



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1568 OF 1994

IN THE MATTER OF THE ESTATE OF PAUL MWAURA THUO (DECEASED)

RULING

1. There are several applications pending disposal in this cause. It was ordered by consent on 27th January 2014 that all the pending applications be disposed of simultaneously. The pending applications are dated 30th July 2013, 5th August 2013, 23rd September 2013 and 5th December 2013.
2. The application dated 30th July 2013 is by way of Motion. It seeks in the main, the setting aside of the orders made on the application dated 6th June 2013 confirming the grant herein. The grounds upon which the said applications are premised are set out on the face of the application, as well as in the affidavit in support of the application, sworn on 30th July 2013 by counsel for the applicant Mr. Joseph Awino.
3. The applicant's case is that the application dated 6th June 2003 was brought *ex parte* and was in bad faith. It is alleged that the applicant's counsel was not invited to the event of the fixing a date for the hearing of the said application, that the date fixed was not convenient to him, that he was not served with hearing notice and that he was busy on the said date attending to another urgent matter elsewhere. It is stated that the grant was confirmed despite the fact that the applicant's had filed a protest affidavit to the proposed confirmation. It is further argued that the confirmation ignored the interests of other dependants of the deceased.
4. The applicants followed up the application dated 30th July 2013 with a Motion dated 5th August 2013. The application is supported by an affidavit sworn by the first applicant, who depones to be a sister of the deceased. She depones that the application dated 5th August 2013 be deemed as one and the same with that dated 30th July 2013. She prays for preservatory orders.
5. The respondents replied to the two applications through the second respondent who swore an affidavit on 23rd September 2013. Their case is that the applicants had been properly served with notice for the hearing of the application due on 30th July 2013 when the grant was confirmed. They state that the applicants have not presented sufficient reasons for the setting aside of the confirmation orders. They further state that the applicants are improperly benefitting from estate property and are illegally collecting rents from estate assets. The second respondent asserts that the court had previously confirmed her to be the sole *bona fide* legal administrator and beneficiary of the estate of the deceased.
6. The application dated 23rd September 2013 is at the instance of the respondents to the applications dated 30th July 2013 and 5th August 2013. The applicants named in the applications of 30th July 2013 and 5th August 2013 are named as the respondents. The application seeks that the respondents be ordered to render accounts in respect property that they are said to be illegally in possession of and to

be evicted or compelled from utilizing assets set out in the application.

7. The affidavit in support of the application dated 23rd September 2013 is sworn by the second applicant. She depones to be the sole administrator of the estate of her deceased father since 28th June 2011, and has been in a tussle with her aunt, the first respondent, over the estate of her father. She lists assets belonging to the deceased that the respondents are alleged to be illegally in possession of. It is alleged that the respondents have fraudulently transferred some of the assets to third parties, and further that they are illegally collecting rents from some of the assets that form part of the estate of the deceased. The respondents are also said to be illegally in occupation of houses belonging to the deceased. It is on this basis that accounts are sought and vacant possession prayed for.

8. There is nothing on record to show that the respondents filed a reply to the application of 23rd September 2013. It would appear, however, that the respondents reacted to the application of 23rd September 2013 by filing the application headed “Notice of Motion Application for Review” dated 5th December 2013. The application seeks two principal orders; being the review and setting aside of an unidentified orders made to the first respondent (Annabel Wambui Mwaura) and suspension of *“dealing with the application dated 23rd September 2013 pending hearing and disposal of the applicants Motion dated 5th December 2013.”*

9. The grounds upon which this application is premised are set out on the face of the application as well as in the affidavit in support sworn on even date by Monica Wanjiku Thuo, the first applicant. She states that the deceased’s will was improperly invalidated as the trial court misapplied the law. It is further alleged that the respondents failed to provide a DNA test to connect them to the deceased.

10. I do not have on record a reply to the said by the respondents.

11. The consent order of 27th January 2014 was to the effect that the said applications be disposed of by way of written submissions. Both sides have filed their respective submissions. The petitioners filed their submissions on 24th March 2013. These two sets of submissions filed for the objectors, both are dated 11th April 2014 and were lodged in court on 13th April 2014. They are filed by two different law firms. There is a reply to these submissions by the petitioners. The petitioners’ submissions are dated 24th June 2014.

12. The objector’s submissions filed by the firm of Messrs. Oluoch – Awino & Co. Advocates dwell on matters that were not deponed to in any of the affidavits on record. The submissions further dwell on Section 76(a), (b) and (c) of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. These provide for revocation of grants. I note that none of the applications before me are premised on Section 76 of the Law of Succession Act nor seek revocation of the grant on record.

13. The set of submissions filed the firm of Messrs. Gedion Odongo & Co. Advocates appear to be filed on behalf of parties who are not named as parties to any of the applications, and who claim to be nephew and grandchildren of the deceased, and who claim to have lived on the deceased’s land for over twenty (20) years. I note that these so-called objectors have not filed any affidavits, and the statements of fact stated in their submissions are not on oath.

14. The petitioners assert that application or confirmation was received by the advocates for the objectors under protest, and state that the said advocate lies when he swears an affidavit alleging that he had not been served. It is equally submitted that the affidavit of protest to the confirmation application was sworn by the advocate for the objectors rather than the objectors themselves. It is further stated that the issues raised in the application dated 30th July 2013 have been overtaken by events in view of the decision of Dulu J. of 16th December 2011, which decision has not been appealed against. It is submitted that the application dated 5th December 2013 is vague, and in any event it does satisfy the threshold for review of orders.

15. I have anxiously considered all the matters raised in applications that are meant to be the subject of this ruling. It appears to me that they all have been provoked by the decision of 30th July 2013. I believe that it would be in the interests of justice if the orders made on 30th July 2003 are set aside so that the same can be heard on its merits.

16. Consequently, I do hereby make the following orders:-

- (a) That the orders made on 30th July 2013 confirming the grant herein are hereby set aside;
- (b) That the application dated 6th June 2013 shall be heard afresh;
- (c) That the respondents and any other interested parties are hereby granted thirty (30) days to file and serve their affidavits of protest to the said application;
- (d) That the matter shall be mentioned on a date to be given at the registry on priority for directions on the disposal of the application dated 6th June 2013;
- (e) That the applications dated 5th August 2013, 23rd September 2013 and 5th December 2013 to be held in abeyance to await the outcome of the application dated 6th June 2013; and
- (f) That costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 2ND DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE