Court in Kilungu should be stayed.

Whether the confirmed grant issued herein to the Petitioner should be revoked.

The main ground for the application for revocation of the confirmed grant issued to the Petitioner, as set out in the Summons dated 23rd January 2014 and 1st Objector's supporting affidavit sworn on the same date, as well as the submissions dated 5th November 2015 filed by J.M. Tamata Advocate, the legal counsel for the Objectors, is that the same was obtained irregularly. The particulars of irregularity are that there was a pending application in form of an Affidavit in protest at the time of confirmation, that the consent dated 28.05.2012 in support of confirmation is only signed by one house when there are three houses of the deceased, and that two prime parcels that is Numbers 1124 & 1127 which are part of the estate have been left out.

It was further submitted that the two parcels of land have been a subject of the Land District Tribunal and LDTC No. 2 of 2008 at Kilungu Law Courts, where a decree was issued directing the two parcels No.1124 and 1127 to be shared equally amongst the three houses .

The Petitioner filed a replying affidavit to the summons sworn on 6th March 2014, and her learned counsel, Andrew Makundi & Company Advocates, filed submissions dated 27th April 2016. The Petitioner denied that there was property belonging to the estate of the deceased that was left out of the grant, and stated that the deceased left plots No. 4289, 1617 and 1124, of which the family met and agreed that that plot No. 1124 was going to be for the Petitioner's house, and the Objectors were also given their share. Further, that she is the sole proprietor of plot No . 1127 having bought it from a Mr. Benard K. Kivuva and issued with a title deed in her name, a copy of which she annexed.

It was submitted that the Objectors have not produced any evidence of their allegations that plot Nos. 4289, 1617 and 1127 have been left out, or that they indeed form part of the estate. Further, that the Petitioner has not concealed the existence of the Objectors as she listed them in the list of beneficiaries in form P&A5, and that the affidavit of protest was unlawfully sworn as the 2nd Objector herein expressly stated in his sworn affidavit dated 18/ 12/ 2012 that he did not authorize the 1st Objector to swear the same on his behalf.

The Petitioner also filed a Further Affidavit she swore on 27th April 2016 in response to new evidence in the Objectors' submissions dated 5/ 11/2015, in which they annexed a copy of decree by the Makueni Land Tribunal. She stated that the decree by the tribunal is illegal and unprocedurally obtained as shown by a copy of a letter dated 30/3/2008 by the Provincial Commissioner Eastern Province Embu.

Further, that the title of the land parcel known as OKIA/NZUUNI/1127 is non-existent and has never been registered in the name of the deceased. In addition that the title document for the said land was registered in the name of the Petitioner, and the Makueni Land Tribunal had no jurisdiction to order cancellation of title and sub-division of land. She annexed a copy of the certificate of official search and green card showing that the title for was closed on 2nd June 2010 upon sub-division.

Revocation of a grant is provided in section 76 of the Law of Succession as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own

motion-

- (a) that the proceedings to obtain the grant were defective in substance;**
- (b) 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;**
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-**
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or**
 - (ii) to proceed diligently with the administration of the estate; or**
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or**
- (e) that the grant has become useless and inoperative through subsequent circumstances.”**

I have perused the Petition for grant dated 25th March 2009 and Summons for confirmation of grant filed herein on 28th May 2012. It is evident from the said grant that there were three houses of the deceased, and no consent of the other beneficiaries from the other two houses other than that of the Petitioner appear to have been given for the appointment of the Petitioner as the sole Administrator of the estate of the deceased, nor of the confirmation of grant. The consent filed with the summons for confirmation was signed by less than half of the beneficiaries. The procedure of obtaining both the grant of representation and its confirmation were therefore defective to this extent, and may have contributed to the various disputes and applications herein. The said confirmed grant is therefore subject to revocation, and the parties herein need to start the process of administration afresh and to agree *inter alia* as to the assets of the deceased available for distribution.

Whether the consent and agreement entered into and filed herein by the Petitioner and Objectors should be set aside

The Petitioner in her Chamber Summons dated 25th September 2015 and supporting affidavit of the same date claimed that she entered the agreement and consent dated 15/8/2015 on 17/8/2015 respectively, after she was coerced and threatened to be committed to civil jail by the advocate of the Objectors because of a judgement debt in Kilungu SRMC NO. 2 of 2008 where she was the judgement debtor. Further, that she signed the said agreement and the consent without knowing the contents and the implications thereto.

In addition that the matter which the consent and agreement seek to be marked as fully settled was determined by this court and the grant confirmed, and the Petitioner stands to suffer irreparably and is apprehensive that her personal property will be included as part of the estate of the deceased and also contravene the confirmed grant.

Andrew Makundi & Co Advocates, the learned counsel for the Petitioner filed submissions dated 16th November 2016 on the said Chamber Summons, wherein reliance was placed on Rule 73 of Probate and Administration Rules on the inherent powers of this court to make any such orders necessary for the ends of justice, and therefore that this court has the jurisdiction to set aside the agreement and consent in order

to avoid injustice to the beneficiaries and the estate. Reliance was also placed on the decisions in **Brooke Bond Liebig (T) Limited vs Mallya (1975) E.A. 266**, and **Edward Acholla vs Sogea Satom Kenya Branch & 2 Others, (2014) eKLR** on the circumstances in which a consent judgment may be interfered with, and for the position no consent order exists and what exists is a mere agreement.

The Objectors responded to the Petitioner's application in a replying affidavit sworn by the 1st Objector on 26th January 2016, wherein he denied that any force was used as the attachment arose from a valid Court order which the Petitioner was required to honour irrespective of any consent or not. Further, that the agreement is yet to be adopted as a consent judgment. In addition, that directions had already been taken on the summons dated 23rd January 2014 and parties had filed submissions, and the said summons cannot therefore not be dismissed. These averments were reiterated in submissions dated 26th October 2016 filed by J. Tamata Advocate, the Objector's learned counsel.

The applicable law on review or setting aside of a ruling and consent judgments is section 80 of the Civil Procedure Act, and Order 45 Rule 1 of the Civil Procedure Rules, which apply to succession matters by dint of rule 63 of the Probate and Administration Rules. Section 80 of the Civil Procedure Act provides as follows:

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

It is noteworthy that the above provisions refer to decrees or orders, and both the Petitioner and Objectors have conceded that there was no order or decree given by this Court arising from the agreement and consent dated 15/8/2015 on 17/8/2015, as the same were not adopted as orders of the Court. The provisions as to review or setting aside of orders under Order 45 Rule 1 of the Civil Procedure Rules and section 80 of the Civil Procedure Act do not apply to the said consent and agreement. The remedy available to the Petitioner in the circumstances is to be found in contract law and principles.

Whether the proceedings in Civil Suit No. 2 of 2008 before the Senior Resident Magistrate's Court in Kilungu should be stayed and/or transferred to this Court.

The Petitioner in the Notice of Motion dated 27th January 2016 and her supporting affidavit of the same date wants Civil Suit No 2 of 2008 at Kilungu Resident Magistrate's Court stayed and or transferred to this Court, for the reasons that the title of the land parcel known as OKIA/NZUUNI/1127 is non-existent

as the title was issued by the Makueni Land Tribunal, which had no jurisdiction to order for cancellation of title and subdivision of the Land OKIA/ NZUUNI/1127 which was non-existent. The Petitioner annexed a copy of official search of the said parcel of land to illustrate this averment.

Further, that the decree was unprocedurally extracted contrary to Order 21 Rule 8 of the Civil Procedure Rules as it was not served to the Petitioner for perusal and approval before it was filed. In addition that the issues raised and the subject for determination in Civil Suit No. 2 of 2008 before the Senior Resident Magistrate at Kilungu are similar to the issues raised in the Succession Cause No 221 of 2009 at Machakos High Court, and that the continuation of Succession Cause no 221 of 2009 in Machakos High Court is contrary to the principle of *res sub judice*. Lastly, that the award of the District Land Tribunal has been challenged by the Petitioner, and the matter was not resolved. The Petitioner annexed a letter from the Provincial Commissioner dated 20th March 2008 in this regard.

The Petitioner's learned counsel in submissions dated 27th April 2016 urged that Civil Suit No. 2 of 2008 before Senior Resident Magistrate at Kilungu be stayed as the two suits are dealing with the same subject matter namely OKIA /NZUUNI/ 1124 and OKIA /NZUUNI/ 1127, and reliance was placed on the decision in **Dr. Leonard Kimeu Mwaothi vs Rukaria M'twerandu M'iriungi, Civil Appeal no. 28 of 2011** wherein Visram, Koome & Odek, JJ.A held that the Law of Succession Act was envisaged as a complete regime of law complete with its own procedure for purposes of administering the estate of a deceased person and the distribution of the estate to the beneficiaries.

Further, that the Petitioner appealed to the Provincial Tribunal at Embu where her appeal was summarily determined on two grounds : - the District Land tribunal was wrongly constituted as the same had only 2 elders to hear and determine the claim, and that the property Known as MAKUENI DISTRICT/NZUUNI/1124 belongs to the deceased and that the parties were supposed to claim it under succession cause.

The Objectors in their preliminary objection to the said Notice of Motion relied on the following grounds:

- 1. That this Honourable Court lacks jurisdiction under succession matter to stop execution of a decree adopted under Land Tribunal Act No. 18 of 1990 Laws of Kenya in 2008.**
- 2. That the Applicant herein ought to have filed a judicial review or appeal in 2008.**
- 3. That this Honourable Court has a special mandate under Law of Succession Act.**
- 4. That it is unprocedural for the Applicant to challenge the implementation or execution of the decree without challenging the decision itself.**
- 5. That there is totally nothing to hear at Kilungu since the decree has been partially satisfied by the Applicant.**
- 6. That the Applicant is guilty of contempt of Court process if at all she divided parcel No. 1127 when fully aware of Misc No.2 of 2008 at Kilungu and P & A 221 of 2009 at Machakos.**
- 7. That issues in two matters are not the same and if any it is the Applicant who is guilty of subjudice for having filed P & A 22.1 of 2009 whereas fully aware of Misc. No.2 of 2008 at Kilungu.**

The learned counsel for the Objectors submitted in submissions dated 24th February 2016 that the two matters are under totally different legal regimes with Machakos High Court P& A Cause No. 221 of 2009 being brought under Law of Succession Act and Kilungu S.R.M Misc. No.2 of 2008 under the now repealed Land Disputes Tribunal Act. Further, that there is nothing to hear at Kilungu S.R.M Misc. No.2 of 2008 as the award was adopted in 2008 and no appeal is pending. It was urged that this Court is being invited to vary and alter the award of Tribunal that was adopted by Kilungu Law Courts under the guise of the Law of Succession Act.

I find that I have to uphold the preliminary Objection raised by the Objectors for the following reasons. Sections 6 and 7 of the Civil Procedure Act prohibits a court from hearing a matter that is *sub judice* or *res judicata* as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.....

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.;”

Kilungu Misc. Civil Suit no. 2 of 2008 is not pending, the issues therein having been definitively decided upon by the adoption of the Land Disputes Tribunal Award on 4th March 2008 before the institution of this Succession Cause. The legal options therefore available to the Petitioner is to appeal the decision in the appropriate forum, which is the Environment and Land Court and not this Succession Cause, as she already sought a review in the Kilungu Court which was denied in a ruling delivered on 9th July 2015 which was attached to her pleadings.

Arising from the foregoing, I accordingly order as follows:

1. The Objectors’ Summons dated 23rd January 2014 is hereby allowed to the extent of the following orders:

a) The grant of letters of administration intestate issued to Serah Mbulwa Mutie on 24th September 2010 with respect to the estate of Muiva Sile Mutie (Deceased) be and is hereby revoked.

b) The confirmation of the grant issued to Serah Mbulwa Mutie on 24th September 2010 by this Court on 17th January 2014 with respect to the estate of Muiva Sile Mutie (Deceased) be and is hereby revoked.

c) The Beneficiaries of the estate of the Muiva Sile Mutie (Deceased) shall within 90 days of the date of this ruling agree on three administrators, being one administrator from each of the three houses of the Deceased, failing which the Court shall appoint the said Administrators in accordance with the applicable law.

2. The *status quo* that shall obtain as regards the properties and assets belonging to the estate of the deceased deceased Muiva Sila Mutie pending the issue of a new grant of administration shall be that the Petitioner, Objectors and Beneficiaries shall continue to be in possession and occupation of the properties and assets they currently occupy; and that the Petitioner, Objectors and Beneficiaries of the estate of the deceased shall not sell, transfer, lease, undertake any further developments on, or in any manner dispose of or waste the said properties and assets, nor in any manner interfere with the current occupation and possession of the same by the other Petitioner, Objectors and Beneficiaries.

3. The prayers sought in the Petitioner’s Chamber Summons dated 25th September 2015 and Notice of Motion dated 27th January 2016 are hereby denied.

4. Each party shall meet their respective costs of the Summons dated 23rd January 2014, Chamber

Summons dated 25th September 2015, Notice of Motion dated 27th January 2016 and Preliminary Objection dated 5th February 2016.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 20th day of February 2017.

P. NYAMWEYA

JUDGE