



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 741 OF 2014

IN THE MATTER OF THE ESTATE OF SIMON NDUNG'U KIMANI (DECEASED)

RULING

1. The cause herein commenced by way of citations issued on 28th March 2014 to Joseph Kimani Ndung'u, Valentine Njeri Kaikai and Peninah Muthoni Mwangi, at the instance of Valentine Njeri Ndung'u. The citees were said to be son and daughters, of the deceased respectively. They were required to take or refuse to take out representation to the estate of the deceased. The citees responded to the citation by filing an affidavit, through Joseph Kimani Ndung'u, sworn on 10th June 2014, accusing the citor of moving for representation to the estate without involving them with a view to disinheriting them. Directions on the citation were given on 8th October 2014. The parties agreed by consent to have representation granted to the citor, Valentine Njeri Ndung'u. and the first citee, Joseph Kimani Ndung'u, a petition in those terms was filed herein, and a grant of letters of administration intestate was accordingly made to the two petitioners on 6th October 2015.

2. The application that I am called upon to determine is a summons dated 30th March 2016. It seeks that the grant of 6th October 2015 be revoked. It is at the instance of Samuel Kenju Kamau and Joseph Njoroge Muriu. They complain that the application for representation was brought without their knowledge yet they were *bona fide* purchasers of a portion of LR No. 13537/47, which is an asset of the estate. They claim to have been in occupation thereof since 1993 and 2003, respectively. They have attached copies of the sale agreements that were purportedly executed between them and the deceased over the said portions. According to the sale agreement exhibited by Samuel Kenju Kamau, the property sold was 0.25 acres out of Ithuri Farm which the deceased had bought from a Njoroge Nguyai vide share certificate number 44. According to Joseph Njoroge Muriu, he had bought an eighth of an acre out of LR No. 13537/47 within Ithuri Farm Juja (share certificate number 44).

3. The two administrators swore two separate affidavits in response. According to second administrator, Joseph Kimani Ndung'u, the parcels of land claimed by the applicants actually belonged to his mother and were subject to HCSC No. 1768 of 2006, which related to his mother's estate, and he asserts that the said property was devolved to the children of his mother. He claims to reside on Plot No. 1065. He has attached two documents to his affidavit. One is a letter from the Kyanjau Housing Cooperative Society Ltd dated 5th June 2014. It is about a share number 122 in that society which indicates that the second administrator's mother, Nyambura Simon, was entitled to plots numbers 314 (Kang'oki), 1065 and 1619 (half acre). The next document is a certificate of confirmation of grant issuing out of Thika CMSC No. 64 of 1995, in the matter of the estate of Mariam Nyambura alias Nyambura Simon, where plot number 204/124 share certificate no. 122 Kyanjau Farming Cooperative Ltd devolved upon the deceased herein to hold for himself and the children of the deceased. The first administrator on her part, avers that the deceased might have disposed of some of his assets before he died, and undertakes that the administrators would distribute the estate with due regard to claims by purchasers. She dismisses the application as premature.

4. It was directed on 21st June 2016 that the application dated 30th March 2016 be disposed of by way of written submissions. There has been compliance therewith. I have read through the written submissions placed on record, and noted the arguments advanced by the parties.

5. Revocation of grants of representation is provided for in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. A grant will be revoked upon three general grounds. One is where there were problems with the process of obtaining the grant. What is considered here would be defects in the process, fraud and misrepresentation, and concealment of matter from the court. The second general ground is where there are problems with administration, principally where the administrators fail to apply for confirmation of grant within the timelines given in the law and where they fail to render accounts as and when ordered to by the court. The last general ground is where the grant itself has become useless and inoperative due to changes in the circumstances of the matter.

6. In the instant case, the applicants appear to point at difficulties with the process of obtaining the grant. They appear to suggest that there were defects in the process and even concealment of matter, in that they were not involved in the process and their interests were not disclosed. As their claim hinges on the process of obtaining the grant, the relevant provisions of the Act and the Probate and Administration Rules thereon would be relevant.

7. In that regard, I will refer to sections 51 and 66 of the Law of Succession Act and Rule 7 of the Probate and Administration Rules. Section 51(2) and Rule 7(1) give an indication of the sort of information that ought to be included or disclosed in an application for representation. In cases of intestacy, the information must include names of surviving spouses, children, parents and siblings of the deceased. There is no requirement that creditors and any purchasers of assets from the deceased ought to be disclosed or listed in the petition. The petitioners are also required to give a full inventory of the assets and liabilities of the estate. Section 66 of the Act lists in an order of preference the persons who could be granted representation where the deceased died intestate. The surviving spouse of the deceased tops that list, followed by all the beneficiaries named in Part V of that Act, the Public Trustee comes next, with the creditors coming last. The relations of the deceased after the surviving spouse, as listed in sections 35 to 39 of Part V, are the children, parents, siblings and relatives of the deceased upto and including the sixth degree of consanguinity. This provision should be read together with Rule 7(7) of the Probate and Administration Rules. Under Rule 7(7), where a person with a lesser right applies for representation, that application will only be considered where the persons with prior or equal right have renounced probate or have consented in writing to grant being made to the applicants or have been served with citations.

8. The applicants herein do not fall in the category of persons who ought to be disclosed in a petition for representation in intestacy. So there was no obligation on the part of the administrators to list them as survivors of the deceased or even to consult them. The applicants fall in the category of creditors. There is no obligation to list them as survivors or to consult them prior to the court being moved for representation. They should be notified through the process stated in section 67 of the Act, which the administrators herein complied with. The applicants' right to administer the estate was not superior nor equal to that of the administrators, so there was no obligation on the administrators to satisfy Rule 7(7) with respect to the applicants.

9. The interests of creditors and purchasers are handled at the stage of the distribution of the estate. This should be when the administrators apply for confirmation of the grant. It is here that creditors file affidavits of protest should the administrators fail to provide or cater for their claims. If the court feels that the claim by the creditor cannot be handled effectively in these proceedings, it would set aside the particular asset in terms of Rule 41(3)(4) of the Probate and Administration Rules for a determination of that claim in separate proceedings.

10. It could be that the applicants were afraid that the administrators might move for administration of the estates without their knowledge and to have the estate distributed without them getting involved. To answer that concern, I would draw the attention of the applicants to Part IV of the Act which provides for filing of caveats. Of particular interest is Rule 15, which allows a person who wishes to receive notice of an application for confirmation of a grant to enter a caveat in any registry. That is the process that the

applicants herein ought to have adopted. In any event, the applicants have not pleaded that they had placed their claim with the administrators who then chose to disregard it. It is heartening to note that the first administrator is fully aware that claims by creditors and purchasers are to be considered before distribution.

11. The final orders shall therefore be -

(a) that application dated 30th March 2016 is unmerited and I hereby dismiss the same with costs to the estate;

(b) that the administrators are hereby directed to file an application for confirmation of grant within thirty (30) days of date hereof and to serve the same on the applicants herein;

(c) that the applicants herein shall be at liberty, upon being served, to file affidavits of protests stating their claim therein;

(d) that the application dated 7th March 2016 shall be disposed of simultaneously with the confirmation application to be filed by the administrators;

(e) that should the two administrators fail to agree on the filing of a joint application, either is at liberty to file the same, and the other to file an affidavit in protest; and

(f) that as the estate comprises of assets situated within Kiambu County, the cause herein shall be transferred to the High Court of Kenya at Kiambu for disposal.

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF FEBRUARY, 2017.

W. MUSYOKA

JUDGE