



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 844 OF 2010**

**IN THE MATTER OF THE ESTATE OF THE LATE WAENI MAINGI NTHENGE alias WAENI MAINGI (DECEASED)**

**MUINDE MATOLO.....APPLICANT**

**VERSUS**

**JONAH KALOKI MAINGI**

**TITUS MUTISYA WAMBUA**

**KIILU MAINGI.....RESPONDENTS**

**RULING**

**The Application**

The Applicant herein is grandson of the deceased Waeni Maingi Nthenge hereinafter referred to as “the deceased”), and has filed an application by way of a Notice of Motion dated 8th July 2016 seeking orders that the letters of administration issued by this court on the 30th March 2011, and the certificate of confirmation of the grant issued on 9th December 2011 and any subsequent orders be annulled and/or revoked. Further, that the resultant registration of land parcel No.MASII/VYULYA /1860 be deemed invalid and be reverted to its original position on MASII/VYULYA/1206.

The Applicant alleges that the grant and the certificate of confirmation of grant was obtained fraudulently and on concealments of material facts, and that the petitioner, who is the 3rd Respondent herein, obtained the grant secretly to disinherit the other beneficiaries. The Applicant further avers that the petitioner has transferred the property of the estate to one Jonah Kaloki Maingi, the 1st Respondent herein ,who is a stranger and not a beneficiary of the estate, and who has filed a Civil Case Number 71 of 2015 in Machakos against the applicant and other beneficiaries to evict them from the property of the estate. According to the Applicant, the application for grant and the certificate of confirmation of grant was made by the least suited person without necessary consent and/or authority to persons with equal or prior rights.

The Applicant in his supporting affidavit sworn on 8th July 2016 and a supplementary affidavit he swore on 2nd June 2016 states that the deceased was survived by Matolo Maingi who is also deceased; Kiilu Maingi, the Petitioner herein; and Dominic Muthuu Maingi who is also deceased. Further, that at the time the Petitioner was applying for the grant and certificate of confirmation of grant, the Applicant’s father, namely Matolo Maingi was deceased, and his family was never involved in the process of obtaining the grant and certificate of confirmation of grant.

According to the Applicant, the sale agreement annexed in the joint affidavit of the 1st and 2nd Respondent shows that Titus Mutisya Wambua (the 2nd Respondent) bought the land from Kiilu Maingi (the Petitioner and 3rd Respondent) and not the deceased in the year 2006, which is 28 years since the demise of Waeni Maingi Nthenge, and that at this time the said Kiilu Maingi had not obtained a lawful confirmed grant or at all, and therefore the purported sale is null and void for all purposes.

Further, that though the name of the Applicant's mother Ndete Matolo Maingi is mentioned in the proceedings sought to be revoked, and though her thumb print is affixed on the consent form, the same are a forgery since his mother who died in 2012 confirmed to him that she knew nothing of the succession case.

The Applicant contended that it is not justified for the Petitioner to be the only Administrator in an estate where the deceased left 3 children with several other beneficiaries. It was averred that the Petitioner has transferred the parcel of land MASII/VYULYA/1862 to his name, MASII/VYULYA /1861 to the name of the 2nd Respondent, and MASII/VYULYA/1860 to the 1st Respondent, leaving out the rightful beneficiaries. The Applicant annexed copies of certificates of search for the said parcels of land.

Mutinda Kimeu & Company Advocates, the learned counsel for the Applicant filed written submissions dated 23rd May 2016, wherein it was urged that the Applicant has demonstrated that he is a beneficiary to the estate by virtue of him being a grandson to the deceased, and his father and mother having also died. The Applicant has also stated that his family members (house of Matolo Maingi) and the house of Muthuu Maingi were not involved in the succession proceedings. Therefore, that he has locus to bring this application, and court was invited to exercise its inherent powers for the end of justice and to prevent abuse of the process of the court, as the Respondent wants to evict the Applicant from their ancestral land/home.

Reliance was in this regard placed on Rule 26 (1) and (2) of the Probate and Administration Rules, which require an applicant seeking to obtain letters of administration to seek consent from every other person entitled in the same degree as or in priority to the applicant, and the decision in **Rusa Rufas wiga v Jane Gachunku [2014] eKLR** that Rule 26 is couched in mandatory terms. As regards the sale of the deceased's land to the 1st and 2nd Respondents, reliance was also placed on sections 45, 55 and 82 of the law of Succession Act that prohibit selling deceased's property before a grant is confirmed, and the case of **Nancy Njoki Ngugi & Another vs George Mangai Thiga & 3 Others [2015]eKLR** where the Court went revoked the grant and ordered the titles fraudulently transferred to revert to the estate using these provisions

### **The Response**

The application is opposed. The 1st and 2nd Respondents filed a joint affidavit sworn on 26th September 2015 and stated that they purchased portions of Masii/Vyulya/1206 from the deceased, and claimed to have acquired the portions legally. The 3rd Respondent also opposed the application in a replying affidavit sworn on 26th September 2015, wherein he stated that the estate was not transferred to strangers but rather it was assigned to lawful beneficiaries including debtors of the estate.

Further, that Ndete Matolo Maingi who was the Applicant's mother participated in the succession proceedings as she was a beneficiary and got a share. In addition, that Jonah Kaloki Maingi bought portion of Masii/vyulya/1206 from deceased in 1978 and that the issue was deliberated by Atangwa clan and the said portion was found to be his. He annexed copies of the clan minutes and verdict, as well as the sale agreement.

Kamolo & Company Advocates, the learned counsel for the Respondents, filed written submissions dated 3<sup>rd</sup> February 2016, wherein the above facts were reiterated, and it was submitted that Ndete Matolo Maingi to whom the share of the Applicant's father was given, participated fully in the succession proceedings and had priority over the Applicant.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made by the Objectors and Petitioner. The issue to be decided is firstly, whether the Applicant has priority to administer the deceased's estate, and if so, whether the orders he seek of revocation of grant and reversion of titles can be granted.

Section 66 of the Law of Succession Act which provides a general guide as to those who will be preferred to administer the estate of a deceased 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 ranking of beneficiaries of an intestate is provided under Part V of the Act, and section 36 of this part specifically provides that where an intestate has left a surviving child or children but no spouse as in this application, the net intestate estate shall be equally divided among the surviving children. It is only where an intestate has left no surviving spouse or children, that the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority under section 39 of the Act-

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

The 3<sup>RD</sup> Respondent herein who was the Petitioner in this succession cause was a surviving child of the deceased, while the Applicant is a grandson of the deceased. The Applicant did not therefore rank equally in the administration of the deceased's estate with the 3<sup>rd</sup> Respondent, and could not therefore be required to be given notice or to give consent to the succession proceedings. The requirements as to such notice and consent are in this regard provided in Rule 26 of the Probate and Administration Rules as follows:

**“(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.**

**(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.**

**(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.”**

In addition, a perusal of the petition and summons for confirmation of grant filed herein shows that the Applicant's mother Ndete Matolo was involved and gave her consent to the succession proceedings, and the Applicant did not provide any evidence to show that his mother's thumb print which signified her consent to the grant of letters of administration to the 3<sup>rd</sup> Respondent and the confirmation of the said grant was a forgery as claimed. The proper procedure is for Applicant and his family to take out a grant of representation of their father's and/or mother's estate to pursue their interest in the deceased's property. The sum total of the foregoing is that this Court finds that there was no fraudulent concealment of material facts on the part of the Petitioner herein who is the 3<sup>rd</sup> Respondent, to entitle the Applicant to the orders he seeks.

The prayers sought in the Applicant's Notice of Motion dated 8th July 2016 and are accordingly denied, and as this is a family dispute, each party shall meet their respective costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 10<sup>th</sup> day of October 2016.

**P. NYAMWEYA**

**JUDGE**