



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Musungu v Ohutso (Probate & Administration 3 of 2000)  
[2023] KEHC 26132 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26132 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
PROBATE & ADMINISTRATION 3 OF 2000**

**DK KEMEL, J**

**NOVEMBER 30, 2023**

**BETWEEN**

**ALBERT MABANGO MUSUNGU ..... PETITIONER**

**AND**

**JACKTON O OHUTSO ..... OBJECTOR**

**JUDGMENT**

1. Pursuant to Section 47, 76 (b) of the [Law of Succession Act](#) and Rule 44(1), 49 & 73 of the [Probate and Administration Rules](#), the Objector filed an application dated 12<sup>th</sup> April 2022 and filed on 28<sup>th</sup> April 2022 which was heard viva voce seeks to revoke the Grant of Letters of Administration made to the Petitioner on 15<sup>th</sup> April 2002 and confirmed on 12<sup>th</sup> July 2007 and then rectified on 15<sup>th</sup> December 2009. The application seeks the following reliefs:
  - i. Spent;
  - ii. Spent;
  - iii. The Grant of Letters of Administration issued to Albert Mabango Musungu, the Petitioner herein be revoked and/or annulled;
  - iv. The Objector be henceforth included as amongst the beneficiaries of the deceased's estate as a purchaser of parcel of land Bungoma/Naitiri/980 measuring approximately 5 acres.
  - v. Costs.
2. The application was centered on grounds inter alai; that the Objector purchased LR No. Naitiri/99/ Tongaren/Bungoma measuring approximately 5 acres from the deceased in 1989 and that a dispute arose between them on the aspect of transfer of the same to the Objector. The same was filed before the Tongaren Land Disputes Tribunal on 23<sup>rd</sup> March 1995 whereby the Tribunal issued a determination in favour of the Objector. The deceased proceeded to appeal the decision of the Tribunal to the Provincial



Tribunal in Kakamega wherein the Provincial Tribunal upheld the decision of the Tongaren Land Disputes Tribunal. Upon the demise of the deceased, the administrator of the estate of the deceased proceeded to file a suit at this Court vide Civil Case No. 80 of 2004 seeking eviction order against the Objector from the said parcel of land. Justice S. Mukunya vide a judgement delivered on 11<sup>th</sup> May 2016 issued orders that the Objector file an application to compel the Land Registrar Bungoma County to have LR No. Naitiri/99/Tongaren/Bungoma measuring 5 acres be registered in the name of the Objector. According to him, the proceedings that led to confirmation of the grant were defective in substance and obtained fraudulently by the making of a false statement and concealment of material facts from the Court. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

3. The application was supported by the affidavit sworn by the Objector Jackton O. Ohutso (the purchaser herein) on 12<sup>th</sup> April 2022 wherein he reiterated the grounds on the face of the summons.
4. The application was opposed by the Petitioner vide a replying affidavit sworn on 18<sup>th</sup> July 2022 and filed on 19<sup>th</sup> July 2022. He deponed that during the tenure of the Grant proceedings, the Objector did not lodge any objections and that his summons for revocation of Grant are simply an afterthought. It was alleged that the Objector failed to point out whether the transaction regarding the place where he had bought the 5 acres from the deceased and whether he ever received the consent from the Land Control Board as the same was a controlled transaction and that the Objector is ingeniously trying to enforce a void agreement which ought not to be entertained by this Court. He averred that the Objector is not a beneficiary to the estate of the deceased thus cannot enforce a purchaser's interest in these proceedings.

### **Objector's Case**

5. OB PW1 was Jackton Onyango Ohutso, who adopted his witness statement and documents filed on 14<sup>th</sup> March 2022 as his evidence in Chief. He testified that the dispute at hand touches on the distribution of the estate of Peter Musungu Mabango the deceased herein and the ownership of 5 acres of land from LR No. Naitiri/99/Tongaren/Bungoma by the purchaser (Objector herein). He stated that he purchased 5 acres of land from the deceased vide an agreement dated on or about 31<sup>st</sup> December 1989 for a consideration of Kshs. 128,780/= . The first payment of Kshs.100,000/= was made on 31<sup>st</sup> December 1989 and the balance of Kshs. 28,780/= cleared on 25<sup>th</sup> March 1990/= . Upon clearing the balance, the deceased denied the Objector access to the land and further failed on several occasions to initiate the transfer of the said 5 acres as he never appeared before the Land Control Board. A dispute arose between the deceased and the Objector leading to the involvement of the Tongaren Land Dispute Tribunal on 23<sup>rd</sup> March 1995 which proceeded to issue a determination in favour of the Objector. The deceased proceeded to appeal the said decision to the Provincial Tribunal in Kakamega which upheld the decision of the Tongaren Tribunal. At the demise of the deceased, the family of the deceased proceeded to institute a suit vide Civil Case No. 08 of 2004 seeking eviction orders against the Objector but the Court vide a judgement by Justice S. Mukunya on 11<sup>th</sup> May 2016 dismissed the case and ordered the Objector to file an application compelling the Land Registrar Bungoma County to have the subject 5 acres be registered in his name. However, it was his contention that the same was not effected as the proceedings that led to the Grant failed to capture and disclose his interests in the estate of the deceased herein.
6. On cross-examination, he told the Court that he purchased the contentious 5 acres in December 1989 and that he did not procure the consent of the Land Control Board. He testified that the decision of the Provincial Appeal Committee was rendered on 5<sup>th</sup> February 2001 after the demise of the deceased, who died on 6<sup>th</sup> November 1999 and that he is currently in occupation of the 5 acres.



7. On re-examination, he told the Court that, he is in occupation of the 5 acres and that the issue of the death of the deceased during the appeal proceedings did not arise at all.
8. OB PW2 was Aggrey Manyonge Wamucho, who told the Court that he wished to rely on and adopt his witness statement recorded on 28<sup>th</sup> January 2020 as his evidence in chief. According to him, the deceased sold the parcel LR No. Naitiri/99/Tongaren/Bungoma to be precise 5 acres to the Objector herein so that he could use the money to settle Agricultural Finance Corporation & KGCU loans but that he did not have documents as they were processed by the buyer. According to him, the Objector approached him when the deceased became reluctant to process the transfer of the land documents and that he was involved in the dispute resolution as a witness before the Tongaren Divisional Dispute Tribunal and the Western Provincial Land Dispute Appeals Tribunal.
9. On cross-examination, he told the Court that the parcel that was sold was LR No. Naitiri/99/Tongaren/Bungoma and that he witnessed the payment of the first amount Kshs. 100,000/=

### **Petitioner's case**

10. PET.PW1 was Albert Mabango Musungu, who told the Court that he wished to rely on and adopt his replying affidavit sworn on 18<sup>th</sup> July 2022 as his evidence in chief. According to him, during the tenure of the Grant proceedings the Objector did not lodge any objections and that his summons for revocation of Grant are simply an afterthought. It was alleged that the Objector failed to point out whether the transaction where he bought the 5 acres from the deceased ever received the consent from the Land Control Board as the same was a controlled transaction and that the Objector is ingeniously trying to enforce a void agreement which ought not to be entertained by this Court. He averred that the Objector is not a beneficiary to the estate of the deceased thus cannot enforce a purchaser's interest in these proceedings.
11. On cross-examination, he told the Court that as per the agreement the Objector purchased land and that he is aware of the matter Bungoma HCC No. 8 of 2004. According to him, he did not appeal against the decision of the Court in Bungoma HCC No. 8 of 2004 and that his prayer was to evict the Objector from LR No. Naitiri/99/Tongaren/Bungoma.
12. On re-examination, he told the Court that the Objector was not on the land when the judgement in Bungoma HCC No. 8 of 2004 was issued.
13. At the conclusion of the hearing, parties were instructed to file and exchange their written submissions and the matter was subsequently set down for judgment. The Objector duly filed and exchanged his submissions.
14. The issue for determination herein is whether the Objector's application meets the threshold for the revocation of a grant within the meaning of section 76 of the [Law of Succession Act](#).
15. For avoidance of doubt, section 76 of the [Law of Succession Act](#) states 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.”

16. Section 76 was clearly expounded on by the Court *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR where it was stated that:

“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.”

17. The Objector invited this Court to revoke the grant of letters of administration for the reasons that the Petitioner obtained the confirmed grant by way of concealment of a material fact that he was entitled to 5 acres of the suit land having bought it from the deceased because both parties evidence confirmed



that he bought the suit land and that what was pending was the appearance of the deceased before the Land Control Board to effect transfer of title to the Objector. According to the documents as relied upon by the Objector, it is evident that this Court found him to be the legitimate owner of the 5 acres from LR No. Naitiri/99/Tongaren/Bungoma and that the family of the deceased proceeded with the process for Grant of Letters of Administration in which he was not included as a beneficiary in both the petition and summons for confirmation of Grant.

18. From the foregoing and from my thorough perusal of the Court's records, it is my view that the Petitioner purposely disinherited the Objector (purchaser). There is evidence in place to prove as much. In any case, the Petitioner has not adduced any evidence to prove that the purchaser denounced his interest in the suit land or asked to be refunded and/or if ever the said refund was made to him with regard to the 5 acres from LR No. Naitiri/99/Tongaren/Bungoma or that any other Court of superior status did overturn the decision of this Court in Bungoma HCC No. 8 of 2004. The manner in which the confirmation of Grant was undertaken is evidently improper. The manner in which this Grant was obtained is contrary to the dictates under section 76(b) and (c), for revocation of a Grant. The Court shall therefore, exercise its mind on the aforementioned issue.
19. For the foregoing reason, I find that the Grant should therefore be revoked
20. *In Re Estate of Moses Wachira Kimotho (Deceased)* Succession Cause 122 of 2002 [2009] eKLR, the Court made pronouncements on the importance of disclosing all material facts before a Court of law while seeking letters of administration and confirmation thereof. It observed;

“I am certain that had the Applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the Respondent been forthright and candid and included the Applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The Respondent knew of the Applicants' interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant.”

21. Section 76 of the Act envisions that a Grant can be revoked where the Grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The Petitioner was aware of the Judgement of this Court in Bungoma HCC No. 8 of 2004 but still went ahead not to implement it but kept the objector in the dark and failed to accord him an opportunity to contest his interest as a creditor to the estate of the deceased during the confirmation of the grant. This was clearly a fraudulent and a concealment of a material fact from the court. In any event, the petitioner ought to have lodged an appeal against the judgement of this court made in HCC. No. 8 of 2004 but not to surreptitiously file for grant and had it confirmed without the courtesy of inviting the objector to appear in court and prove his interest in the estate. As long as the objector had bought land from the deceased, there is no way that the petitioner could run away from the stark reality that the objector is a creditor to the estate. It is instructive that the petitioner having sued the objector vide HCC No. 8 of 2004 for eviction from land that he was in occupation cannot be said to be unaware that there was someone on the land during the confirmation of grant proceedings. This was a clear deceit on the part of the petitioner. Again, the petitioner's claim that the parcel of land in issue quoted in the sale agreement between deceased and objector a= is different from the one he distributed is not



convincing in view of the fact that he did file a suit against the objector seeking to evict him the same land that he distributed. This then implies that the land reference numbers may have been changed during the conversion from settlement allocation to freehold titles. It is not in dispute that the objector is still in occupation of the portion of land that he bought from the deceased.

22. It is noted that the objector has sought for revocation of the grant as well as the certificate of the confirmed grant. I find it will not be appropriate to revoke the grant issued to the petitioner as an administrator. I find it is appropriate to only interfere with the certificate of confirmation of grant so as to capture the objector's interest in the estate as a creditor and or liability to the estate. The objector will then be entitled to five acres while the balance of 9.96 acres will be registered in the name of the petitioner to hold in trust for himself and the rest of the beneficiaries. There is also need to ensure that any titles so far issued ought to be cancelled and the property do revert back in the name of the deceased for purposes of redistribution as proposed herein.
23. In light of the above, I find merit in the Objector's summons for revocation of grant dated 12/4/2022. The same is allowed in the following terms:
- i. The certificate of confirmation of grant issued to Albert Mabango Musungu on 15<sup>th</sup> April 200 on 12<sup>th</sup> July 2007 and rectified on 15<sup>th</sup> December 2009 is hereby cancelled.
  - ii. The Objector herein Jackton Onyango Ohutso is hereby declared as a genuine creditor and or liability in the estate of the deceased herein and thus entitled to a share of the estate of the deceased.
  - iii. A fresh and rectified certificate of confirmation of grant be and is hereby issued to Albert Mabango Musungu in which the estate of the deceased comprised in LR No. Bungoma/ Naitiri/980 is re-distributed as follows:
    - a. Jackton Onyango Ohutso.....5 acres
    - b. Albert Mabango Musungu.....9.96 acres (to hold in trust for himself and Alex Musungu, Pascal Mulongo, Mathias Khisa Musungu, Patrick Musungu, Moses Babu and Robert Buliba.
  - iv. Any titles that had been issued pursuant to the impugned certificate of confirmation of grant dated 12/7/2007 and rectified on 15/12/2009 be and are hereby cancelled by the Bungoma County Land Registrar and the same do revert in the name of the deceased Peter Mabonga Musungu for re-distribution pursuant to order (ii) above.
  - v. The Parties to appear before the Land Registrar Bungoma within 60 days for purposes of effecting the necessary transfer of title and changes in Land register.
  - vi. Each party to bear their costs.
24. It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**D. KEMEI**

**JUDGE**

In the presence of:

Omusundi for Objector

Murunga for Petitioner



