



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 558 OF 2009
IN THE MATTER OF THE ESTATE OF MUSYOKI MWINI(DECEASED)
PIUS MBENGEI MUSYOKI.....PETITIONER/RESPONDENT
VERSUS
WAMBUA MUSYOKI.....OBJECTOR/APPLICANT
RULING

The Summons

The Petitioner herein petitioned for, and was issued with a grant of letters of Administration Intestate by this Court on 23rd September 2009 with respect to the estate of Musyoki Mwini (hereinafter referred to as “the deceased”), who died on 24th June 1991. The said grant was subsequently confirmed and a certificate of confirmation of grant issued to the Petitioner on 21st October 2010. The Objector then moved this Court through an application by way summons dated 24th May 2011 for revocation of the said grant and certificate of confirmation of grant.

The grounds for the application are that the grant was obtained fraudulently by the making of a false statement that the Objector had consented to the grant being made to the Petitioner, and to land title Mbooni/Kalawani /827 being registered in the name of the Petitioner to hold in trust. Further, that the grant was made by concealment from the Court of the material facts that land titles number Mbooni/Kalawani /851 and Mbooni/Kalawani /829 are also registered in the name of the deceased, but were left out in the petition and certificate of confirmation of grant. He attached a certificate of official search for land parcel Mbooni/Kalawani /851, which showed that the deceased was the registered proprietor. Lastly, that the Petitioner failed to disclose that it is only the Objector who has a right to inherit land title Mbooni/Kalawani /827, as the other beneficiaries had got their share of the estate in other lands.

These grounds were reiterated by the Objector in the affidavit and further affidavit he swore in support of the summons on 24th May 2011 and 29th May 2015 respectively, wherein he stated that the deceased was his father, and that the Petitioner is his step-brother. Further that prior to his death, the deceased had given his step-brothers including the Petitioner their share of the family land, leaving the Objector as the sole beneficiary of land title Mbooni/Kalawani /827 which is being used by the Objector’s son. He gave the particulars of the family land given to his step-brothers as follows:

- (i) Pius Mbengei Musyoki - Mbooni/Kalawani /1003
- (ii) Richard Mutinda Musyoki - Mbooni/Kalawani /1000

- (iii) Philip Muthama Musyoki - Mbooni/Kalawani /1001
- (iv) Isaac Mwongela Musyoki - Mbooni/Kalawani /1002
- (v) Peter Mwekethi Musyoki - Mbooni/Kalawani/1004

The Objector averred that the Petitioner and his step-brothers do not live in land title Mbooni/Kalawani /827 and do not use it in any way, and that the registration of the said land has not been changed, but that the Petitioner has been calling family meetings with a view to sub-dividing the said land. He also contended that the Petitioner and his step-brothers had illegally sold Plot No. 4 at Kalawani market which belonged to the deceased and did not give him a share of the sale price, and that the Petitioner had sold parcels number 846, 2246, 2247, 2265 and 2266 in Mbanya Adjudication section belonging to the estate of the deceased to third parties without letters of administration. The Objector attached a letter from the District Land Adjudication and Settlement Officer of Makueni Adjudication Area showing the owners of the said plots.

The Response

The Petitioner's response to the application is found in a replying affidavit and two further affidavits he swore on 16th July 2012, 18th May 2015 and 15th June 2015 respectively. According to the Petitioner, the Objector refused to consent to the Petition for grant of letters of administration and to the land parcel Mbooni/Kalawani /827 being registered in his name in trust, despite the Objector being included in the list of beneficiaries.

The Petitioner admitted that before their late father died, he gave each of his sons parcels of land as stated by the Objector, save that the land parcel given to the Petitioner was Mbooni/Kalawani /1005 and not Mbooni/Kalawani /1003. Further, that the deceased also gave the Objector a parcel of land being Mbooni/Kalawani /829 and not Mbooni/Kalawani /827, and they attached a certificate of official search showing the registration of Mbooni/Kalawani /829 in the Objector's name as owner. The Petitioner averred that land parcel Mbooni/Kalawani /827 was not given to anyone by the deceased, and is family land which ought to be sub-divided equally to each beneficiary.

It was further contended by the Petitioner that Plot No. 4 at Kalawani market was not sold by him or his brothers, but was sold by the deceased before his demise to cater for his medical bills. As regards land parcel Mbooni/Kalawani /851, the Petitioner stated that the said land was given to all the beneficiaries except the Objector, who had already been given a plot from Mbooni/Kalawani /827 which he sold to one Mutua Ivongo, and he annexed a copy of the said sale agreement and translation thereof. He further stated that he was not aware that he ought to have included land parcel Mbooni/Kalawani /851 as an asset of the deceased, and prayed that the confirmed grant be amended to include the said parcel of land to be shared equally among the beneficiaries except the Objector.

Lastly, on the land parcels at Mbanya, the Petitioner stated that the said land parcel which was unsurveyed at the time it was given to him and the Objector by the deceased, and that he sold plots from his portion of land to one James Nyamai Katunga and Richard Muthoka Mutiku Katolo.

The Arguments

The Objector's application was canvassed by way of *viva voce* evidence and written submissions. The Objector gave evidence and called four additional witnesses, while the Petitioner also testified and called three witnesses in support of his case. The Objector's learned counsel, B.M Mung'ata & Company Advocates, filed written submissions dated 1st March 2016, while F Katunga & Company Advocates, the learned counsel for the Petitioner, filed submissions dated 24th March 2016.

The evidence brought by the Objector who was PW1 was that the deceased had before his death distributed his land between his two wives Nthemba and Mwikali. Further, that Themba had five sons, while he was the only son and child of Mwikali, and it was on this basis that he was given the parcel of

land known as Mbooni/Kalawani /827. The Objector claimed that he had lived on the said parcel of land for 50 years, and that even though he moved to Yatta , his son occupies the said parcel of land. He relied on his affidavits in support of the averment that there were parcels of land not included in the list of assets of the deceased. Lastly, he testified in cross-examination that he declined to sign some documents because the land had not been distributed, and that the Petitioner did not tell him that he was petitioning for the grant.

Peter Kavila Mule, Kimeu Mbithi and Daniel Muli Kinyanzwe who were PW2, PW3 and PW5 respectively and cousins of the Objector, testified that the land parcel Mbooni/Kalawani /827 belongs to the Objector because it was given to the Objector and his son resided thereon. They however on cross-examination stated that they were not present when the said land was given to the Objector by the deceased.

Isaac Kitaka Kaleli (PW4) testified that he was the deceased's cousin, and was present when the deceased divided his land among his wives which was when the Objector's mother was given land parcel Mbooni/Kalawani /827. He testified that he was not present when the land was later subdivided among the deceased children. He claimed that the Objector was not given any other portion of land, and ought to be given Mbooni/Kalawani /827 which he has been in occupation of.

The Objector's learned counsel reiterated the facts of the application and evidence given by the parties in his submissions, and urged that the Petitioner made a false statement that the Objector consented to the making of and confirmation of the grant of letters of administration. Further, that the Petitioner failed to inform the court that Mbooni/Kalawani /827 belonged to the Objector, and did not disclose that Mbooni/Kalawani /851 belonged to the deceased and should also be shared out to the Objector as well and thereby intended to disinherit the Objector.

The Petitioner on his part testified as DW1 and confirmed that the Objector is his stepbrother. He however stated that land parcel Mbooni/Kalawani /827 belonged to the deceased irrespective of whether the Objector's son was staying thereon, and should be distributed among all beneficiaries. He testified that he forgot to include Mbooni/Kalawani /851 in the petition for grant and stated that the same should be distributed among the sons of the 1st wife of the deceased, since the Objector had been given his portion of Mbooni/Kalawani /827 which he sold. Further, that the Objector had also been given Mbooni/Kalawani /829 which he sold.

DW2 was Philip Muthama Musyoki, the Petitioner's brother who reiterated that Mbooni/Kalawani /827 and Mbooni/Kalawani /851 belonged to the deceased, and should be distributed as stated by the Petitioner since the Objector had been given his portion of Mbooni/Kalawani /851 when the deceased was alive. Philip Kisuku Mulei (DW3) testified that he is a son in law of the deceased and brother in law to the Petitioner. He testified that he was given a court letter which he took to the Chief of Kagonde to give the Objector, and that the chief called him and told him that the Objector had collected the letter.

DW3 further testified that the deceased had called him in 1976 and told him that he would give his sons land and remain with two parcels of land namely Mbooni/Kalawani /827 and 851. Further, that the deceased again called him before he died and told him that he would sell a portion of Mbooni/Kalawani /827 to give the Objector money to buy land in Yatta, and remove him from Mbooni/Kalawani /851. Joshus Muthini Kitheu (DW4), a cousin of the Petitioner and Objector also testified that land parcels number Mbooni/Kalawani /827 and 851 belonged to the deceased, and should be distributed equally among his beneficiaries.

The Petitioner's learned counsel also reiterated the arguments and evidence given by the Petitioner, and submitted that if the deceased had given the Objector land parcel Mbooni/Kalawani /827 then the same could have been transferred into the Objector's name just like was done in the case of land parcel Mbooni/Kalawani /829. He prayed that the confirmed grant be amended to include land parcel Mbooni/Kalawani /851 to be shared by all beneficiaries except the Objector.

The Determination

I have read and carefully considered the pleadings, evidence and submissions made by the parties. The issues to be decided are firstly, whether the Petitioner's confirmed grant of letters of administration should be revoked; and if not, secondly, what assets are to be included in the deceased's estate and lastly, how the deceased's estate should be distributed.

This court has jurisdiction to revoke or annul the grant as is clearly set out in section 76 of the Law of Succession Act (Chapter 160 of the Laws of Kenya) 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.”

In the present application the Objector seeks to revoke the said confirmed grant issued to the Petitioner on three grounds; being that he did not consent to the Petition for the said grant, that there are properties that are not included in the list of the deceased assets, and that the property sought to be distributed namely Mbooni/Kalawani /827 is not available for distribution having been given to him by the deceased.

I have perused the Petition for Letters of Administration Intestate, the affidavit in support of the said Petition, and consent to the making of the grant to a person of equal or lesser priority filed herein by the Petitioner on 13th July 2009. The Objector is listed therein as one of the beneficiaries of the estate of the deceased but did not sign the consent. Likewise, the summons for confirmation of grant also includes the name of the Objector as one of the beneficiaries but he did not sign the consent to confirmation. DW3 in this regard testified that he was given court papers to take to the Objector about the succession proceedings, and that he was informed by the Chief of Kangonde that the Objector received the said papers. The Objector in his testimony also confirmed being given Court papers and stated that he did not sign the same as he thought they were about distribution.

The Objector cannot therefore claim to have been ignorant about the succession proceedings nor can it be found that there was material non-disclosure or a false statement in this regard by the. Having opted not to sign the Petition, the Objector ought to have followed the correct procedure with regards to objecting to the making of the grant as provided in section 68 of the Law of Succession Act and Rule 17 of the

Probate and Administration Rules, or an affidavit of protest to the confirmation of grant as provided for in Rule 40(6) of the Probate and Administration Rules.

As regards the assets of the deceased estate, the first argument raised by the Objector was the non-inclusion of Mbooni/Kalawani /851 in the list of assets, which fact has been admitted by the Petitioner, who seeks to have the same included in the list of assets and distributed by this Court. The Objector in this regard attached a certificate of official search marked as annexure “WMMI” to his further affidavit sworn on 29th May 2015, showing that the deceased was registered proprietor of land parcel Mbooni/Kalawani /851 on 4th April 1990.

The Objector also admitted in his testimony upon cross examination that plot 4 at Kalawani market was indeed sold by the deceased before his death to raise money for his treatment. Lastly, the Objector did not bring any evidence to demonstrate that the other missing assets he alleged to belong to the deceased, namely parcels number 846, 2246, 2247, 2265 and 2266 in Mbanya Adjudication section, where owned by the deceased at the time of his death and available for distribution.

It is my view that the appropriate remedy with regard to the non-inclusion of Mbooni/Kalawani /851 is not revocation of the grant to the Petitioner, but a revocation of the confirmation of the said grant, and redistribution of the all of the deceased’s confirmed assets.

The outstanding question remaining to be addressed as regards the assets of the deceased is whether land parcel Mbooni/Kalawani /827 belongs to the Objector and is thus unavailable for distribution. The Objector claims he was given the said parcel of land by the deceased. None of the witnesses he called to testify in this regard stated that they were present when the deceased gave the said parcel to the Objector. They claimed that it belonged to the Objector by virtue of the same having been given to the Objector’s mother, and the Objector’s son having been in possession of the same since the deceased’s lifetime. The Petitioner contests this position and insisted that the said parcel is the deceased’s property, and that the property given to the Objector was land parcel Mbooni/Kalawani /829.

The evidence of ownership with regards to land parcel Mbooni/Kalawani /827 that was attached to the Petitioner’s petition for letters of administration is a certificate of official search which showed that the deceased was registered as proprietor of the land on 4th April 1990.

The Objector in addition does not contest the Petitioner’s averments that he was given land parcel Mbooni/Kalawani /829 by the deceased. The Petitioner attached a certificate of official search marked as annexure “PMMI” to his further affidavit sworn on 18th May 2015 showing that on the same date when the deceased was registered proprietor of land parcel Mbooni/Kalawani /827 on 4th April 1990, the Objector was also registered as proprietor of Mbooni/Kalawani /829. It is therefore not comprehensible and unlikely that the deceased could have given the Objector Mbooni/Kalawani /827 and not had the said land registered in the Objectors name, and instead registered it in his own name.

In addition there was no evidence brought of the deceased giving the said land to the Objector and the date this was done, particularly given that the land was registered in the deceased name on 4th June 2010 one year before the deceased’s death on 24th June 1991. The evidence on record therefore shows that land parcel Mbooni/Kalawani /827 belonged to the deceased and is available for distribution.

The two confirmed assets of the deceased are therefore land parcels Mbooni/Kalawani /827 and Mbooni/Kalawani /851.

On the last issue as regards the distribution of these assets, the Petitioner argues that the Objector ought not to share in the distribution of land parcel Mbooni/Kalawani /851. since he was given a portion of Mbooni/Kalawani /827 which was sold to enable him buy land in Yatta. The Petitioner attached a sale agreement marked as annexure “PMM” to his further affidavit sworn on 15th June 2015 as evidence of this assertion.

I have perused the said sale agreement and note that firstly, it does not refer to land parcel Mbooni/Kalawani /827 but is with respect to “a plot at Kalawa Market size 44ft x 100ft”. Secondly the said agreement is dated 14th December 1992, more than one year after the deceased’s death. Lastly, the agreement is between Wambua Musyoki Mwini (the Objector) and one Mutua Ivingo. It cannot therefore be evidence of the deceased giving the Objector a portion of Mbooni/Kalawani /827, as the deceased was not a party to the agreement and was dead by that date.

It is my opinion therefore that the principle that shall guide the distribution of the two parcels of land is the one set out in section 38 of the Law of Succession Act which provides as follows:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

Likewise section 40 of the Law of Succession Act provides that :

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

I note in this regard that the beneficiaries listed in the petition for letters administration, and in the affidavit by the Petitioner in support of the summons for confirmation dated 12th March 2010 conform with those listed in the letter dated 7th July 2009 from A.M Maweu, the chief of Kalawani Location, that was filed in Court together with the Petition on 13th July 2009. This list of beneficiaries included the Objector and is not contested, and is the list of beneficiaries that shall be adopted by the Court.

I accordingly order as follows pursuant to sections 47 and 71 of the Law of Succession Act:

1. The Certificate of Confirmation of a grant issued to Pius Mbengei Musyoki on 21st October 2010 with respect to the estate of Musyoki Mwini (Deceased) be and is hereby revoked.

2. The grant of letters of administration intestate issued to Pius Mbengei Musyoki on 23rd September 2009 with respect to the estate of Musyoki Mwini (Deceased) be and is hereby confirmed on the following terms as regards the distribution of the said deceased’s estate:

a. Land Parcel Mbooni/Kalawani /827 to be shared equally among the following heirs/beneficiaries of the said deceased:

(i) Pius Mbengei Musyoki

(ii) Wambua Musyoki

(iii) Christina Mueni Mwongela

(iv) Richard Mutinda Musyoki

(v) Philip Muthama Musyoki

(vi) Joyce Ndungwa Peter

(vii) Agnes Mutile

(viii) Rebecca Musyoki

b. Land Parcel Mbooni/Kalawani /851 to be shared equally among the following heirs/beneficiaries of the said deceased:

(i) Pius Mbengei Musyoki

(ii) Wambua Musyoki

(iii) Christina Mueni Mwongela

(iv) Richard Mutinda Musyoki

(v) Philip Muthama Musyoki

(vi) Joyce Ndungwa Peter

(vii) Agnes Mutile

(viii) Rebecca Musyoki

3. There shall be no order as to costs as this dispute concerns family members.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 11th day of July 2016.

P. NYAMWEYA

JUDGE