



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Mutuku Matolo Mui alias Mutuku Matolo (Deceased) (Probate & Administration 130 of 2011) [2022] KEHC 13105 (KLR) (26 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13105 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MACHAKOS**  
**PROBATE & ADMINISTRATION 130 OF 2011**  
**MW MUIGAI, J**  
**SEPTEMBER 26, 2022**  
**IN THE MATTER OF THE ESTATE OF MUTUKU**  
**MATOLO MUI ALIAS MUTUKU MATOLO (DECEASED)**  
**BENSON PHILIP MUTUKU .....PETITIONER/RESPONDENT**  
**VERSUS**  
**JACINTA MUENI JOHANA ..... APPLICANT**

**RULING**

**Court Record**

1. Mutuku Matolo Mui Alias Mutuku Matolo died on 6<sup>th</sup> October, 2009 as per Death Certificate serial No. 050603.
2. Benson Philip Mutuku petitioned for letters of administration and annexed the following documents; -
  - a. The Death Certificate Serial No 050603 issued at Makueni District on 11<sup>th</sup> January, 2011.
  - b. The Chief's letter dated 18/01/2011 from Kanthuni Location confirmed that the deceased person hailed from his area of jurisdiction – Kanthuni location, Yekanga sub-location – Kanthuni Division, Kanthownzweni district. He was married to the late Mutheu Mutuku.
  - c. He left behind the following beneficiaries.
    - a. John Mutuku Matolo – son (deceased)
    - b. Benson Philip Mutuku – son
3. The Deceased left behind the following properties known as
  - a. Parcel No. Makueni/Kimundi/2861 – (7.74 Ha)
  - b. Parcel No. Okia/Mukuyuni/1545 - (0.1Ha)
  - c. Parcel No. Okia/mukuyuni/1511 – (0.03 Ha)



- d. Parcel No.Okia/nzuuni/1718 – (1.50 Ha)
4. The Grant of letters of Administration was issued on 20<sup>th</sup> June, 2011 by Hon. P. Kihara Kariuki J (as he then was) to Benson Philip Mutuku.
5. The Certificate of Confirmation was issued on 26<sup>th</sup> July 2012; Makueni/Kimundi/2861  
Okia/Mukuyuni/1545  
Okia/Mukuyuni/1511  
Okia/Nzuuni/1718-1.08Ha registered in the name of Benson Philip Mutuku & 0.43Ha registered to Christine Saina Makembu

**Summons for revocation and/or rectification of grant dated on 31<sup>st</sup> may, 2019**

6. Jacinta Mueni Johana the Applicant herein filed Summons for revocation and sought the following orders; -
1. That the grant of letters of Administration (intestate) made to the Petitioner/Respondent by this Court in this cause and which were confirmed on 20<sup>th</sup> July, 2012 be revoked and/or rectified to reflect all the beneficiaries.
  2. That the subsequent dealings in the estate of the deceased and in particular the transfer of the parcels No. Makueni/Kimundi/2861, Okia/Mukuyuni/1545, Okia/Mukuyuni/1511 and Okia/Nzuuni/1718 to the Petitioner/ Respondent and Third parties be reversed and/or annulled.
  3. That costs of this application be paid out of the estate.
7. Applicant's Application is based on the following grounds:
- a. That the grant was obtained fraudulently by the making of a false statement.
  - b. That the grant was made fraudulently by misrepresentation and the concealment of material facts.
8. The Applicant filed Affidavit in support of summons for revocation and/or rectification deposing as follows: -
- a. That the deceased Mutuku Matolo Mui died sometime in 2010 and grant of letters of administration intestate was made and confirmed to Benson Philip Mutuku the Petitioner herein.
  - b. That the deceased herein, Applicant's father in was registered owner of all that parcels of land Known as Makueni/Kimundi/2861, Okia/Mukuyuni/1545, Okia/Mukuyuni/1511 & Okia/Nzuuni/1718.
  - c. That the late Mutuku Matolo Mui had only two sons, namely Benson Philip Mutuku (the Administrator herein) and Johana Mutuku Matolo – her late husband.
  - d. That her late husband Johana Mutuku Matolo died on 2<sup>nd</sup> February, 2010 leaving her and 5 issues.
  - e. That the Petitioner herein secretly petitioned the Court for letters of Administration intestate with an aim to disinherit the family of Johana Mutuku Matolo who as a beneficiary of the deceased is entitled to equal share with the petitioner.



- f. That the Applicant came to learn that the Grant of letters of administration intestate were issued and confirmed when she was served with Court documents on 15<sup>th</sup> April, 2019 in Makueni PMCC No. 49 of 2019 where the Petitioner/Respondent sought to evict her and her children from the land they inherited from their parents.
- g. That in the said grant the applicant and her children have been excluded and disinherited will all the Estate of Mutuku Matolo Mui.
- h. That the Petitioner hurriedly and clandestinely transmitted the entire parcel into his name and those of 3<sup>rd</sup> parties and caused title deeds to be issued for land parcels No. Makueni/Kimundi/286, Okia/Mukuyuni/1545, Okia/Mukuyuni/1511 & Okia/Nzuuni/1718.
- i. That the said grants are revoked and the subsequent transactions and dealing in the estate of the deceased are annulled and or reversed, the Applicant and her children stand to be disinherited.
- j. That the said grant be revoked and/or rectified to reflect all the beneficiaries of the Estate of Mutuku Matolo Mui and that the Estate be divided into two equal shares subject to all the liabilities existing prior to the demise of Mutuku Matolo Mui.

#### **Chamber Summons dated 12<sup>th</sup> October, 2020**

9. The Applicant herein filed a Chamber Summons seeking the following orders: -
  - a. (Spent)
  - b. That this Court grant an order of stay of proceedings in Makueni PMCC No. 49 of 2019 pending hearing and determination of the Summons for Revocation of the Grant herein dated 31/05/2019.
  - c. That costs of this application be in the cause.
10. The application was based on the following ground inter alia: that the Applicant is the widow to the late Johana Mutuku, son to the later Mutuku Matolo Mui therefore she is a beneficiary to the estate of the deceased; that the late Mutuku Matolo Mui had two sons including the Petitioner herein; that he had divided all his estate equally between both sons prior to his death; that the late Johana left behind a widow and 5 issues and are meant to enjoy the benefits of the deceased's estate.
11. That the Respondent secretly sought for certificate of confirmation of grant without involving all other beneficiaries; that the Respondent transferred the entire estate left by his father to his late father and him under his name; that the Respondent instituted a suit seeking to evict the Applicant and her children disinheriting them from the estate of Mutuku Matolo Mui.

#### **Replying affidavit sworn on 18<sup>th</sup> november 2020**

12. The Petitioner herein filed a Replying Affidavit deposing that:
  1. That the Applicant is not a widow of Johana Mutuku Matolo and there has never been any marriage between the two nor has there been any issues.
  2. That the late Matolo was married to another woman who is not the Applicant and were blessed with one (1) daughter.



3. That the late Johana Matolo sold all his property that had been bequeathed to him by our later father and left for unknown places but later traced when he was ailing and settled in the Respondents land as he had no nowhere else to go.
4. That Mutuku Matolo Mui is not father in law to the Applicant.
5. That the Applicant is married to another person who is not my brother, the late Johana Mutuku Matolo.
6. That he has not disinherited the Applicant as she is not a dependant nor related to myself as demanded by law.
7. That the Applicant has sold the entire parcel No. Okia/mukuyuni/2221 which forms part of the estate of the deceased necessitating the filing of Makueni suit.
8. That the Applicant is not approaching This Court with clean hands
9. That the 3<sup>rd</sup> parties who benefited from the estate of the late Mutuku Matolo did not bought land form the deceased personally.
10. That the applicant is not a beneficiary of the estate of Mutuku Matolo Mui and the application dated 31<sup>st</sup> May 2019 lacks merit and should be dismissed with costs to the Respondent.

## SUBMISSIONS

### **Applicant's submissions**

13. The Applicants submits that she filed an application dated 31/05/2019 seeking for orders for revocation of grant that was confirmed on 20/07/2012. The applicant based her application on the following grounds: -
  - a. That the grant was obtained fraudulently by making false statements
  - b. That the grant was obtained fraudulently by mis presentation and concealment of material facts.
14. The Applicant herein has a duty to prove that the grounds set out in Section 76 of the *law of Succession Act* are adhered to before the Grant is revoked.

In the case of *Albert Imbuga Kisigwa –vs- Recho Kavai Kisigwa* Succ Cause No. 158 of 2000 the Court noted thus;-

“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.”

The Court in the case of *Jamleck Maina Njoroge –vs- Mary Wanjiru Mwangi* [2015] eKLR at Par 11 it stated as follows; -

“The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party



or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

### **Respondents submissions of 18/11/2020**

15. The Respondent submitted that the Applicant filed an application dated 13/10/2020 to stay proceedings in this cause. The Applicant has also filed a similar application in Makueni Civil Suit No.49 of 2019 dated 15<sup>th</sup> September, 2020 which is pending ruling before the Trial Court. This is clearly forum shopping and trying their lack in any Court possible.
16. In the case of Gitu Geoffrey & Simon Gitumbirira vs Charlene Njeri Kuria Civil Application No.164 of 2017 (UR 130/2017) it was stated that seeking similar reliefs in different Courts amounts to abuse of the Court process and it must be discouraged.
17. That the Applicant is in occupation and enjoying the land registered in the name of the Respondent as she had sold the Respondent's land and is only stalling the Civil Suit No.49 Of 2019.
18. The Court while quoting ELC No. 112 of 2017 Jackson Lukali Igweta –vs- David Maingi & 2 others stated in Halsbury's law of England 4<sup>th</sup> Edition vol. 37 on pages. 330 & 332;

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt, ought not to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The Application for stay on this ground must show not merely that the Plaintiff might not, or probably would not succeed but that he could not possibly succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”

19. It was finally submitted that the Applicant is clearly out to frustrate the respondent from enjoying his property. That the applicant has not shown any reasons as to why the court ought to stay proceedings nor the delay in prosecuting the summons for revocation of the grant. The same application is pending before the lower court in Civil Suit No. 49 of 2019.

### **Respondent's submissions on 22/4/2022**

20. Section 109 of the *Evidence Act* is to the effect that 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.
21. In the case of *Philmark Systems Co. Limited vs Andermore Enterprises* [2018] eKLR the court cited the case of *IEBC & Anor vs Stephen Mutinda Mule & 3 others* [2014] which also cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Limited –vs- Nyasulu*;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without



due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defense not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defense not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

22. The Applicant claims that the Respondent concealed to court o material facts in exclusion of other beneficiaries and wish to submit that the Applicant is a stranger and not a wife to the deceased Johana. No proof of marriage or cohabitation has been provided.
23. Finally, it was submitted that the proceedings or confirmation were not defective in any form nor were they fraudulently obtained or that there was concealment of material facts.

#### **Determination**

24. The Court considered the pleadings and submissions and the issue that arises for determination is whether the grant issued and confirmed by the Court to the Respondent; the deceased’s surviving son Benson Philip Mutuku should be revoked or not.
25. The 2<sup>nd</sup> issue that arises is whether ELC proceedings in ELC 49 of 2019 in the Application filed on 11/4/2019 (the application is directly related to this matter and pleadings closed submissions were filed but was not heard and determined) where the Respondent filed suit against the Applicant herein on ownership of the suit property Ukia /Mukuyuni/2221 which was formerly Ukia/Nzuuni/1781 but was transferred after grant in the instant matter Succession Cause 130 of 2011 was confirmed.

Section 76 of *Law of Succession Act* provides;

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;
26. The Applicant’s case is that the deceased was/is the Applicant’s Father-in-law as she is the widow of the deceased’s late son, Johana Mutuku Matolo and the Registered owner of Makueni/Kimundi/2861, Okia/Mukuyuni/1545, Okia/Mukuyuni/1511 & Okia/Nzuuni/1718.



27. The Applicant deposed that her late husband died on 2/2/2010 leaving her and 5 children and have been settled on the suit property Ukia/Mukuyuni/2221 to date.
28. By virtue of the pending Application ELC 49 OF 2019 SPM CT MAKUENI where the Respondent sought orders that the Applicant among other defendants are to be evicted from the suit premises and the Applicant herein seeks stay of the pending proceedings as she pursues the revocation of grant issued to the Respondent in the instant Proceedings. The Applicant asserts that the Respondent solely pursued and obtained a grant and confirmed grant of the estate of the deceased and although disclosed the deceased brother, he failed to disclose his widow the Applicant and the 5 children as beneficiaries to the deceased's estate.
29. On the other hand, the Respondent asserted that that the Applicant was not the wife of his late brother, Johana Mutuku Matolo and alleged that the Applicant was married to someone else. That he has not disinherited the Applicant as she is not a dependant nor related to myself as demanded by law.
30. The Respondent indicated that, the Applicant has sold the entire parcel No. Okia/mukuyuni/2221 which forms part of the estate of the deceased necessitating the filing of Makueni suit, ELC 49 OF 2019 SPM CT Makueni
31. Therefore, the grant issued and confirmed to him by this Court was not obtained fraudulently and he did not fail to disclose material facts or conceal material facts as to the beneficiaries of the deceased's estate.
32. The Applicant reiterated and submitted that she well demonstrated the fact that she was wife to the deceased's beneficiary his late son, Johana Mutuku Matolo and therefore is entitled to inheritance from the estate of the late father; the deceased herein. The Applicant asserted that she met the threshold provided under Section 76 of Law of Succession Act.
33. The Petition for letters for administration filed in this Court on 10/2/2011 disclosed beneficiaries of the deceased's estate as the 2 sons of the deceased John Mutuku Matolo – son (deceased) & Benson Philip Mutuku – son.
34. The Kanthuni Location, Mavindini Chief's letter of 18/01/2011 depicted the surviving son, Benson Philip Mutuku & John Mutuku Matolo (deceased) as beneficiaries of the deceased.
35. On the other hand, the Applicant annexed letter from the Ukia- Makueni Chief of 9/10/2020 and outlined the beneficiaries of the estate of Mutuku Matolo as;
  1. John Mutuku (Deceased)
  2. Nini Mutuku
  3. Syombua Mutuku
  4. Maluva Mutuku
  5. Nthemba Mutuku
  6. Mulike Mutuku
  7. Muthini Mutuku
36. The Court record finds that there are divergent lists of alleged beneficiaries of the deceased by the warring parties to the dispute without tangible and cogent evidence or proof.



37. This Court finds that the facts deposed by the Applicant and Respondent are unconfirmed allegations and counter allegations by and against each other. The standard of proof in civil matters is prescribed by Section 107-112 of the Evidence Act. In a nutshell he who alleges must prove.
38. In the instant case the Applicant has not proved the allegation that she was/is wife/widow of the deceased's son by production of any legal document or evidence deposed in an Affidavit (s) to confirm any marriage negotiations and/or traditional wedding to persuade this Court to proceed for hearing of the matter through viva voce evidence. There are no legal documents to confirm the 5 children of the deceased son of the deceased. The facts deposed without proof do not amount to tangible and cogent evidence that the Applicant was/is family of the deceased. The evidence has not met the legal standard of proof and that the Respondent concealed the fact and obtained fraudulently the grant and confirmed grant without oral evidence where the veracity of the evidence and demeanor of the witness is tested through cross examination. The Court makes reference to point in the following case;
39. In the case of M'nkiria Petkay Shen Miriti vs Ragwa Samuel Mbae and 2 Others, Election Petition NO. 4 OF 2013, it was observed that:
- “(42) In relation to the allegations that the affidavits are bad in law for being false, I take the view that as section 109 of the Evidence Act provides, the burden of proof of particular facts lies on the person who alleges those facts. ....The veracity of the contents of affidavits can only be tested when the witnesses of either side take the stand. This makes the issue unsuitable for determination at the preliminary stage as the court has not had an opportunity to hear the witness evidence. The Applicants are therefore asking the court to make a decision on the basis of untested evidence which this court cannot do. As was noted by Kimondo J in Nairobi Election Petition 2 of 2013 Steven Kariuki v. George Mike Wanjohi & Others at page 16: Ideally, cases should be determined on tested evidence at a full hearing.” (Emphasis added)
40. From the above reasoning and finding and taking into account that pleadings filed bind parties and the Court as found in Philmark Systems Co. Limited vs Andermore Enterprises [2018] eKLR supra; there is no sufficient evidence adduced by the Applicant at this stage to warrant the grant of 26<sup>th</sup> May of 2011 and confirmed grant of 5<sup>th</sup> June 2012 to be revoked under Section 76 of Law of Succession Act.
41. To the next question, regarding the application that this Court grant an order of stay of proceedings in Makueni PMCC No. 49 of 2019 pending hearing and determination of the Summons for Revocation of the Grant herein dated 31/05/2019. The Applicant relied on ELC No. 112 of 2017 Jackson Lukali Igweta –vs- David Maingi & 2 others,supra
42. See Ringera J. (as he then was) Global Tours &Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 thus;
- “...whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether



it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

43. The Environment & Land Court is vested with jurisdiction to hear and determine ownership use and title of land. The Respondent obtained a grant and confirmed grant from this Court and obtained the beneficial interest from the deceased’s estate to his ownership. Therefore, the Trial Court is legally entitled to investigate ownership of land between the Respondent’s interest and the Applicant’s claim as wife/widow of the John Mutuku Matolo – son (deceased) the deceased’s son; Mutuku Matolo alias Mutuju Matolo. It is not in the interest of justice to stop the hearing of the ELC case as each party is entitled to access to justice by virtue of Article 22 48 & 50 of *the Constitution* of Kenya. The hearing and determination of the ELC matter should proceed if parties move the Trial Court appropriately.

### **Disposition**

1. This Court finds that the evidence on record is not sufficient to prove on a balance of probabilities that the Applicant was/is wife/widow of the Deceased’s late son John Mutuku Matolo (deceased) and that the Applicant and 5 children are beneficiaries of the deceased.
2. The Court did not find sufficient evidence to prove that the Respondent was engaged in concealment of material facts and fraudulently obtained the grant and confirmed grant issued to the Respondent, Benson Philip Mutuku.
3. That ELC 49 OF 2019 SPM CT MAKUENI shall proceed before the Trial Court if and when the parties move the Court appropriately.
4. No orders as to costs are granted as it is a family matter.

**DELIVERED & SIGNED & DATED IN OPEN COURT ON 26<sup>TH</sup> SEPTEMBER 2022.**

**M.W. MUIGAI**

**JUDGE**

