



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 211 OF 2012

IN THE MATTER OF THE ESTATE OF MUKULU VYALU (DECEASED)

GRACE KAMINDA KYULE.....PETITIONER

VERSUS

KITIVI VYALU.....OBJECTOR

RULING

A grant of letters of administration intestate was issued on 12th July 2012 to the Petitioners herein with respect to the estate of Mukulu Vyalu (hereinafter referred to as “the Deceased”). The said grant was confirmed on 14th June 2013. The Objector claims to be a stepson of the Deceased, and in possession of the Deceased’s property known as Kalama/Muumandu/1057. The Objector filed a summons for revocation of grant dated 23rd November 2013 seeking an order that the grant issued on 14th June 2013 be annulled and/or revoked.

The grounds for the application as stated in the Objector’s supporting affidavit which he swore on 23rd November 2013 are that the Deceased was registered as the owner of the parcel of land known as Kalama/Muumandu/1057 on behalf and in trust of the other family members, since at the time of survey and demarcation his father had died. Further, that the Petitioner who is his step-sister carried out the succession cause without their knowledge, which cause is meant to disinherit him and other family members, and that the Petitioner is already threatening them with eviction. The Objector annexed a copy of the green card of the subject parcel of land.

The Petitioner filed a replying affidavit sworn on 7th December 2013 in response to the Objector’s application. The Petitioner averred that the deceased was the owner of the parcel of land known as Kalama/Muumandu/1057, and that during the registration of the said land there was no indication that the deceased was registered in trust for any person. Further, that she did not have to inform the Objector when she was filing the Petitioner as he is neither a dependant nor a beneficiary of the estate.

In addition, that the issue as to who is entitled to the parcel of land known as Kalama/Muumandu/1057 was deliberated upon by family members on 11th February 1996, whereby a verdict was reached that the Petitioner was the sole beneficiary of the Deceased’s estate. The Petitioner annexed a copy of a letter from the Assistant Chief of Muumandu Sub-Location dated 1st November 2011 showing the beneficiaries of the deceased, and a copy of the resolution of the family meeting held on 11th February 1996.

The Evidence

The Court on 15th December 2015 directed that the Objector's application would proceed to hearing by way of *viva voce* evidence, and the hearing was held on 10th October 2016. The Objector called three witnesses during the hearing. Their first witness was the Objector (PW1), and he relied on the supporting affidavit he filed on 23rd November 2015, whose averments are reproduced in the foregoing. Upon cross-examination, the Objector stated he does not know the number of the subject land he was objecting to, and that his father who was called Vyalu had three wives including the Deceased, and that his mother called Mathei has her parcel of land at Kavyuni. Further, that the Deceased who was his step-mother was given land to bring up her children on, but that the plot of land he is fighting for belongs to his mother, and he does not want anything from the estate of the deceased. He also testified that he was not present at the family meeting held on 11th February 1996, and that his mother and brother were present at the meeting.

PW2 was James Mulinge, who was an Assistant Chief at Muumandu sub-location between 1966 to 1990 and who testified that he knows the Petitioner and Objector. He adopted an affidavit he swore on 18th January 2016 as his evidence, wherein he states that he was present in 1990 when the estate of the late Vyalu Mumyaka was being distributed to his three wives namely Ndungulu, Syevuo and Mathei; and that the Deceased was not among the three wives as she had divorced her husband in 1953.

Further, that he learnt there was a dispute in 1995 when the Petitioner came to claim the subject land, and that the clan called a meeting whereat the Petitioner stated that she wanted the said land because she had incurred the costs of surveying it, and had incurred the costs of medication of the deceased. PW2 testified that the clan resolved to pay the Petitioner Kshs 10,500/= to avoid a curse. According to PW2 the land is now being used by the Objector and belonged to Mathei before.

Upon cross-examination PW2 stated that the Deceased was the owner of the land that is being disputed, and used to be a wife of Vyalu Mumyaka, and that he does not know who the beneficiaries of the deceased are.

Solomon Muange Nthuli (PW3), a retired school teacher, testified that he knows the Petitioner and Objector and was secretary of the clan. According to PW3, the land in dispute is being used by the Objector after he was given the same by his mother, and that before he started using it the Petitioner was the one using the land. However, that once the Petitioner was married she had no right to the land as she was given land elsewhere. Upon cross-examination PW3 stated that the clan met on 15th July 1995 and found that the land used to belong to the Deceased, but that it should go the Objector, the deceased having died and her daughter having got married. The Objector was also to pay the Petitioner some money. He stated that he did not attend the family meeting of 11th February 1996.

The Petitioner on her part testified as DW1 and called one additional witness. The Petitioner adopted her replying affidavit as her evidence, and in addition stated that the Deceased who was her mother had six children, one of whom is deceased, and that she owned three parcels of land during her lifetime. Further, that the Deceased was chased by the Objector and his brothers from the land parcel Kalama/Muumandu/1057, and that the Petitioner was also threatened with death and moved from the land, and does not use it now. She stated that the subject land is being cultivated by the Objector, and borders land owned by the Objector's mother which he also possesses.

Upon cross-examination the Petitioner stated that the Deceased moved to Makueni after she was chased away, and where she went to look for land and was residing at the time of her death.

DW2 was Peter Mulinge Vyalu, a grandson of the Deceased, who testified that when the Deceased died he was in Tanzania having moved there for work in 1960, and that the land in dispute at the time belonged to and was cultivated by the Deceased. He asked the Court to adopt a witness statement he signed dated 15th January 2016 and filed in Court on 19th January 2016 as his evidence. He stated therein that when he returned to Kenya in 1977 he found the Petitioner cultivating the subject parcel of land, and in 1996 the Objector started to claim that he was the rightful heir.

Further, that the Atangwa Kanguli clan met and resolved that the Objector pays the Petitioner Kshs 15,000/=, and on 11th February 1996 the family met and refused this proposal, and resolved that the land belonged to the Petitioner who had been given the same by the Deceased. It was also decided by the family that the Objector should give the land back to the Petitioner.

Upon cross-examination DW2 stated that the Deceased left for Makueni after her husband died in 1955, and that he was 13 years old at the time having been born in 1942. He also confirmed that the Objector was not present at the family meeting .

The Issues and Determination

The counsel for the Petitioner and Objector were directed by the Court at the close of the hearing to file written submissions. The Petitioner's learned counsel, P.N. Musila & Company Advocates filed submissions dated 14th December 2016, while the Objector's counsel, Tamata & Company Advocates did not file any submissions within the timelines agreed upon.

I have read and carefully considered the pleadings, evidence and submissions made by the Petitioner and Objector. The issues to be decided are firstly, whether the Objector is entitled to Kalama/Muumandu/1057 which is registered in the name of the deceased, and secondly, if so, whether the confirmed grant issued to the Petitioner should be revoked. The Objector asks for revocation of the grant on account of being in possession of the said parcel of land, and on account of his non-participation in the Petition for, and confirmation of the grant.

The Petitioner submitted after analysing the evidence given during the hearing that the threshold of sections 76(a),(b) and (c) of the Law of Succession Act has not been met to warrant revocation or annulment of the grant. Further, that section 67 of the Law of Succession Act was complied with as the Petitioner annexed the requisite notice made in the Kenya Gazette Number 7322 of 31st May 2012, and the Objector ought to have raised his objection within 30 days of the said notice.

I note that on the first issue, the Objector claims that the land parcel No Kalama/Muumandu/1057 which was registered in the name of the Deceased was registered in her name as trustee. None of the Objector's witnesses however adduced any evidence as to the circumstances in which the said land was registered in the name of the Deceased, with PW2 and PW3 acknowledging that the Deceased was indeed the owner of the said parcel of land, and PW1 also testifying that the Deceased had been given a portion of land to bring up her children on.

PW1 also admitted that his mother who was a co-wife of the deceased had her own land, which was corroborated by PW2 who testified that the Deceased's husband did distribute his land between his three wives including the Objector's mother, and that the Deceased was left out as she had divorced her husband. He however did not explain how the Deceased came to be registered as owner of Kalama/Muumandu/1057.

Therefore, to the extent that no evidence was brought to show that the Deceased was indeed trustee for the other wives and children of her husband, and also to the extent that evidence was brought to show that her co- wives had been given their own land by their husband, and the Objector's family had acknowledged that the Petitioner was entitled to the Deceased's land, this Court finds that the land parcel No. Kalama/Muumandu/1057 was not held in trust for the Objector by the Deceased.

PW3 also intimated that the clan decided that the Petitioner should not be given the subject land as she was a married daughter of the Deceased, and had no right to the land vis-à-vis the Objector. The Constitution is now clear in Article 27 that any form of discrimination based on race, sex, marital status or culture is prohibited. Specifically **Article 27(3)** (4) and (5) of the **Constitution** specifically provide as follows:

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

In addition, **Section 29(a)** of the Law of Succession Act in recognizing **children** of a deceased as dependants does not classify those children as sons, daughters, married or unmarried. This Court in this regard concurs with the holding of Makhandia, J. (as he then was) in ***In Re Estate of Solomon Ngatia Kariuki (Deceased), (2008) eKLR*** wherein the learned Judge held as follows:

'The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.'

The foregoing findings dispose of the Objector's summons, as their net effect is that the Objector is not entitled to the land parcel of Kalama/Muumandu/1057 which was registered in the name of the Deceased, and is therefore not a beneficiary of the Deceased. No defect, fraud, false statement or untrue allegation has therefore been shown by the Objector to warrant revocation of the confirmed grant issued to the Petitioner, as required by section 76 of the Law of Succession which provides 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.”

The Objector’s summons for revocation of grant dated 23rd November 2013 is accordingly dismissed. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 6th day of March 2017.

P. NYAMWEYA

JUDGE