



REPUBLIC OF KENYA



In re Estate of Naumi Mulwa Nzeki (Deceased) (Succession Cause 219 of 2011) [2023] KEHC 2667 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 219 OF 2011
MW MUIGAI, J
MARCH 28, 2023**

BETWEEN

KISUSYA MULWA NZEKI APPLICANT

AND

JOHN MUTETI MULWA 1ST RESPONDENT

ESTHER NDUKU MULWA 2ND RESPONDENT

NTHIIKE MULWA ALIAS MUTHIKE MULWA NZEKI 3RD RESPONDENT

RULING

1. The deceased Naumi Mulwa Nzeki died on November 16, 2009 as per death certificate.
2. The Beneficiaries and administrators filed petition on 18/3 /2011 and the Chief's letter of 18/9/2010 outlining members of the family of the deceased.
3. The Kenya gazette of 9/9/2011 confirmed administrators of the deceased's estate and the grant of letters of administration was issued on 20/12/2011.
4. John Muteti Mulwa & Esther Nduku Mulwa were appointed administrators of the estate of Naumi Mulwa Nzeki.
5. Summons for revocation of grant were filed on 15/3/2012 by the applicant, Nthike Mulwa Co wife to the deceased Naumi Mulwa Nzeki.
6. By ruling delivered by hon LJ B Thurairaja of 5/2/2015, the applicant informed the court that LR 5XX & LR 5XX Ikoleni Adjudication Section were jointly owned by the deceased and herself as co wives to late Jonathan Muia Mumo. The Administrators were to file summons for confirmation of grant and serve the applicant so as to file a protest which would be disposed off first before confirmation of grant.



7. Summons for confirmation of grant was filed on 7/9/2011 by Nthike Mulwa after the Administrators failed to file the summons and a preliminary objection was raised on December 14, 2015. The court ruling of 27/4/2016 by hon Edward M Mureithi J, the Administrators were to file summons for confirmation.
8. Summons for confirmation of grant was filed on 23/5/2016 by the Administrators of deceased's Naomi Mulwa Nzeki's estate.
9. The protestor, Nthike Mulwa filed affidavit of protest on 12/7/2016 that the suit properties Iveti/Ikoloni/5XX (Iveti/Iveti/5XX) belongs to one Samuel Muthama Muinde and Iveti/Iveti/5XX she and the deceased are tenants in common. Although boundaries were in place the legal subdivision was/is yet to be done.
10. The Administrators filed response to protest and agreed to a surveyor to establish the acreage of the deceased's portion and that of the protestor before confirmation of grant.
11. By ruling delivered on 21/4/2020 by hon DK Kemei J, the grant of letters of administration intestate made to Administrators John Muteti & Esther Nduku Mulwa on December 20, 2011 was confirmed.
12. The mode of distribution was/is;

IVETI/IVETI/5XX

 - a) 1.88 Ha to be registered in the name of Muthike Mulwa Nzeki
 - b) 1.88 Ha to be registered in the names of John Muteti Mulwa & Esther Nduku Mulwa to hold in trust for themselves and children of the deceased Naomi Mulwa Nzeki.

Iveti/Iveti/5XX

 - a) 0.215 Ha to be registered in the name of Muthike Mulwa Nzeki
 - b) 1.88 Ha to be registered in the names of John Muteti Mulwa & Esther Nduku Mulwa to hold in trust for themselves and children of the deceased Naomi Mulwa Nzeki.
13. The parties filed 2 Applications thereafter, the protestor filed summons dated 3/7/2020 seeking subdivision of land as per the certificate of confirmation of grant of 5/5/2020 pursuant to the Trial Judge ruling of 21/4/2020.
14. On the other hand the 1st petitioner sought review of the court ruling of 21/4/2020 *vide* summons for review dated 6/2/2021.
15. This court's ruling of 12/5/2022, upheld the summons for subdivision and dismissed application for review. And also granted the Deputy Registrar leave to execute transfer documents if Administrators fail to comply.

Summons for Revocation or Annulment of Grant

15. The applicant brought the summons dated September 30, 2022 under section 47 and 76 of the [Law of Succession Act](#) and rules 44 and 73 of the [Probate and Administration Rules](#) seeking the following orders that;
 - a. Spent
 - b. Spent



- c. The grant of letters of administration issued to the 1st administrator/respondents and the certificate of confirmation of grant thereto be annulled and/or revoked
 - d. Any distribution, transfers and dispositions of any kind and/or by the administrators with respect to the estate of the deceased herein be declared unlawful, null and void and the registration of any 3rd parties by the Administrators be ordered to return the original title deed in his name at the Lands Registry, Machakos for cancellation
 - e. The costs of this Application be borne by the respondents
16. The summons are supported by the supporting affidavit sworn by Kisusya Mulwa Nzeki deposed on September 30, 2022 in which it was contended that Naumi Mulwa Nzeki (hereinafter referred to as the deceased) is the original owner of the estate properties being Iveti/Iveti/5XX and Iveti/IvetI/ 5XX and the 3rd respondent is not a beneficiary and ought not to get a share of the deceased's estate properties.
17. The certificate of title under the tenancy in common tenure was registered with secrecy and thus illegal and was meant to deprive the rightful beneficiaries of the estate and this information was not produced or adduced by the Administrators prior to confirmation of the grant. Thus, the proceedings were defective in substance and the grant was obtained fraudulently by the making of false statements and by the concealment from the court of things material to the case. It was contended that the grant has become useless to all the rightful beneficiaries of the estate of the deceased since the applicant has been disinherited.
18. The 1st and 2nd respondents did not respond to the summons for revocation despite the court orders of 3/10/2022 that the instant application be served to the respondents and they file responses within 14 days after service. On November 28, 2022 the court granted 1st & 2nd Respondents to file Written Submissions. On December 13, 2022, it was confirmed that 1st & 2nd respondents were served and they did not file pleadings or written submissions.

3rd Respondent's Replying Affidavit

19. It was deposed by Nthiike Mulwaalias Muthike Mulwaon October 14, 2022 that the deceased, Naumi Mulwa Nzeki was her co-wife and the said parcels were registered in both their names as tenants in common and after she litigated with the deceased in Iveti Land Adjudication Section Case No 49 and 50 of 1998, the title deeds were registered.
20. She contended that after the demise of Naumi Mulwa Nzeki, the 1st and 2nd Administrators petitioned for letters of administration and she filed a protest and a ruling was delivered in her favour on April 21, 2020 by Justice DK Kemei.
21. It was contended that the 1st and 2nd respondent failed to comply with the orders compelling her to file an application dated July 3, 2020 while the 1st and 2nd respondents filed an application dated February 6, 2021 which were both heard and in a ruling delivered on May 12, 2022 allowed her Application and dismissed the applicant's application. Subsequently the Deputy Registrar signed the order to give effect to the ruling.
21. It was opined that the applicant had not made out a case under section 76 of the *Law of Succession Act*, the applicant's allegations are meant to mislead the court and delay justice, at no time did she use deceit to have her name entered in the title deeds and that Summons herein are a sham, misadvised, ill-



conceived and made in an effort to frustrate the cause of justice. The court was urged to dismiss the summons with costs to her.

Applicant's Written Submissions Dated December 13, 2022

22. While relying on section 76 of the *Law of Succession Act* and the cases of *Re Estate of Prisca Ong'ayo Nande (deceased)* [2020] eKLR, *Matheka and Another vs Matheka* [2005] 2 KLR 455 and *Re Estate of Julius Ndubu Javan (deceased)* [2018] eKLR, It was submitted that the Administrators/ respondents contravened subsection (b) of section 76 *LSA*, by concealment of material facts that the 3rd respondent is not a beneficiary of the estate of the deceased.
23. It was submitted that the applicant had established that the 3rd respondent either by her own accord and /or colluding with the Administrators to have herself included as a tenant in common with the deceased.

3rd Respondent Submissions Dated November 22, 2022

24. It was submitted that the grounds set out by the applicant do not satisfy the requirements of section 76 of the *Law of Succession Act*. further that the grant herein was confirmed after a lengthy court battle between the Administrators and herself which included the court hearing witnesses. It was contended that the applicant is a brother of the 1st and 2nd Administrators and his share of the deceased estate is still intact. Reliance was placed on the *Estate of Prisca Ongayo Nande* [2020] eKLR
24. On costs, it was submitted that this was a family dispute and she deserved to be awarded for costs. The court was urged to dismiss the application.

Determination

25. The court has considered the summons, the affidavits on record and the submissions of parties and the issue for determination are;
 - f. Whether the grants should be revoked or annulled
 - g. Whether the original title deed in the name of the 3rd respondent should be returned to the Lands Registry Machakos for cancellation.
26. Section 76 of the *Law of Succession Act*, cap 160, Laws of Kenya provides as follows:
 - “76. Revocation or annulment of grant 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.”

27. Section 107 of the *Evidence Act* provides that ‘he who alleges must prove.’ The applicant has alleged that section 76 (b) *LSA* has been satisfied;

This court wishes to address the matter as follows;

- a) The petition for letters of administration intestate filed and the Chief of Iveti’s letter of 18/9/2010 listed the beneficiaries of the estate as;
 - i) Kisusya Mulwa- son
 - ii) Peter Mulwa- son
 - iii) Muteti Mulwa- son
 - iv) Mbaika Mulwa- daughter
 - v) Syonguvi Mulwa- daughter
 - vi) Rebecca Mulwa- daughter
 - vii) Esther Mulwa- daughter
- b) The applicant/protestor Nthike Mulwa came on board on 15/3/2012. The applicant categorically stated that she was/is co -wife of the deceased. Clearly, she was/is not a beneficiary of the deceased’s estate as she is not a surviving spouse(s), child/children sister to the deceased.
- c) In the application for summons for revocation of grant, the said 3rd respondent annexed to the supporting affidavit citation filed in Succession Cause 106/2010 to accept or refuse the citation.
- d) In the supplementary affidavit of same date, the 3rd respondent attached copies of proceedings of 13/9/89, at Machakos District Iveti Adjudication Section/Machakos District Land Board regarding ownership and adjudication of LR No 5XX & LR 5XX at Ikoleni adjudication section. It was confirmed that the 2 parcels belonged to Mulwa Nzeki who had 2 wives, the 3rd respondent being one of them. At the conclusion of the proceedings it was ordered the name of the 3rd respondent Muthike Wambua Nzeki to be added in Plot No 5XX & Plot 5XX. These proceedings were certified as true copies of the original on October 20, 2010 by Land Adjudication Officer Machakos.
- e) In the affidavit in response to protestor’s protest to confirmation of grant by 2nd Administrator, Esther Nduku Mulwa admitted that the property Iveti/Iveti/5XX was sub divided on the ground between protestor/3rd respondent and the deceased what remained was for surveyor to confirm acreage. So, although, strictly speaking the 3rd respondent is not a beneficiary of the deceased’s estate, the estate of the deceased available to her beneficiaries/family is ½ of the 2



properties; LR No 5XX & LR 5XX. The other 1/2 of the properties, belong to 3rd respondent as owner and not as beneficiary of deceased's estate.

- f) The applicant has raised the issue that the 3rd respondent is not a beneficiary of the estate herein. This issue was addressed by this court in its ruling dated April 21, 2020 where the court recognized this position and stated as follows;

“even though the protestor is not a family member of the deceased I find the circumstances herein rather unique. For instance the protestor and the deceased are co-wives of the late Mulwa Nzeki who was the owner of the parcels of Ian Iveti/ Iveti/ 5XX and 5XX . again the deceased and the protestor are jointly registered as proprietors in common. I find therefore that confirming the grant in terms proposed by the protestor is quite appropriate and will help dispose the matter.”

28. This ruling by hon DK Kemei J essentially settles the question of the position of the 3rd respondent in these proceedings. This information was not concealed but came out clearly during the hearing and determination of the matter.

29. In Mombasa Bricks & Tiles Ltd & 5 Others v Arvind Shah & 7 Others [2018] eKLR, the court observed doctrine of *functus officio* and *res judicata* and stated as follows:-

“I understand the doctrine, like its sister, the *res judicata* rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits. It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.”

30. The Supreme Court in Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the *functus Officio* Doctrine, with Special Reference to its application in Administrative Law” [2005] 122 SALJ 832 to the effect that:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

31. By the court's ruling delivered by this court on May 12, 2022, an application for review of the orders above was dismissed

Disposition

32. Consequently, the summons dated September 30, 2022 is dismissed as none of the grounds subscribed for revocation of grant under section 76 LSA are borne out by the evidence on record.



It is so ordered.

**DELIVERED SIGNED & DELIVERED IN OPEN COURT IN MACHAKOS ON 28TH MARCH
2023. (PHYSICAL/VIRTUAL CONFERENCE)**

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF

Mutune H/b Nzioka For The 3Rd Respondent

Mukula H/b D. Mutinda For The applicant

Gorffrey/patrick - Court Assistant(s)

