



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 609 OF 2008

IN THE MATTER OF THE ESTATE OF NASON MUSEMBI MUSOMBA (DECEASED)

JOHN MUSYOKA MUSEMBI.....PETITIONER

VERSUS

1. DAVID MUEMA MUSEMBI.....1ST OBJECTOR

2. BENJAMIN MAKENZI MUSEMBI.....2ND OBJECTOR

RULING

A grant of letters of administration intestate was issued on 8th December 2008 to the Petitioner herein with respect to the estate of Nason Musembi Musomba (hereinafter referred to as “the Deceased”). The said grant was confirmed on 3rd May 2010. The Petitioner and Objectors are all sons of the Deceased. The Objectors have filed a summons for revocation of grant dated 26th June 2016 seeking the following orders:

1. That the grant issued to John Musyoka Musembi be revoked.
2. THAT, an order do issue prohibiting any transactions that may be commenced by use of the grant herein and/or disposal of any of the properties to the estate.

The grounds for the application are that the grant was obtained by fraud and the concealment of material facts, and that the interests of the Objectors have not been taken care of in the said grant. The Objectors explained in a supporting affidavit and supplementary affidavit sworn on 26th June 2016 and 21st June 2016 respectively by the 1st Objector, that the deceased had concealed in his Petition for grant of representation that the Deceased had the following other survivors:

1. Davis Musembi - Son
2. Benjamn Musembi - Son
3. Eliud Musembi - Son
4. Rodah Mwikali - Son
5. Rodah Mwikali - Daughter
6. Susan Nzisa - Daughter

7. Grace Mukenyi - Daughter

8. Rose Ndumi - Daughter

The Objectors attached a copy of the Petition filed herein and confirmed grant showing the Petitioner as sole beneficiary. They also state that they had filed other applications dated 3rd August 2011 and 4th July 2012 which were struck out on account of letters they had filed in Court on 27th February 2012 withdrawing the instructions to their Advocates and the said applications, and which they claimed they were coerced and paid by the Petitioner to file. The Objectors denied that their application was *res judicata* and attached copies of notices of withdrawal of the said letters filed in Court on 29th June 2015.

Lastly, they also claimed that the Petitioner had failed to disclose a share of the deceased at Konza Ranch being no 1554, and to include as a liability the property known as L/R Machakos/ Konza North Block 1/1125 which was sold to one Henry Muli Kisenga. The attached a copy of the sale agreement.

The Petitioners filed a notice of Preliminary Objection dated 6th October 2015, and replying affidavit sworn on 25th May 2016 by the Petitioner in response to the Objectors summons. The ask that the summons be struck out on the ground that it is *res judicata* as there are similar applications dated 2nd August 2011 and 4th July 2012 on which rulings have been given by this Court. Further that the application is incompetent and bad in law in light of the Applicants' letters to this Court filed on 27th February 2012, and the summons ought to be stayed in view of Machakos ELC No 141 of 2011 and Civil Appeal No. 95 of 2012.

These grounds were explained in further detail in the replying affidavit wherein it was also stated that that after consultation among the deceased's children, it was agreed that the Petitioner would Petition for letters of administration, and the properties comprised in the Deceased's estate would be registered in his name in the first instance and later shared out as agreed by the beneficiaries. It was also averred that Henry Muli Kisenga who is the Defendant in Machakos Civil Suit No 141 of 2011 in which the subject matter is the parcel of land known /R Machakos/ Konza North Block 1/1125, is behind the summons for revocation of grant so that the said suit collapses.

The Issues and Determination

The Court directed that the Objectors' summons be heard by way of written submissions. Gladys Gichuki Advocates for the Objectors filed submissions dated 7th September 2016, while Nzei & Company Advocates for the Petitioner filed submissions dated 13th February 2017.

I have read and carefully considered the pleadings and submissions made by the Petitioner and Objectors. The issue to be decided are firstly whether the summons by the Objectors is *res judicata*, and secondly, whether the grant issued to the Petitioner should be revoked. The Objectors ask for revocation of the grant on account of their being children of the deceased, and on account of their non-participation in the Petition for, and confirmation of the grant.

The Objectors submitted in this regard that no consent as alleged by the Petitioner had not been displayed, that the grant of representation issued to him was obtained through fraud and concealment of material facts and that section 76 of the Law of Succession Act empowers the Court to revoke the grant. Further, that the application herein is not *res judicata* as the previous applications were struck out on technicalities, and the subject letters disowning the application have since been withdrawn by the Objectors.

The Petitioner on the other hand submitted that the neither the Petitioner nor the Objectors had legal capacity to sell the deceased's land parcel Machakos/Konza North Block 1/1125 to Henry Muli Kisenga on 9th June 1994 before the letters of administration were taken , and that the Petitioner is seeking through the suit filed in Machakos ELC Suit No 141 of 2011 to protect the said property as personal

representative of the estate of the deceased pursuant to section 82 of the Law of Succession Act.

Further, that the Objectors are abusing the Court process by withdrawing their letters and filing the present summons, and the Court was urged to preserve land parcel Machakos/Konza North Block 1/1125 until Machakos ELC Suit No 141 of 2011 is heard.

I am guided on the first issue for determination by sections 6 and 7 of the Civil Procedure Act which prohibit 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.;”

I have perused the ruling on the application dated 4th July 2012, and note that the said ruling and the previous ruling on the application dated 3rd August 2011 struck out the Objectors’ said applications on the basis of the letters they filed withdrawing the said applications and instructions to their lawyers on record. Therefore the issues they raised as to whether there was fraud and material concealment of material facts by the Petitioner were not heard and determined on merit, and there were no definitive findings made by the Court on the issues. The plea of *res judicata* cannot therefore be raised in the circumstances.

On the second issue, the grounds for 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 Letters of Administration Intestate, and affidavit in support of the said Petition filed herein by the Petitioners on 2nd October 2008. The Objectors are not listed therein as the beneficiaries of the estate of the deceased, despite their relationship with the deceased and Petitioner. Likewise, the Petition does not have the consent of the Objectors.

I however find that that the Objectors did not provide any evidence of their allegations of the wastage of the deceased's estate by the Petitioner or of the properties said to have been left out of the distribution. In addition, the sale agreement entered into by the Petitioner and Objectors with Henry Muli Kisenga with respect to land parcel Machakos/Konza North Block 1/1125 that they rely on as proof of liabilities of the estate is dated 9th June 1994. The deceased died on 6th June 1980 and the grant herein was issued to the Petitioner on 8th December 2008 and confirmed on 3rd May 2010. The said sale is thus illegal, null and void, as it purported to dispose of the Deceased land parcel Machakos/Konza North Block 1/1125 when the sellers did not have confirmed grant contrary to section 55 and 82 of the Law of Succession Act.

Lastly, given that the deceased died in June 1980, it is my view that revocation of grant is not the appropriate remedy in the circumstances, as the administration of the deceased's estate needs to proceed to a close in the interests of justice and of the beneficiaries.

The concerns raised by the Objectors as regards their interest and claims in the deceased's estate can in my view be adequately addressed in confirmation proceedings by way of an affidavit of protest, as provided for by Rule 40 (6) and (7) of the Probate and Administration Rules, which provides as follows in this respect:

“(6) Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.

(7) The registrar shall without delay forward to the applicant a copy of each protest filed in the cause under subrule (5) or (6).

(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.”

This Court will therefore only revoke the confirmation of the grant, so as to give the Objectors the opportunity to canvass and prove their claims and interest over the deceased's estate. The Objector's summons for revocation of grant dated 26th June 2016 are accordingly allowed only to the extent of the following orders:

1. The Certificate of confirmation of the grant issued to John Musyoka Musembi on 3rd May 2010 with respect to the estate of Nason Musembi Musomba (Deceased) be and is hereby revoked.
2. The Petitioner herein shall file and serve the Objectors with a fresh Summons for Confirmation of Grant within 30 days of the date of this Ruling.
3. The Objectors shall file and serve their Affidavits of Protest, if need be, to the said Summons for Confirmation of Grant within 30 days of service of the said Summons, failing which the Summons for Confirmation of Grant shall proceed to hearing.

4. The *status quo* that shall obtain as regards the properties and assets belonging to the estate of Nason Musembi Musomba (Deceased) pending the confirmation of 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.

5. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 7th day of March 2017.

P. NYAMWEYA

JUDGE