



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

SUCCESSION CAUSE NO. 290 OF 2015

IN THE MATTER OF THE ESTATE OF MUTHUI NGONYO (DECEASED)

PATRICK MUTINDA NZOKA.....APPLICANT

VERSUS

ROBERT MUTHUI.....RESPONDENT

RULING

1. The Applicant herein filed an application dated **24th September, 2013** seeking various orders. Following earlier directions given prayers 1, 2, 3 and 4 of the application were disposed off leaving the substantive prayer where he seeks revocation and/or annulment of a grant of Letters of Administration Intestate made to the Respondent/Petitioner on the **22nd February, 2011** and confirmed on the **14th November, 2012**.
2. The application is premised on grounds that: The grant was obtained fraudulently by the making of a false statement and concealment from Court of something material to the case; It was obtained by means of untrue allegation of fact notwithstanding that the allegation was made in ignorance or inadvertently and the Applicant bought land **Parcel No. Matinyani/Kauma/608** from the Deceased during his lifetime, occupied and took vacant possession of the same and ought to be distributed to him.
3. The Applicant swore an affidavit where he deponed that the Estate of the Deceased comprised of two (2) parcels of land namely, **Matinyani /Kauma/606** and **Matinyani/Kauma/608** respectively. In or about **1978** during the lifetime of the Deceased he purchased land **Parcel No. Matinyani/Kauma/608** measuring **1.2 Ha** (subject land) from the Deceased at an agreed purchase price of **Kshs. 31,000/=** which he paid in full and took occupation and possession upon which he resides to date a fact known to family members. This parcel of land was distributed to the Respondent upon confirmation of the grant.
4. In or about **2012**, the Respondent who is also known as **Robert Muithi Muthui** demanded for vacant possession of the land which the Applicant purchased from the Respondent's father and even cited him to take out Letters of Administration Intestate in respect of the Estate of the Deceased. The Citation – **Kitui Succession Cause No. 233 of 2012** came up for hearing where it was disclosed that a Succession Cause had already been filed; it was fraudulent on the part of the Respondent to distribute the subject land.
5. In response the Respondent filed an affidavit in opposition of the application where he deponed that the grant was made in full disclosure of all material facts. The Applicant was neither a blood relative nor a dependant of the Deceased therefore he was not entitled to a grant in his favour. That is the Applicant has a claim against the Estate of the Deceased he should institute a Civil Suit to establish a claim instead of seeking to revoke or annul the grant. The Applicant is a trespasser on a portion of the Estate of the

Deceased and is circumventing the law by presenting the application to buy time to continue his unlawful act. Facts deponed in the supporting affidavit do not give entitlement to the Applicant to refuse to yield to vacant possession of the part of the Estate that he unlawfully occupies.

6. The application was canvassed by way of written submissions that I have considered.

7. The law in respect of revocation and/or annulment of grant is provided in **Section 76** of the **Law of Succession Act** that states thus:

“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 order or allow; 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.”

8. It is argued by the Applicant that he was a creditor to the Estate of the Deceased. He adduced in evidence a sale agreement he entered into with the Deceased when he purchased the subject land. He stated that he took occupation and possession of the land immediately. The Respondent referred to him as a trespasser. This is an insinuation that the Applicant unlawfully intruded the Deceased's land and remained in occupation from **1978 to 4th June, 2001** when the Deceased passed on without being sued. He lived on the parcel of land for **23 years** without being interrupted. It is not in dispute that the land in issue is agricultural land. It is also not in dispute that no consent was obtained from the Land Control Board but the Deceased allowed the Applicant to live on the land and he continued to be in occupation for more than **twelve (12) years**. His possession became adverse by operation of the law. **(See Situma vs. Cherongo (2000) eKLR)**.

9. At the outset the person who petitioned for Letters of Administration was the mother of the Respondent, **Kiseki Muthui**. In the affidavit in support of the Petition for Letters of Administration paragraph 4 the Deceased was survived by eight (8) people, a wife and seven children. His assets were indicated as:

1. Matinyani/Kauma/606.

2. Matinyani/Kauma/608.

10. On the **24th January, 2011**, the Respondent filed a defective application seeking an order granting

him leave to revoke and annul the grant of Letters of Administration issued on the **4th February, 2008** and the same to be rectified to include his name as the Applicant. Secondly he sought an order confirming the grant of Letters of Administration to be issued to **Robert Muthui**.

11. He went before the Court alone on **22nd February, 2011** despite the fact that there were other beneficiaries to the Estate who should have been heard. His application was granted as prayed. Subsequently the grant was confirmed with the whole Estate of the Deceased being distributed to the Respondent. None of the beneficiaries signed consents as to the adopted mode of distribution of the Estate. Looking at the coram of the day when the order was made, only the Petitioner was indicated as having been present. He notified the Court that they had agreed on the mode of distribution which was confirmed by the Court. It would have been prudent for the trial Court to interrogate the beneficiaries if indeed they had agreed and whether they understood the consequences of such an order.

12. That notwithstanding the Respondent, his mother and the beneficiaries in the matter were aware the Applicant was in possession/occupation of part of the Estate since **1978**. This fact was not brought to the attention of the Court; it was concealed. Soon after the Respondent was substituted as the Administrator of the Estate and the grant confirmed he demanded vacant possession of the portion that was occupied by the Applicant. His action clearly showed that his actions were deliberate which goes to prove that he acted fraudulently when he concealed material facts from the Court.

13. Having considered what transpired in this case, I make orders as follows:

- (i) Following concealment of material facts from Court I do revoke the grant.
- (ii) The survivors of the Estate of the Deceased shall apply for a fresh grant.
- (iii) The file shall be returned to the Lower Court for that purpose.
- (iv) Costs of this application shall be borne by the Respondent.

14. It is so ordered.

Dated, Signed and Delivered at Kitui this 13th day of July, 2017.

L. N. MUTENDE

JUDGE