



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 729 OF 2010

**IN THE MATTER OF THE ESTATE OF SIMION KIMEU MWALYO alias SIMON KIMEU
MWALYO (DECEASED)**

SAMMY MASAKU KILONZO.....OBJECTOR/APPLICANT

VERSUS

PETER NGUMBI MWALYO..... PETITIONER/RESPONDENT

JACKSON KYALO KIMEU..... PETITIONER/RESPONDENT

RULING

The Petitioners are the sons of the deceased Simion Kimeu Mwalyo alias Simon Kimeu Mwalyo (hereinafter referred to as “the Deceased”), who died on 20th July 2007. The Petitioners petitioned for, and were issued with a grant of letters of Administration Intestate by this Court on 27th July 2011 with respect to the estate of the Deceased.

The Objector is the grandson of one Mwata Mwinza Nthenge who the Objector claims bought land parcel No. Kalama/Nziuni/118 from one Mwalyo Kamoni and one Mulinge Mutua Muthuku. The said Mwalyo Kamoni is alleged to be the Petitioner’s grandfather, and that an ownership dispute as regards the said parcel of land between the Objector and the deceased who was registered as proprietor of the said land, resulted in a suit being filed in Court in Machakos High Court HCCC No. 18 of 2005.

The Objector has filed an application by way of Chamber summons dated 7th May 2015 seeking revocation of the grant of letters of administration intestate issued to the Petitioners with respect to the estate of the deceased, which summons is the subject of this ruling. The grounds for the application are that the Petitioners failed to disclose to the court a material fact, being the existence of the suit of Machakos High Court HCCC No. 18 of 2005.

The application is supported by an affidavit sworn on 7th May 2015 by the Objector, wherein he explained the afore-stated facts as regards the ownership dispute between him and the deceased over land parcel no Kalama/Nziuni/118, and stated that he has put up a home on the said parcel of land, and also registered a restriction against any dealings on the land.

The Objector’s learned counsel, J.N Kimeu & Company Advocates, filed submissions dated 21st March 2016 wherein they wholly relied on the contents of the Objector’s affidavit in support of the revocation sought, and in the alternative prayed that the issue of the distribution of the deceased’s estate be canvassed by way of *viva voce* evidence so that the interests of the respective parties be determined on merit.

The Response

The 1st Petitioner filed a replying affidavit sworn on 25th January 2016, while the 2nd Petitioner's response was in a replying affidavit he swore on 8th June 2015. Both Petitioners denied that land parcel Kalama/Nziuni/118 belongs to the Objector, and aver that it was registered in the name of the deceased and is available for distribution. A copy of a certificate of official search showing that the said parcel of land was so registered was attached. Further, that after the Objector filed the suit in Machakos High Court HCCC No. 18 of 2005 against the Deceased, he applied for an injunction which application was heard and determined in a ruling delivered on 21st September 2005, a copy of which ruling was attached by the 2nd Respondent, and that the Objector has not taken any steps since to have the suit heard. Further, that after the deceased died, the Objector took no steps to substitute the deceased with his legal representative in the said suit, which has thereby since abated.

The 1st Petitioner also gave an account of various suits filed by the Objector's grandfather against the deceased, and attached copies of the pleadings and rulings given in the various cases. These cases are Kilungu District Magistrate's Court Civil Case No. 36 of 1973, Kilungu District Magistrate's Court Civil Case No. 163 of 1972, Machakos Resident Magistrate's Civil Appeal No. L 13 of 1978 and a Land Adjudication Appeal in Minister's Appeal Case No 103 of 1987

It was also contended by the 2nd Petitioner that the Objector has no capacity to file this application as he is not a legal representative of Mwata Mwinza Nthenge who is deceased.

Nzei & Co Advocates, the learned counsel for the 1st Petitioner, filed submissions dated 8th July 2016, wherein it was urged that the Objector is not a relative or beneficiary of the deceased, and the suit he filed against the deceased abated on 20th July 2008 one year after the deceased's death and before the succession proceedings were commenced. Further, that he is neither a creditor, purchaser of, or legal representative of the persons he claims under, and has not exhibited any documents to demonstrate that his ancestors bought the land he claims.

The 2nd Petitioner's learned counsel, Mulwa and Mulwa Advocates, filed submissions dated 3rd March 2016, wherein he also urged that the Objector is a stranger to the estate of the deceased as he is neither a relative or beneficiary of the deceased, and has no claim against the estate of the deceased. Therefore, that there was no obligation to inform him or get his consent to the succession proceedings. Further, that there was no material non-disclosure or false allegations made by the Petitioners, as the documentation availed to the Court demonstrate that land parcel number Kalama/Nziuni/118 is registered in the name of the deceased.

The Issues and Determination

The Court directed that the said summons be heard by way of affidavit evidence and written submissions. I have read and carefully considered the pleadings and submissions made by the Objector and Petitioners. The issue to be determined is whether the Petitioner's grant of letters of administration should be revoked. Section 76 of the Law of Succession Act provides that any interested party can bring an application for revocation of grant. Section 76 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 grant issued to the Petitioners on the ground that the Petitioners did not disclose that there is a suit filed by the Objector with respect to land parcel Kalama/Nziuni/118 that is registered in the Deceased's name. I have perused the documents attached by the Petitioners in this regard, and I note that the said parcel was indeed registered in the Deceased's name on 22nd June 2007, and that the suits filed on the same by Mwata Mwinza Nthenge were resolved in favour of the Deceased.

The pending suit by the Objector is in his capacity as grandson of the original claimant, Mwata Mwinza Nthenge, who is since deceased. The Objector has not exhibited any grant of representation to show that he is the legal representative of the said Mwata Mwinza Nthenge or any evidence that the said Mwata Mwinza Nthenge purchased the said land as alleged. In the premises he has not exhibited evidence of any interest he has in the disputed land, and does not fall in the categories of persons who have an interest in an intestate deceased's estate as stated in section 66 of the Law of Succession Act, which provides as follows:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will. “

The Objector nevertheless still has an opportunity to file an affidavit of protest at the time of confirmation if he wants to prove his interest in the said parcel of land, and appropriate directions will be given at that stage. In addition, the Petitioners as legal representatives of the deceased will be able to represent the deceased in the suit in Machakos High Court HCCC No. 18 of 2005 in the event that it is still subsisting, since they are mandated to do under section 82 of the Law of Succession Act which gives powers to an

administrator as personal representative of the estate of a deceased to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate.

The prayers sought in the Objector's Chamber summons dated 7th May 2015 are accordingly denied, and the Objector shall meet the costs of the said Chamber Summons.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 18th day of July 2016.

P. NYAMWEYA

JUDGE