



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 2 OF 2009

IN THE MATTER OF THE ESTATE OF ISAIAH NDAMBUKI NDUNDA (DECEASED)

MUMO NDAMBUKI

AGNES K. NDAMBUKI.....PETITIONERS

AND

VERSUS

MARY NDUKU MAKAU.....INTERESTED PARTY

RULING

The Interested Party herein has filed a summons for revocation of grant dated 6th April 2016 seeking the following substantive orders:

1. The Respondents be enjoined from disposing of, selling, alienating, sub-dividing or in any manner dealing with the property known as No. 19 Mitaboni pending the hearing of the application.
2. The grant of letters of administration issued on 9th February 2009 and confirmed on 16th February to the Respondents be revoked and/or annulled.
3. The Interested Party herein be included in the list of liabilities/creditors of the estate of Isaiah Ndambuki Ndunda (hereinafter referred to as “the deceased”).

The grounds for the application are that the Petitioners failed to disclose the existence of a ruling delivered by a District Officer on 29/2/1996, determining that 23 acres of the property known as No. 19 Mitaboni belonged to the Interested Party and was not available for distribution , and that there was an agreement to this effect between one Rhoda Munanie and the Interested Party.

The Interested Party in her supporting affidavit sworn on 6th April 2016 claimed that she advanced a loan of Kshs 11,000/= to Rhoda Munanie, who is now deceased and who was a wife to the Deceased Isaiah Ndambuki Ndunda , which agreement was on condition that the said Rhoda Munanie was to allocate to her 20 acres of the land once it was surveyed. The Interested Party attached a copy of the said agreement dated 27th June 1985 and a translation thereof in the English language, and the ruling by the District Officer dated 29th April 1996.

Andrew Makundi & Co Advocates for the Interested Party filed submissions dated 19th December 2016, wherein reliance was placed on section 47 and 76 of the Law of Succession Act, and Rule 73 of the

Probate and Administration Rules for the grant of the orders sought. The facts averred to in the foregoing were reiterated for the position that the proceedings to obtain the grant were defective, and the grant was obtained fraudulently by the making of a false statement or concealment from the court of material facts.

The Petitioners filed Grounds of Opposition dated 30th May 2016 and a replying affidavit they swore on the same date, in opposition to the application by the Interested Party. The Petitioners' learned counsel, F.M. Mulwa Advocate also filed written submissions dated 31st October 2016. The gist of the Petitioners' response is that the Deceased, Petitioners and Interested Party were not privy to the agreement relied upon, and that the Interested Party has no *locus standi* and is neither a creditor or beneficiary of the estate of the deceased, and is thus not entitled to bring the application or the orders sought.

Further, that the property part of which the interested Party claims to have purchased from the late Rhoda Munanie belonged to the Deceased, and the Deceased during his lifetime never authorized Rhoda Munanie to sell any part of his property, and she was therefore not in a position to pass title of the property to any person.

Reliance was placed on the decisions in **Rosina Nawekulo Wafula & Another vs Nikasio Makokha Wafula (2015) e KLR** and **In Re Estate of Micheal Mwangi Githinji (Deceased) (2009) e KLR** for the position that the Interested Party has the burden of proving any or all of the grounds for revocation, and has failed to demonstrate that she advanced any monies to the deceased or his estate. In addition that the ruling made by the District Officer on 29th February 1996 is not binding on this Court, and is in any event not enforceable as it is time barred under the Limitation of Actions Act.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Petitioners and Interested Party. The issue to be decided is whether the confirmed grant issued to the Petitioners should be revoked. The Interested Party asks for revocation of the said grant on account of having not been included as a creditor or liability to the estate of the Deceased, by virtue of an agreement she entered into with one Rhoda Munanie, and a ruling given by the District Officer giving her a part of the deceased's estate. 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 agreement and ruling relied on by the Interested Party. The agreement dated 27th June 1985 is between one Makau Kilonzo and Rhoda Munanie. The Interested Party is not a party to the said agreement neither is there any mention of the deceased, or the deceased’ parcel of land known as No. 19 Mitaboni in the said agreement. The said agreement was also entered into before the confirmed grant as regards representation of the estate of the deceased was issued herein on 9th February 2009. The Interested Party cannot therefore rely on the said agreement to lay any claim on the deceased’s estate.

The law of Succession Act at section 55 in this regard provides as follows with regard to disposition of capital assets of a deceased persons estate:

“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”

This position is reinforced by section 82(b)(ii) of the Act which provides that no immovable property of a deceased person shall be sold before confirmation of the grant.

Likewise, as regards the ruling dated 29th April 1996, while the same is shown to be on a dispute between the Interested Party and Rhoda Munanie, it also does not indicate the parcel of land that is in dispute. In addition, the Interested party has not shown the title that the said Rhoda Munanie had to No. 19 Mitaboni, or any authority given to the said Rhoda Munanie by way of a confirmed grant of letters of administration to the deceased’s estate to dispose of the said plot.

Lastly, the Petitioners, being the widows the deceased, have priority over the Interested Party as regards the administration of the estate of the deceased’s estate under section 66 of the Law of Succession Act, and cannot therefore be removed as administrators in favour of the Interested Party or any other beneficiary without their consent.

Section 66 provides as follows in this regard:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will. “

The prayers sought in the Interested Party’s summons for revocation of grant dated 6th April 2016 are accordingly denied for the foregoing reasons with costs to the Petitioners.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 14th day of February 2017.

P. NYAMWEYA

JUDGE