



REPUBLIC OF KENYA



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**In re Estate of Muindi Lei Mutwota (Deceased) (Succession Cause 206 & 960 of 2013
(Consolidated)) [2023] KEHC 3908 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3908 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 206 & 960 OF 2013 (CONSOLIDATED)**

MW MUIGAI, J

APRIL 28, 2023

IN THE MATTER OF THE ESTATE OF MUINDI LEI MUTWOTA (DECEASED)

BETWEEN

EVA NDUNGE MUIITHYA 1ST PETITIONER

BENSON NZIOKA WAMBUA 2ND PETITIONER

AND

PETER KIMONGO MUINDI OBJECTOR

AND

PAULINE NTHOKI THIRD PARTY

CECILIA KYALO THIRD PARTY

WANZA MUTUKU THIRD PARTY

CHRISTOPHER MBITHI THIRD PARTY

PETER MUEMA THIRD PARTY

JUDGMENT

Background

1. At the outset, the ruling of this court of 21st October 2021 refers. this court ordered;
 1. Succession Cause 960 of 2009 is consolidated to instant Court file and the lead file shall be Succession Cause 206 of 2013.
 2. The Court shall seek from parties how and when the pending applications should be disposed of



3. The Temporary injunction/interim orders issued are extended and shall remain in force pending hearing of the Applications and/or further orders of the Court.
 4. The Application by the Objector for burial shall be considered during hearing of pending application(s) but shall not be granted at this stage for reasons outlined above.
 5. Costs shall be in the Cause.
1. Vide a petition received on 10th April, 2013, in which the petitioners petitioned this Honorable Court for a grant of Letters of Administration intestate of the estate of Mundi Lei Mutwota who died domiciled in Kenya at Kathiani Sub-location on 16th October, 2007.
 2. A Assistant Chief's letter dated 5th February, 2013 confirmed that Muindi Lei Mutwota(deceased) was known to the said Assistant Chief and was survived by two sons; Jackson Muithya Muindi and Paul Wambua Muindi.
 3. Vide the Gazette notice dated 16th August, 2013, Jackson Muithya Mundi and Paul Wambua Muindi the deceased's sons were gazetted for a grant of Letters of Administration intestate to the estate of Muindi Lei Mutwota (deceased).
 4. Grant for Letters of Administration issued on 10th October, 2013 and dated 28th October,2013 were issued by this Honorable Court to Jackson Muithya Mundi and Paul Wambua Muindi as personal representatives of the deceased's estate.
 5. Vide application for Summons for Confirmation of Grant dated 11th December, 2013 the personal representatives sought orders for the grant of letters of administration made to Jackson Muithya Muindi and Paul Wambua Muindi be confirmed.
 6. Pursuant to the application for confirmation of Grant this Honorable Court on 7th May,2014 certified the grant of representation to the estate of the late Muindi Lei Mutwota issued to personal representatives and confirmed the said grant.
 7. On 29th August,2017, the petitioners/ respondents herein made an application for rectification of the grant of Letters of Administration and certificate of confirmation of grant issued by this Honorable on the 10th October,2013 and 7th May, 2014 on the grounds that Jackson Muithya And Paul Wambua Mundi who were the court appointed Administrators then and since deceased having died on 8th/10/2014 and 29th /1/2016 respectively.
 8. Petitioners /Respondents herein sought to replace the deceased Administrators as they were widow and son of the deceased administrators respectively. The said application for rectification was further supported by the affidavit of Eva Ndunge Muithya and Benson Nzioka Wambua (Respondents/ Petitioners). The said affidavit listed the properties that were registered in the deceased Administrators names and indicating that the application was made with the consent of other dependents.
 9. on 4th february,2019, Letters of Administration intestate of the estate of Muindi Lei Mutwota was granted to Eva Ndunge Muithya and Benson Nzioka Wambua and subsequently confirmed on 6th February, 2019 by this Honorable Court to the latter Administrators.
 10. Vide summons for Revocation dated 5th December,2019 the objector herein Peter Kimongo Muindi sought a revocation of letters of Administration to the Petitioners herein made on 4th February, 2019 claiming that it was defective in substance among others. The application for revocation of the grant was opposed by the Petitioners in their replying affidavit dated 10th February, 2020.



11. Vide notice of motion dated 21 July,2020 the Objector/ Applicant sought a grant of temporary injunction restraining the Respondents from disposing, transferring, sub-dividing, entering or taking possession of the Applicant's property being parcel Number Mitaboni/Kathiani/362, Mitaboni/Kathiani/130, Mitaboni/Kathiani/334, Mitaboni/Kathiani/ 358 and Mitaboni Ithaeni/2116, which application was spent vide order dated 22nd July, 2020 in favor of the Applicant.

Hearing

12. On 15/11/2022 Peter Kimongo the Objector testified that the deceased herein Muindi Lei Mutwota was his father and he had 2 wives Musui Muindi 1st wife and Mutave Muindi 2nd wife. He is son to Mutave Muindi who had 5 daughters and 1 son- himself. He relied on the Witness Statement of 5/2/2022 and list of documents of 9/2/2021 and Supplementary List of documents of 17/1/2022 all produced as exhibits.
13. The thrust of Objector's case is that that Amwei Clan determined that the deceased had 2 wives and the properties of the deceased ought to be divided between the 2 wives. The Clan's decision is housed in Exhibit 4 of 29/9/2009 and hence the grant obtained in this Court file /Succession Cause be revoked as the 2nd family was left out.
14. In cross examination by the Petitioners through their advocate on record, the Objector stated he was born in 1952 in Kyuluni as 2nd born in the family and lived in Kathiani County in a house built in 1972. He stated that they did not live in Chanzavi but in Kyuluni whose land belongs to the deceased. He stated that he did not know when and how the deceased herein his late father died. His family was not involved in settling the deceased's medical bills and were not part of the family in making arrangement for the deceased's funeral.
15. The Objector stated that his mother died last year 2021 and he sought to bury her on the deceased's land and that is why he filed the matter in his own right not of his mother and sisters. He could not recall when his mother was married to the deceased. He obtained the burial permit from the District Commissioner and later the death certificate and filed Succession Cause 960 of 2009.
16. In re-examination the Objector confirmed the deceased had no land in Chanzavi and they live on Kyuluni on the deceased's land and no one has chased them from the land. The land should be divided into 2 parcels that is why he sought the revocation of grant in this matter.
17. PW2 David Nzioka Nzau stated that the deceased Muindi Lei Mutwota, was a member of Amwayi Clan and related to him from his father's side. He was present when the clan held a meeting on 29/9/2009, where the Objector, Peter Kimongo stated that his step brothers snatched from him land that belonged to his father. At the meeting, Peter Kimongo and his late mother Mutava Muindi were present and step family were Muithya Muindi and Wambua Muindi. After listening to the parties the clan determined that the deceased had 2 wives and they produced Identity cards to confirm they are family members of the deceased's family. They wrote their report and it is Exhibit 4 and his statement of 17/1/2022 was adopted as his evidence.
18. In cross examination Pw2 stated that he knew the deceased as an elder and could not recall when he died, the clan did not find out when the Objector's mother was married but they found her there on Plot Mitaboni/Kathiani/358.The clan was to erect boundaries and the family members did not sign the Agreement Exhibit 4.
19. In re-examination, the witness stated that the 2nd wife's children live in the property Mitaboni/Kathiani/358 and they established the land belonged to the deceased from the Search Certificate. The



- clan was not brought any dispute of eviction and the clan divided the properties into 2 portions and the family members were present.
20. PW3 Alphonse Musyoka Matheka relied on his statement of 9/2/2021 and he stated the deceased married his Aunt, his father's sister and they had 4 daughters and 1 son Peter Muindi Kimongo and the daughters are Syombua, Kanini, Maria and Syowai and they lived on the deceased's land.
 21. In cross examination, the witness stated that he was not there when dowry was paid but he grazed the goats that were paid as dowry. He knew Peter Kimongo since he was born in 1950s and he lives in Kathiani
 22. PW4 Muasya Musembi stated he lives in Kathiani /Kyuluni and a nephew of the deceased Muindi Lei Mutwota an older brother to his father and they lived in one village Kathiani/Kyuluni. The deceased had 2 wives Muswii 1st wife and Mutava 2nd wife. The 2nd wife had 1 son Peter Kimongo and 4 daughters who were married. The 2nd wife lived on the deceased's property but she went to work somewhere else.
 23. In cross-examination he confirmed that the deceased had 2 wives but he did not know when the 2nd wife was married and did not witness the payment of dowry.
 24. The Petitioner, PW1 Eva Ndunge Mueti testified that the deceased was her father-in-law, father of/ to Jackson Muithya Muindi, her late husband, she was married in 1960 and she found 1 wife Muswii, she did not know Mutava.
 25. PW1 relied on her witness statement and various pleadings except for the letter by Chief of Kathiani Location that was objected to by the Objector. PW1 stated that there were Purchasers on the land, one Nthoki who built and cultivated the land among other Purchasers.
 26. In cross examination, PW1 asserted that she was married to the deceased's 1st born son Muithya Muindi and they lived in Kathiani/Kyuluni 367/Mitaboni/Kathiani. She stated that Mutave and Kimongo lived at Chanzavi. PW1 reiterated that the deceased had 4 Plots and she could not recall who stayed where. She did not know of the Clan meeting and decision. She knew only Maswii as wife to the deceased. That is why in this matter the Petition only included the family of the deceased with Maswii wife of the deceased. When the sons of the deceased obtained the confirmed grant, they sold the land to the Purchasers, one of them lives there but other farm /cultivate their portions.
 27. PW2 Daniel Mutiso Wambua who claimed to have recorded the statement of the Chief who is now deceased and produced it as exhibit in Court. In cross examination he stated he was the Village elder at the time and knew the deceased from the 1980s and he knew of the 1 wife Maswii and not the 2nd wife Mutava. They were neighbours with the deceased's family. He confirmed he knew the Objector who lives in Muguini he did not know whether he was on the deceased's shamba or not. He stated that he and the Chief were sent by the District Officer (D.O) to guard and fell trees which they did and did not call the family or any clan.
 28. PW3 Peter Muithya, grandson to the deceased and son of Eva Ndunge Muithya 1st Administrator and he relied on his statement as evidence. In a nutshell his grandfather had only 1 wife his grandmother, Maswii. He is resident at Kyuluni Kathiani, he was born there and did not know the Objector, Kimongo, he saw him in Court. They filed Petition in this matter and outlined the family and no one objected to making of grant and confirmation of grant. With regard to the Amwai Clan Report of 2009, he stated he knew nothing about it and he was not there. There is the Letter by the Assistant Chief that indicates that the deceased had 2 wives but they did not contest it as he was not aware of it.
 29. PW4 Pauline Nthoki Munyao stated she bought 1st shamba from Muindi Lei, the deceased. The 2nd shamba she bought from Peter Kimongo as son of the deceased and she has never obtained the title. In



2019, Muithya and his mother took her land and sold it to another purchaser. In 2020, they went to the D.C Kathiani and were informed of a Caution placed by Peter Kimongo.

30. PW5 Peter Muema, bought land from Paul Wambua son of the deceased when he was still alive.
31. PW6 Cecilia Kavindu Kyalo bought land from Eva Ndunge Muithya, Benson Nzioka Wambua & Peter Muithya -Administrators of deceased's estate.
32. PW7 stated that Christopher Mbithi bought land from Jackson Muithya and Paul Wambua Muindi, sons of the deceased.
33. PW8, Margaret Wanza Mutuku bought land from Jackson Muithya and Paul Wambua Muindi, for him sons of the deceased. She was sent by her son in Mandera to buy land and he sent the money and bought land for Alex Kasyoka Mutuku, her son. During the sale, those present were Jackson Muithya Muindi, Peter Kimongo Muindi and Benson Nzioka Wambua s/o Paul Wambua Muindi.

She was neighbor to both Muithya and Kimongo for 10 years. In 2019, 10/10/2019, she was with Kimongo's wife at the shamba when Peter Muithya grandson of the deceased, PW3 was removing Kimongo's crops and planting his own and thereafter, the matter was brought to Court in 2020.

The witness produced the Agreement for sale of 22/5/2009, written in Kikamba and it was translated by the Court Assistant confirming the sale payments made and purchaser, seller and witnesses present signed the Agreement.

34. In cross examination by the Objector, the witness confirmed that she bought land from Wambua Muindi and Kimongo Muindi was present. Kimongo Muindi is son of the deceased, Kimongo's wife is called Karene Kimongo and Kimongo's mother was called Mutave Muindi. She knew Kimongo since the 1980's when she was married after she went to school with her husband. From the day Kimongo's crops were uprooted, by Peter Muithya, he also evicted Kimongo from the land.

Submissions

Objector/applicant's Submissions To The Application Dated 5th December 2019.

35. Pursuant to submission dated 3rd March,2023 averred that they affirm the contents of the summons for revocation or annulment of grant and contents of the affidavit in support of the summons for revocation or annulment of grant. They relied on Section 76 of the *Law of Succession Act* which states as follows with regards to revocation 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.

36. Further, they relied in *Re Estate of Prisca Ong'ayo (Deceased)* (2020) eKLR and contended that the Applicant prays for the grant issued to the Petitioners/ Respondents on the 4th February, 2019 be annulled or revoked on the ground that the proceedings were defective in that the grant was obtained fraudulently by making false statements or concealing from the court things material to the case.
37. It was contended that prior to this succession proceedings being filed the Objector herein had filed before the Hon Court Succession Proceedings being High Court Succession Cause Number 960 of 2009. Stating that the Petitioners were well aware of these proceedings before they filed this this Succession cause but chose to ignore it and filed a different Succession with the intention of sidelining the Objector/Applicant.
38. They submitted further that the said Succession Cause is still pending before this Court hence the present cause is improperly filed and the grant obtained through it be revoked as it was obtained fraudulently.
39. Consequently, it was averred that the Petitioners herein filed to disclose that the deceased had had two wives one whose name is Muswii Muindi and the second was Mutave Muindi whom they claim was left out by the Petitioners in the proceedings. That the Applicant is the son of the deceased from the second wife confirming in his testimony that his father had two wives relying on the letter from the Assistant Chief dated 11/11/2009 confirming that the deceased had had two wives.
40. That the interested parties confirmed that they bought land from the Petitioners and not the deceased stating that they bought the land after being informed that succession proceedings had been completed and that the Respondents herein had obtained a certificate of confirmation of the grant.
41. It was averred that the interested parties in their testimonies confirmed that the deceased had two wives and that the Applicant was a son of the deceased and the 2nd wife and that the Objector/ Applicant was residing on the property of the deceased.
42. Further, it was submitted that the Petitioners confirmed using the grant obtained in this cause they sold the land to the interested parties herein but have not transferred the same. It was contended that the Petitioners denied that the objector and his mother stayed on the belonging to the deceased herein and that they did not know the Objector nor his mother.
43. On the issue of clan meeting held it was decided that and agreed that the deceased herein had two wives by the name Muswii Muindi and Mutave Muindi; it was agreed in that meeting that all properties of the deceased be shared equally among the two wives.



44. In conclusion it was submitted that the Objector/Applicant's summons for revocation or annulment of grant be allowed.

Administrators And Third Parties' (respondents' Written Submissions.

45. The Petitioners vide their submissions dated on 25th January, 2023 inter alia raised the following issues for determination.

- a. whether there are sufficient grounds to revoke the grant and the certificate of confirmation of grant herein
- b. whether the third parties are entitled to the estate property
- c. whether the deceased mother of the objector one Mutave Muindi should or should not be interred on the estate property.

46. As to the issue of whether there are sufficient grounds to revoke the grant and the certificate of confirmation of grant herein, they submitted that it is not in dispute that the deceased whom this estate relates left five (5) parcels of land registered in his name;-

- i. Mitaboni/Kathiani/130
- ii. Mitaboni/Kathiani/362
- iii. Mitaboni/Kathiani/334
- iv. Mitaboni/Kathiani/358
- v. Mitaboni/Ithieni/2116

47. That what is in dispute is whether the deceased had one or two houses.

48. They submitted that the Objector/ Applicant's allegation that there was another Succession Cause No 960 of 2009 is unknown to the Petitioners/ Respondents since the same was not brought to their notice by the Objector. That the Registrar of this Honorable Court at the time of filing the petition herein vide a letter dated 24/4/2013 certified that there was no other grant of representation in respect to the estate of the deceased. Contending that the death certificate used to prosecute the alleged Succession Cause was not a genuine one and that the Objector is guilty of laches for failing to prosecute his alleged Petition for period of more than 10 years and for failing to engage the Administrators family for a period more than 13 years since the deceased died.

49. On the issue of whether the said Mutave Muindi was the 2nd wife of the deceased it was submitted that the Objector was not aware when the deceased herein whom this estate relates died, he did not know when or whether his alleged father was sick and what he was suffering from. His sister and mother were not also aware of the same and neither the Objector nor his family participated in the burial rights of the deceased. The Objector did not also know when his mother and the 1st got married to the deceased herein.

50. It was submitted that the Administrators denied existence of the deceased having two wives as alleged by the Objector. That their family does not know one Mutave Muindi, the alleged second wife to the deceased since herself and family do not live in Kathiani Sub-county where the deceased established his home and where the deceased known properties are situated. That the only recognized wife who used to live with the deceased is on Muswii Muindi.



51. Consequently, it was averred that in as much as the Objector's witness No 3 and 4 confirming to be neighbors and relates to the deceased herein and as much as they alleged that the deceased had two houses, none of them could confirm when the mother of the Objector got married to the said deceased neither could they confirm when or not dowry was paid.
52. That there was no allegation as to customary marriage and no evidence was put to show the performance of the requisite customary law rites of marriage between the deceased and Mutave Muindi further, it was contended that there was no allegation of cohabitation and when the same started. They relied *In the Matter of the Estate of P.W.M (deceased)* (2013) eKLR in which court noted that;-
- “In the absence of proof of a customary law marriage, the only other way of establishing a marriage relationship between the applicant and the deceased was by getting the court to presume marriage between the applicant and the deceased. The principles for presumption marriage out of a prolonged co-habitation were set out in the case of *Hortensia Wanjiku Yawe v The Public Trustee* Court of Appeal for East Africa Civil Appeal No 13 of 1976, and in other decisions that followed. Evidence to establish cohabitation amounting to a marriage can only be clearly brought out in oral evidence.”
53. It was averred that no evidence whether oral or affidavit was led to demonstrate that the deceased was married to one Mutave Muindi. On allegation of fraud reliance was made on the case of *In the Matter of the Estate of P.W.M (supra)* in which the court in dismissing the summons for revocation noted inter alia that
- “It should be noted that allegations of fraud border on an accusation of commission of a criminal offence. In civil matters, allegations of fraud are treated as more serious than other allegations. Pleadings on fraud are stricter. The allegations should be supported by sufficient particulars. It is said here that the grant was obtained fraudulently, consequently the pleadings on the point ought to be to a higher standard. I note that the particulars of fraud are bare, totally insufficient to support an allegation of fraud.”
54. The petitioners contended that the allegations of fraud had not been particularized as required by law stating that applicant did not prove the allegations of fraud to the required standards.
55. As to whether the third parties are entitled to the estate property, it was averred that 5th third party is a grandson of the deceased whom this estate relates and also a son the 1st Administrator/ Respondent. That the other 3rd parties purchased a portion to be excised from land parcel No Mitaboni/Kathiani/130. That the 1st and the 6th 3rd parties purchased and were put into possession in land parcel No Mitaboni/Kathiani/130 during the lifetime of the deceased. It was further averred that the 3rd and 4th third parties purchased portions of land parcel No Mitaboni/Kathiani/130 from Jackson Muithya Muindi and Paul Wambua Muindi who were first Administrators and biological sons of the deceased and are since deceased
56. That the 2nd third party bought the portion of land parcel No . Mitaboni/Kathiani/130 and was put in possession by the current administrators together with the 5th third party on the strength of the rectified certificate of confirmation of grant issued on 6/2/2019.

This was done before the filing of the summons for revocation of grant filed on 10/12/2019. Reliance was made to Section 82 of the *Law of Succession Act* which gives powers to personal representatives to among other things sell the property as long as the grant is confirmed. They averred that should the grant be revoked the respective parties who sold their shares to third parties will still have an



opportunity to the portions to the third parties during the distribution of the estate properties. That the third parties are innocent purchasers for value without notice from any adverse claims from any one including the Objector. Reliance was made to Section 93 (1) of the Law of Succession Act is to the effect that;-

Validity of transfer not affected by revocation of representation

- (1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

57. On whether the deceased mother of the objector one Mutave Muindi should or should not be interred on the estate property, the petitioners contended that on 23/7/2020 this honorable court issued status quo orders to preserve the estate properties pending the hearing and determination of the issues in this matter. The objectors mother passed on more than a year later hence on the strength of the status quo orders the Objectors mother should not be buried on the estate properties until hearing and determination of the pending applications.
58. They submitted that the Administrators family had the requisite locus standi to apply for the grant herein and subsequent confirmation and that the same were done procedurally and in accordance with the law.

Determination

59. The Court considered pleadings, oral evidence, written submissions of parties to the dispute and the issue(s) before Court are whether;
 - a) the grant issued on 8/10/2013 and confirmed on 7/5/2014 should be revoked under Section 76 LSA
 - b) whether the 3rd parties/purchasers are entitled to the portions of land purchased in light of the instant application for revocation of grant.
60. . Re Estate of Prisca Ong'ayo (Deceased) (2020) eKLR The Court emphasized revocation of grant on the following grounds;

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground



is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

61. For this Court, Section 107 of *Evidence Act* is applicable

Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109 of *Evidence Act* on proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Section 112 of *Evidence Act* on proof of special knowledge in civil proceedings

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

In a nutshell ‘He who alleges must prove’.

62. The Objector’s claim to revocation of grant is that he is a son of the deceased and his mother Mutave Muindi was/is 2nd wife to the deceased. As to his mother being wife to the deceased, evidence ought to have been adduced on the marriage contracted between the families of the deceased and the 2nd wife.

63. In *Restatement of African Law: The Law of Marriage & Divorce* by Eugene Cotran prescribes a Kamba Customary Marriage entails;

‘Capacity- The Parties must have capacity to marry and capacity to marry each other

Consent- The parties to the marriage and their respective families must consent to the Union

Slaughter of Ram- No marriage is valid unless the nthenge ya kwitia mbui nthamake nthi is slaughtered

Marriage Consideration- There can be no valid marriage unless a part of the marriage consideration has been paid.

Commencement of Cohabitation- The time at which a man and woman become husband and wife legally, is when they begin cohabitation, when the bride comes to the bridegroom’s home.’



64. Customary marriage entails a ceremony or series of ceremonies between families', elders and relatives in executing any, some or all the requirements of such marriage. Consequently, there would be witnesses to the effect of the ceremony or ceremonies. In the instant case such evidence was not adduced.
65. The Objector sought revocation of grant on grounds that there was concealment from Court of pertinent material facts. The Petitioners failed to disclose the other/earlier pending Succession Cause 960 of 2009 that was filed. The Petitioners failed to disclose that the deceased had 2 wives Muswii & Mutave Muindi as per the letter from the Chief and that the distribution of the deceased's estate failed to bequeath some of the assets to various members of the family of the deceased.
66. The deceased died on 16/10/2007 and the Succession Cause was instituted in 2009 by the Objector who sought ½ of the whole estate of the deceased. It is clear from the Court record that there was an ongoing simmering dispute where on the one hand the Objector sought redress from the Clan as per the Attached document of Amwei Clan and the other group sought to file a separate Succession Cause. From these facts, clearly in light of the unresolved dispute, the Petitioners could not reasonably disclose what they either did not know or agree with; any other family.
67. From these facts, the marriage of the 2nd wife to the deceased is not borne out by the evidence on record. Was/is the Objector son of the deceased? The Objectors witnesses confirmed the Objector as son of the deceased, the Petitioner denied knowledge of the 2nd family. The evidence on record pits one side against the other.
68. This Court wonders, if the dispute as to family of the deceased arose 2 years after the deceased's death why was the dispute not placed in Court for hearing and determination when most witnesses were alive and family members alive and well to undergo sibling DNA to determine paternity once and for all?
69. Secondly, the Amwei Clan Kathiani Division Final Judgment on Land Dispute between Kimongo Muindi & Jackson Muithya Muindi of 29/9/2009 indicates that after listening to all parties concerned including the brothers of late Muindi Lei, the clan came to the following judgment that the deceased late Muindi Lei had 2 wives Maswii Muindi and Mutave Muindi. The Clan found that land belonging to the late Muindi Lei to be divided equally between 2 wives.
70. This Decision raises various concerns; were Kimongo Muindi and Jackson Muithya in attendance and what did each say? What are names of Muindi Lei's brothers who were present and what did they say? Apart from the Committee members present who were the other members of Muindi Lei's family present? Were the wives of the deceased present? Is the decision/finding and distribution of the deceased's estate in the absence of a written or oral will valid/legal? All these concerns make this Court find the said Judgment by the clan not binding to this Court or proceedings.
71. The Objector took the stand and testified and did not disclose in detail his family background, how and where he was born, where he lived and if with and on the deceased's property how he came to reside there, who witnessed his stay, when and how his mother and siblings came to reside if at all with the deceased and if not where and why? He did not call any of his siblings to testify or any elder to testify on his stay or acquaintance with his father. The Court found serious gaps in his testimony except for reliance on the Clan letter/judgment and Chief's letter.
72. This Court found, PW8 Margaret Wanza Mutuku a witness whose demeanor was disturbing. She did not record a witness Statement as other witnesses, did not file and serve in Court the Agreement for sale of land purchased by/for her son was not annexed as other witness 3rd Parties did, she was not party to these proceedings, and if the land purchased was her son's, the son ought to have testified. If she bought land from Muithya Muindi & Jackson Muindi and asked Kimongo and he agreed to this sale as



she alleged how come, the same Kimongo Objector, is seeking revocation of the grant on the basis that he was left out by the very same Muithya Muindi & Jackson Muindi, Administrators of the deceased's estate yet he approved the sale in 2009?

Disposition

1. From the pleadings filed and evidence on record, this Court is not satisfied on a balance of probabilities that the Objector proved that he is son of the deceased and he resided on the deceased's land. The application for revocation of grant is dismissed.
2. All 3rd Party /Purchasers claims are protected under Section 93 *LSA*. If agreed the same shall be reflected in the rectified Summons for Confirmation of Grant.
3. If the sales/purchases are contested then the status quo shall be maintained pending hearing and determination before the ELC Court.

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

M.W.MUIGAI

JUDGE

In the presence of:

No Appearance - For The Petitioners

No Appearance - For The Objectors

Geoffrey - Court Assistant

