



**In re Estate of Mulei Mutisya Mbua (Deceased) (Succession Cause 727 of 2009) [2023] KEHC 17899 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17899 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 727 OF 2009**

**MW MUIGAI, J**

**MAY 25, 2023**

**IN THE MATTER OF THE ESTATE OF MULEI MUTISYA MBUA (DECEASED)**

**BETWEEN**

**MUTUA MUTINDA ..... APPLICANT**

**AND**

**BENJAMIN MUTUNGA KYULA ..... RESPONDENT**

**JUDGMENT**

1. Petition received on 10th September, 2009, in which the petitioner BMK petitioned this Court for a grant of Letters of Administration intestate of the estate of MMM (deceased) who died on 6th May, 1997 domiciled in Kenya at Machakos.
2. Pursuant to the Affidavit in support of Petition for Letters of Administration Intestate, the deceased died intestate and left the following surviving him; -
  - a. BMK Adult
3. The Affidavit in support of Petition for Letters of Administration Intestate mentioned property left by the deceased at the date of his death to be L.R. No. Massii/Kithangani/5XX and L.R. No. Massii/Kithangani/5XX
4. Vide the Assistant Chief's letter dated 18th August, 2008 confirmed that MM (deceased) hailed from Kavumbi Sub-location and that he (deceased) was survived by his wife MM who also died in 2007. Further that the deceased together with his wife had no children only a brother in law BMK who used to take care of both the deceaseds hence the rightful heir.
5. The petitioner BMK the brother in law of the deceased and sole beneficiary annexed two death certificates to the petition:



- a. Death Certificate No. 23XX23- MMM who died on 6<sup>th</sup> May, 1997 at 90 years issued at Makueni District.
  - b. Death Certificate No 00XX182- MM who died on 18<sup>th</sup> May, 2007 at 75 years old issued at Makueni District
6. Vide the Gazette notice dated 16th October, 2009, BMK of P.O Box 33 Kibwezi in Kenya the deceased's brother-in-law was gazetted for grant of Letters of Administration intestate to the estate of MMM, late of Masii who died at Kalungu sub-location on 6th May, 1997.
  7. Grant for Letters of Administration granted on 23<sup>rd</sup> November, 2009 and issued by this Court on 7<sup>th</sup> December, 2009 to BMK as personal representative of the deceased's estate to render a just and true account thereof as required by law.
  8. Application for Summons for Confirmation of Grant dated 7th July, 2010, the Applicant sought orders for the grant of letters of administration granted on 23<sup>rd</sup> November, 2010 made to BMK be confirmed.
  9. Grant for letters of Administration intestate was confirmed by this Court vide a Certificate of Confirmation of Grant on 27<sup>th</sup> July, 2010 to the said BMK.
  10. Pursuant to Summons for Revocation dated 16<sup>th</sup> January, 2019 the Applicant herein (MM) sought orders for the revocation or annulment of grant of letters of administration issued on 7/12/2009 and confirmed on 27/7/2010; an order canceling the land title number Massii/Kithangani/5XX issued to BMK through a void grant; an order that the estate of the deceased be preserved pending determination of the application. The application was on the grounds that the Respondent is an in law to the deceased and grant was obtained fraudulently by concealing the names of some of the beneficiaries to the estate of the deceased.
  11. Supporting affidavit the Applicant herein claimed that he is the son to the deceased from the second wife whom he claimed the deceased married hence is entitled to the whole estate of the deceased as the only survivor in the estate.
  12. In Replying Affidavit dated 22<sup>nd</sup> March, 2019 the Respondent deposed that MM (deceased) and MM (deceased) did not get children averring that his sister married Applicant's mother as concubine; deposing that Applicant and his sisters came with their mother and so no child was born at the home of the deceased; stating that the Applicant is not a son of the deceased even in the remotest degree of consanguinity; deposing that the deceased owned land parcel numbers Massii/Kithangani/5XX & Massii/Kithangani/5XX which after deceased died were left under the care of his sister MM (deceased); deposing that his sister became sick for a very long time as she was suffering from cancer and he financed her treatment in various hospital by paying all the bills; stating that before the sister she expressed her wishes in letter dated 1/5/2007 wherein the two parcels of land numbers Massii/Kithangani/5XX and Massii/Kithangani/5XX were given to him (letter marked BMM 1 copy of the letter was annexed);
  13. The matter was deposed by way of Written Submissions.
  14. The Ruling dated and delivered on 4<sup>th</sup> December, 2019 by Kemei J the application for revocation of grant was dismissed.
  15. Another Application for Revocation or Annulment of grant dated 9/3/2020 was filed by one KM who claimed to be the second wife of the deceased claiming that the grant was obtained fraudulently by concealing that MM was survived by the Applicant as the second wife.



16. Vide Application dated 7<sup>th</sup> December, 2020 and filed on 10<sup>th</sup> December, 2020 by MM the Applicant herein sought orders that this court order Police investigate into the origin and authenticity of Death Certificate No 00XX182 issued by the District Registrar of Births and Deaths for Machakos and Death Certificate No. 23XX23 issued by the District Registrar of Births and death Deaths for Makueni; the application was based on the grounds that the Respondent moved the Court on the strength that the issuance of death certificate in different districts is alarming; that it is not possible for the same individual to die from malaria and also from cancer further it is not possible for the person to die 5<sup>th</sup> May,1997 and also die on 6<sup>th</sup> May, 1997.
17. In the Replying Affidavit dated on 22<sup>nd</sup> April, 2021, the Respondent opposed the application averring that the application was res judicata; that since the dismissal of the Application, the Applicant has never appealed or applied for review or setting aside of the said ruling; that the Applicant's mother KM filed a similar application dated 9/3/2020 which she has never pursued; that death of his brother in law MMM, he was issued with the death certificate which enabled him file the succession cause; that the Applicant opinion that a criminal offence was committed in issuance of the death certificate should be lodged as complaint with the police; that at the time the Applicant filed the application dated 16/1/2019 he never raised the issue of authenticity of the death certificate and it now more than two years and the present application is an afterthought and brought after inordinate delay; that no cogent and sufficient reasons have been enhanced to warrant granting the orders sought.
18. The Applicant herein further filed another Application dated 21<sup>st</sup> October,2021 and filed on 25<sup>th</sup> October,2021 in which he sought orders for stay of any further proceedings of Tawa Senior Magistrate's Court Civil Case No 144 of 2018. The application was based on the grounds that the Respondent using the Certificate of confirmation issued by this Court caused himself to be registered as proprietor of LR No. Masii/ Kithangani/5XX and Masii/Kithangani/5XX; that respondent herein filed Tawa Senior Magistrate's Court Civil Case No 144 of 2018 seeking orders to evict the Applicant herein from LR No. Masii/ Kithangani/5XX and Masii/Kithangani/5XX; stating that the Respondent presented fraudulent documents to this Court and the Applicant has made application to have the issued to the Respondent set aside.
19. The Respondent did not file his rebuttal to the Application dated 21<sup>st</sup> October,2021.
20. The matter was disposed by written submissions of the Applicant.
21. This Court delivered on 2<sup>nd</sup> November 2021, Ruling and maintained status quo and preserved the estate of the deceased under Section 45 LSA pending hearing and determination of the instant application through oral evidence. The Court granted orders that the Deputy Registrar Machakos High Court issues Witness Summons to the Registrar of Births & Deaths Machakos and Makueni to prepare reports and present in Court to determine the genuine Death Certificate in relation to the Deceased herein within 30 days.
22. The Deputy Registrar Machakos High Court was also to issue <sup>th</sup> December,2019. No eviction shall take place until after ruling and determination of matter of LR No. Masii/ Kithangani/5XX and Masii/ Kithangani/5XX.

Witness Summons to the Chief Kavumbu Sub/Location Masii Location to prepare Report to confirm the contents of the letter dated 18/8/2008 by Mr. Solomon M. Kimilu Assistant Chief Kavumbu & Chief Kathiani to confirm details of deceased family within 30 days. Court further ordered no burial of the late Applicant's late wife on the deceased's estate until hearing and determination of the alleged forgery, fraud & illegality and proof that the Applicant is son of the deceased/ beneficiary vide Ruling of 4



## Hearing

### The Applicants case was/is as follows;

23. PW1 Masinde Douglas from the Registrar of Births & Deaths Office. He produced 2 Registers each from Makueni and Machakos Offices respectively. The Witness confirmed that both Death Certificates were genuine as each was filled in as per the information availed to the Registrar of Births & Deaths Office.
  - a) Death Certificate No 00XX182 issued by Registrar of Births & Deaths in Machakos is for MM aged 83 years who died on 5th May 1997 at Kithangaini after he suffered from Cancer.
  - b) Death Certificate No 23XX23 issued by District Registrar of Births & Deaths in Makueni related to MMM, aged 90 years who died on 6th May 1997 at Kalungu Sub-Location after he suffered from Malaria.
24. PW 2, MM, the Applicant in a nutshell told the Court that his mother KM was married as a Iweto in 1978 by M MM wife of MMM under Kamba customary law. MM and MM married but they had no children. MM died in 1997 and left widow MM who was sick for a long time and died in 2009. He went with his mother to the homestead of MM and other siblings and lived there upto 1985 when they left and returned with their mother to her home. In 1992, MM came for him and he resided on his property to date.
25. He was/is married to 1 wife and 5 children, his wife died on 26/6/2021 and he cannot bury her on the property as the Respondent BMK had the property transferred to himself and sought to evict him from the land.
26. The late MM never owned LR No Masii/Kithangani/5XX & LR No Masii/Kithangani/5XX and there is no Succession Cause was/is filed of her estate.
27. The Applicant admitted that the Summons for Revocation Application filed on 16/1/2019 was dismissed vide Ruling of the Court Hon. D.K. Kemei J of 4/12/2019 and was not reviewed or successfully appealed against.
28. The applicant denied that he came to the deceased's property after the demise of MM he went on to the land settled sold portions of the land and/or sold cows and household goods.
29. PW3 KM mother of the Applicant was married by MM & MM as a Iweto under Kamba customary law in 1978 and her parents were paid dowry by M & M. At the time she had 3 children KM, MM, KM and the couple could not have children. In 1982 she gave birth to the 4th child KM in the homestead of MM and after disagreeing with M, she left with her children in 1985 and never went back.
30. PW3 admitted she lived/lives in Wanzaini where her father gave her land, her child who died was buried there and the Applicant MM was not born at the deceased's home. In 1992, she gave M and M her son, MM who has been on the property to date.
31. PW4 PK, M's step brother & PW5 MM, the deceased's nephew, confirmed MM and MM were married and had no children. KM was married as Iweto and the Applicant MM resided on the property to date.



### **The Respondent's case is as follows;**

32. DW1 BMK, brother to MM (deceased) wife of MM Deceased herein. They did not have children and so they married the Applicant's mother KM as concubine; Iweto . The applicant came with her children and none of the children was born in the homestead.
33. Later, KM left with her children and M thereafter fell sick for a long time and the Respondent took care of her and financed her treatment at various hospitals. Before her demise MM on 1/5/2007, his sister, bequeathed the properties to him and banned the Applicant family from attending her funeral.
34. On 26/5/2009, he swore an Affidavit for late registration of death and obtained the Death Certificate at Makueni at the Registration of Births & Deaths Registry/Office.
35. DW1 filed Petition on 10/9/2009, obtained the grant on 7/12/2009 and it was confirmed on 12/8/2010. He told the Applicant to vacate the land. The clan told the applicant to vacate the land.
36. The Respondent contended that the Applicant was seeking revocation of grant through the back door as his earlier application for revocation of grant filed on 16/1/2019 was dismissed vide Ruling of 4/12/2019.
37. DW2 DMM, step brother of MM & DW3 BMK, nephew of MM confirmed that the Deceased MMM and MM were married and had no children. M married K and the marriage did not last , she left with her children including the Applicant. MM died in 1997 and MM long after 2007. The properties were gifted to the Respondent who looked after her sister until she died. On 18/4/2009, the Clan local Committee met at the home of MM and deliberated on the issue and the applicant was to vacate from the property.

### **Submissions**

#### **Applicant's Submissions**

38. The Applicants submissions dated 23<sup>rd</sup> February, 2023 and filed on 24<sup>th</sup> February, 2023 submitted that Summons were duly served to Registrar of Births and Deaths in Makueni County and in Machakos and after several delays the Registrar of Births and Deaths of Machakos County showed up and claimed that death Certificate No. 00XXX83 issued in Machakos County Office and Death Certificate No. 23XX23 issued in Makueni County Office were genuinely issued. That information appearing in both death certificates is based on the information supplied by the person seeking the death certificate and supporting documents. Contending that the entire evidence did not assist the Court resolve the issues before the court.
39. It was Submitted that the Chief of Kavumbi sub-location and the Assistant Chief of the area were also summoned and both appeared in court and were equally unhelpful to court. The Chief stated that he was new in the area and did not have any record in respect of the letter dated 18/8/2006 issued by the former Assistant Chief. The Assistant Chief on the hand claimed that he was new in the job and had no record in the office in respect of the letter by Mr. Kimilu dated 18/8/2008.
40. It was further averred that due to failure by persons summoned to shed light into the matter, the parties opted to call oral evidence to assist the Court reach a fair determination. The Applicant called four witnesses while the Respondent called three witnesses and the key questions arose for determination: -
  - a. Whose estate is before court? is it MMM or that of MM? Who among the two did this court grant certificate of confirmation?



- b. The certificate of grant by this court was issued in respect of the estate of MMM; why was that certificate used to transfer LR No. Masii/ Kithangani/5XX and Masii/Kithangani/5XX which were Registered in the name MM?
  - c. Could MM pass to the Respondent LR No. Masii/ Kithangani/5XX and Masii/ Kithangani/5XX as claimed by the Respondent?
  - d. Is the Applicant herein a son of MM? And is KM a wife (Iweto) of MM and MM?
41. It was the position of the Applicant that the estate before Court is for one MM, and not MMM as unprocedurally disguised. MMM to what it claims on the face of the pleadings and Ruling of this Court that MMM did not exist. No National Identity Card or driving license was produced in court in that name save for death Certificate No. 23XX23 only.
42. It was contended that documents before court with the name MM are: -
- a. National Identity Card No. 170XX24/6X
  - b. Burial permit No. 70XX46.
  - c. Death Certificate No. 00XX182.
  - d. Search dated 10/6/2009 for Masii/ Kithangani/5XX.
  - c. Search dated 10/6/2009 for Masii/Kithangani/5XX
43. It was averred that the documentary and oral evidence adduced in court shows that the estate of one MMM that the court issued grant of letters of Administration with existing property mentioned in this court in the name of MMM only not MM.
44. It was submitted that the Respondent was aware that the estate he had petitioned this court for grant of letters of administration was not of MMM but was for MM pursuant to the official search conducted by the Respondent in respect of the Two parcels of the assets of the deceased's estate at Machakos Registry which found the land was registered to one MM and not the alleged MMM.
45. On the issue of whether MM could give the parcel of land it was submitted that she could not give the Respondent what she did not have herself since land was owned by MM and would have passed over to MM upon death of the MM only if she had undertaken a Succession Cause hence in the absence of that no person including the Applicant herein and his mother is entitled to the estate of the deceased.
46. As to the issue of whether KM and her son the Applicant herein were beneficiaries to the Estate of MM or not, it was the position of the Applicant that MM and his wife MM who sought and married K as 'Iweto'. This was their wish and act. Contending that 'Iweto' marriage is a very special marriage among the Kamba Community in that the wife who is not blessed with the children marries another woman and the children 'Iweto' bears become children of the wife and her husband and are entitled to all the rights and privileges of children. Averring that it is irrelevant for the Respondent to claim that the Applicant herein was not a biological son of the deceased. The children of 'Iweto' are not supposed to be biological children in any event/case.
47. It was the prayer of the Applicant that court should annul and revoke the grant and direct the parties to petition for the estate of MM who before his death held the National Identity number 170XX24/6X and was a registered owner Masii/ Kithangani/5XX and Masii/Kithangani/5XX to enable all those who have interest in the estate to be considered by the court so that no party is unfairly deprived of the rights. The Applicant further relied on his Submissions dated 13/8/2021.



## Respondent's Submissions

48. The Respondent filed his submissions dated 16<sup>th</sup> February,2023 and filed on 17<sup>th</sup> February,2023 in which the Respondent Submitted that vide ruling dated 2/11/2021, it was ordered that the two Death Certificates No. 00XXX83 issued at Machakos and Death Certificate No 23XX23 issued at Makueni to be investigated to ascertain which of the two is genuine. Contending that summons were issued to the Registrar of Births and Deaths who appeared in Court and confirmed that both death certificates were genuine as they were issued by the respective offices.
49. It was the position of the Respondent that first Death Certificate to issue was from Makueni which was obtained by the Respondent. He averred that an affidavit he swore at Principal Magistrate Court at Makindu was produced which enabled him to report late registration of the deceased and was issued with a Death Certificate which he used to petition for letters of administration over the deceased estate. The death Certificate had the names MMM.
50. It was submitted the Respondent's sister by the name MM was married to the deceased. Contending that the deceased died first and left behind his wife MM who later became ill and died; the Respondent is one who catered for her treatment and before she died, she made clear her wishes in a document dated 1/5/2007. She gifted the two parcels of land Masii/ Kithangani/5XX and Masii/Kithangani/5XX to the Respondent who later had title deeds issued to him after he obtained Letters of Administration.
51. Contending that court called oral evidence to establish as to whose estate the grant was issued. The applicant called four witnesses and the said witnesses appeared to have been coached to maintain that the deceased had only two names and was called MM.
52. It was further averred that the Applicant (PW1) and his mother (PW 2) who stayed with the deceased for some time could that the deceased did not have a third name. However, PW4 MM was candid and in cross examination he admitted that the names of the deceased were MMM. Submitting that the Respondent's witnesses were truthful and clearly stated that he was known as MMM.
53. It was the position of the Respondent that PW4, DW1, DW2 and DW3 proved beyond peradventure the names of the deceased. Therefore, the names MM and MMM refer to one and the same person who is deceased in this estate.
54. It was submitted on behalf of the Applicant is not a child of the deceased, he was not born at the home of the deceased as by his mother (PW 2) was married as an Iweto at that home he was already born. He cannot therefore claim any inheritance rights over the deceased property.
55. Urging that the Applicants mother left the home in 1985 and has ever come back, indeed she bought land at Wanzauni and settled there. One of daughter's M/S K died and she buried her on the land she has at Wanzauni. Contending that it clear that neither she nor the Applicant have claim to the deceased properties. That the Applicant admitted in Cross-examination that the deceased and his late wife MM did not adopt him as their child. He is therefore estopped from claiming the property of the deceased.
56. Further, it was contended that the Applicant made an Application dated 16/1/2019 seeking to revoke the grant issued to the Respondent. The court vide its Ruling dated 4/12/2019 dismissed the said application and clearly stated that the Applicant lacks the locus standi to institute the application. The court further ruled that since the properties had been transferred to the Respondent pursuant to a confirmed grant the only recourse the Applicant had if any was before the Environment and Land Court.



57. It is contended the Applicant has never appealed or applied for review or setting aside the said ruling of the court. The Applicant had not filed any suit before the Environment and Land Court against the Respondent so as to ventilate his interest on land parcel Number Masii/ Kithangani/5XX and Masii/ Kithangani/5XX before the court.
58. It is the position of the Respondent that the material facts placed before the court as well as the evidence adduced, the Certificate of confirmation of grant issued to the respondent was in respect of the estate of MMM who was also known as MM.

### **Determination**

59. The issue(s) for determination are;
1. Should the grant of 7/12/2009 confirmed on 23/8/2010 be revoked?
  2. Did the Respondent present fraudulent documents to Court for issuance of grant and confirmed grant?
  3. Should the Applicant be evicted from the suit-properties that comprise the deceased's estate?

### **REVOCAION OF GRANT**

60. 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—

61. Hon. Mwita J. in the *Albert Imbuga Kisigwa vs. Recho Kavai Kisigwa*, Succession Cause No.158 OF 2000 stated:

“(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.”



62. In Re the Estate of the Late Suleman Kusundwa [1965] EA 247, the court stated that:

“The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased’s property as he was entitled to dispose of by will under the applicable law of inheritance.”

63. The Respondent submitted that the Application filed by the Applicant of 25/10/2021 is a series of various other applications filed by the Applicant, his mother all seeking revocation of grant issued to the Respondent as the administrator and beneficiary of the deceased’s estate.

65. This Court has been informed that the issue regarding revocation of grant is res judicata as the Applicant raised similar application on 16/1/2019 and sought revocation of grant as the Respondent failed to disclose and concealed material facts and Ruling of 4/12/2019 dismissed the said application citing discrepancies of the Applicant’s mother not filing a statement and/or testifying and having neighbours and/or close relatives testifying. In the absence of the Applicant not discharging the burden and standard of proof the application lacked merit.

66. The instant application of 25/10/2021 is by the Applicant and now raises new issues that were not canvassed in the earlier application and more evidence has been adduced by both parties to assist the Court unearth the truth of the matter.

### **Fraudulent Documents**

67. The Applicant based his claim/right on fraudulent documents used/presented by the Respondent to obtain the grant of 7/12/2009 and confirmed on 23/8/2010.

68. The pleadings and evidence on record disclosed anomalies of the deceased’s names, date and cause of death and validity of the death certificates produced in Court as detailed hereinabove.

69. PW1 summoned by the Court from Registrar of Births and Deaths in Makueni County and in Machakos claimed that Death Certificate No. 00XXX83 issued in Machakos County Office and Death Certificate No. 23XX23 issued in Makueni County Office were genuinely issued. That information appearing in both death certificates is based on the information supplied by the person seeking the death certificate and supporting documents. The deceased’s names were dissimilar, one group referred to MM aged 83 years old at Kathaingani and died on 5/5/1997 from cancer and the other group referred to MMM aged 90 years old who died on 6/5/1997 at Kalungu and suffered from malaria.

70. It was contended that the entire evidence did not assist the Court resolve the issues before the court. This Court finds it disturbing that official legal documents are deemed legal and issued based on information presented by one who applies and is served with a copy of the deceased’s death certificate without verification/confirmation of the information.

71. The matter was further complicated by the witnesses summoned from the local administration in the area namely Chief /Assistant Chief where the deceased hailed from and the information relied to this Court is that the local Administration Officers were new and would not shed light on the matter.



72. The Respondent presented the Affidavit of 26/5/2009 that was used seek issuance of the Death Certificate and it was not contested as invalid or forged.
73. The Respondent presented the wishes of MM his late sister married to the deceased in a letter/ agreement of 1/5/2007 and she died a week later 18/5/2007. Strangely, the Respondent never called the author of the letter, the deceased could not have written it down being advanced of age she was frail, weak and sick over a long period that she was in full mental and physical health to write/say her wishes. The agreement did not expressly bequeath the Respondent the specific properties. This Court finds that the document was /is not a will as per LSA and cannot be relied on as the deceased died intestate.
74. Hon Mativo J (as he then was) in the case of Martin Maina Ndegwa vs Charles Thiongo Kanyoro & 3 Others, Succession Cause No. H.C. 121 OF 2010, [2016] eKLR pointed out thus;

“I have also looked at the summons for revocation of grant and I am persuaded that it raises serious issues which need to be resolved by the court and in the event of the orders in question being enforced; the said application may be rendered nugatory. The applicant in the said application has alleged fraud and concealment of material facts. These are issues which need to be resolved at the hearing of the said application.

75. E. A. Francis in his book discussing fraud observes inter-alia as follows:-

- i. No definition is given, either by statute or judicial decision of what constitutes fraud, nor, it seems, is any such decision possible.
- ii. Fraud, for the purposes of these provisions, must be actual and not constructive or equitable fraud.
- iii. Fraud must involve an element of dishonesty or moral Turpitude.

76. In the case of Assets Co Ltd vs Mere Roihi, Lord Lindley stated as follows: ".....that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud-an unfortunate expression and one very apt misled, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud."

After carefully examining the application for revocation of grant and the application before me, and upon analyzing the law, authorities and submissions made by both parties, I find that the applicant has established sufficient grounds for the court to allow the application before me for the interests of justice. (Emphasis added).

## **Fraud**

77. In the Matter of the Estate of P.W.M (deceased) (2013) eKLR the Court noted 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.”



78. From the oral evidence adduced by parties in Court and documents and Witness Statements relied on, the Applicant was not able to discharge the burden and standard of proof as envisaged by Section 107-112 of the Evidence Act which in a nutshell prescribes that 'he who alleges must prove.' Therefore, the grant will not be revoked as grant as the Applicant has not proved to the required standard that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material.
79. From the evidence on record ALL witnesses except formal witness PW1 from the Applicant's side and the Respondent's side admit and concede that PW3, KM was married to MM under Iweto in 1978. MMM alias MM and MM were married and had no children of their own. PW3 came with 3 children and thereafter and her son PW2 MM, left after a misunderstanding with MM, the deceased's homestead in 1985 and never came back.
80. Of interest, according to PW2 & Pw3 which version is contested by the other witnesses, in 1992, the deceased, the MM came for or sent for MM who came to reside in the deceased's home. Apparently he was on the deceased's property from 1992 to date. It is also curious that the Applicant remained on the deceased's property during the lifetime of the deceaseds' and was not evicted until after their demise.
81. The Respondent asserts the Applicant came back when MM died. Be that as it may, MM is a child of PW3 who was married by MM under Iweto. Naturally, he would not be a biological child of the deceased as Iweto is a very special marriage among the Kamba Community in that the wife who is not blessed with the children marries another woman and the children 'Iweto' bears become children of the wife and her husband.
82. The fact that the Applicant was /is a child under 'Iweto' marriage which fact is not contested by either party and coupled by the fact the Applicant has been on the property all these years and was never evicted during the lifetime of the deceased and/or his widow, persuades this Court that he is entitled to remain on the portion of land he occupies.
83. The Respondent who took care of the deceased's widow claims inter vivos gift by the widow to him as her brother. However, the agreement/letter annexed/produced was drawn a week before her death and no one was called to testify on the said document.
84. In P&A Cause No. 51 of 2017 In The Matter of the Estate Of Paul Muthiani Musau (deceased) the Judgment of 21/9/2012 by Hon. LJ R. Nambuye considered 'Iweto' unions under Kamba Customary law was implemented as follows; MK (K) no biological children, M- 2 sons (Applicant, PM & KM) &(grandchildren of the deceased) and KM - (there was contest that she was not a wife under Iweto but an employee but was confirmed to be part of Iweto)JKM, WM & MM (grandchildren of the deceased) were included as beneficiaries of the estate of the deceased.

## **Disposition**

1. The Application of 25/10/2021 is partly upheld and partly dismissed as follows;
2. The Revocation of grant application is dismissed no fraud was proved.
3. The Applicant failed to prove fraud concealed material information by the Respondent.
4. Although the brother to the deceased's wife/widow who took care of the deceased and widow while sick is entitled to the deceased's estate as they had no biological children;



5. The Applicant is proved through Iweto marriage under Kamba customary law of his mother to the deceased's wife/widow and they later left, the Applicant remained/returned and is still on the property. He is entitled to the portion he resides on or an equitable share of deceased's estate.
6. Each party to bear own costs.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 25/5/2023(VIRTUAL/  
PHYSICAL).**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF**

**MR. MUTUA - FOR THE APPLICANT**

**NO APPEARANCE - FOR THE RESPONDENT**

**PATRICK/GEOFREY - COURT ASSISTANT(S)**

