



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

FAMILY DIVISION
SUCCESSION CAUSE NO. 13 OF 1996

IN THE MATTER OF THE ESTATE OF JOSEPH MWEU NZAU (DECEASED)

BEATRICE MULOKO KILONZO

(legal Representative in the Estate of Dishon Kilonzo Mweu (Deceased)).....**APPLICANT**

VERSUS

ISAAC MWONTHI MWEU.....**1ST RESPONDENT**

THERESA MUSYOKA MWEU.....**2ND RESPONDENT**

AND

DELUXE TECHNOLOGIES LTD......**1ST INTERESTED PARTY**

SAMUEL NGUNJIRI GICHUKI.....**2ND INTERESTED PARTY**

PETER KIIRU MWANGI.....**3RD INTERESTED PARTY**

PROMISED LAND

GITHURAI SELF HELP GROUP.....**4TH INTERESTED PARTY**

RULING

1. The deceased Joseph Mweu Nzau died intestate on 3rd May 1992. In the petition for the grant of letters of administration intestate filed on 4th January 1996 by his sons Benjamin Musyoka Mweu and Thomas Muisyo Mweu it was declared that the deceased had left the following children, all sons:-

- (a) Dishon Kilonzo Mweu;
- (b) Isaac Mwonthi Mweu (the 1st respondent);
- (c) James Mulwa Mweu;
- (d) Benjamin Musyoka Mweu (petitioner);
- (e) Samson Kivuva Mweu;
- (f) Thomas Muisyo Mweu (the petitioner); and
- (g) Raphael Muange Mweu.

The estate was indicated to comprise: -

- a) 100 acres in Yatta Plateau;
- b) 37 acres in Katheka Sub-location (Mukuyuni);
- c) Shares in Komarock Ranching Cooperative Society; and
- d) Shares in Prim Villa Cooperative Society.

The grant was issued on 12th March 1996.

2. When the matter came for the confirmation of the grant, the court pointed out that the proposed sharing did not include the three daughters of the deceased. The daughters were: -

- (a) Elizabeth Mukonyo;
- (b) Tabitha Mwawa; and
- (c) Veronica Mwikali.

3. On 22nd October 2010 an application dated 15th October 2010 was filed by the 1st respondent seeking the revocation of the grant, and that a fresh grant be issued jointly to him and to Raphael Muange Mweu. The 1st respondent complained that the petitioners had taken unduly long to have the grant confirmed. He informed the court that one petitioner (Benjamin Musyoka Mweu) had since died. Further, that another of the deceased's sons James Mulwa Mweu had died on 15th September 2010 following which there was a court case regarding his burial place. The court heard the application and on 31st December 2010 gave a ruling revoking the grant issued on 12th March 1996. A fresh joint grant was issued to Thomas Muisyo Mweu, the 1st respondent, Veronica Mwikali and Theresa Musyoka Mweu (the 2nd respondent). The 2nd respondent was the widow of the late Benjamin Musyoka Mweu.

4. Following an application for the confirmation of the grant, the applicant Beatrice Muloko Kilonzo (widow to Dishon Kilonzo Mweu who had died on 22nd October 1995) filed a protest complaining that she was being provided with only 5 acres from the estate of the deceased. The protest was dismissed on 24th February 2017. Evidence had been given that the late Dishon Kilonzo Mweu had been given more land by the deceased. The reason why the applicant's application was dismissed was that she had not taken out a grant in relation to her deceased husband and therefore her application was not competent.

5. On 18th December 2017 the grant was confirmed. This followed an application dated 31st October 2017 and filed on the same date by the administrators (the 1st and 2nd respondents, Thomas Muisyo Mweu and Veronica Mwikali). The application received the consent of Samson Kivuva Mweu and Raphael Muange Mweu.

6. The applicant filed the application dated 3rd May 2019 seeking the revocation of the certificate of confirmation issued on 18th December 2017; an order to preserve parcel Donyo Sabuk Komarock Block 1/62 which had been subdivided into parcels Nos. 84321, 84322, 84323 and 84324; and Land Registrar Machakos County be ordered to cancel the titles issued (Nos 84321, 984322, 84323 and 84324) following the subdivision of Donyo Sabuk Komarock Block 1/62 so that the parcel could revert to its original number. The applicant sought an interim order of injunction to restrain the administrators, their servants and/or agents from further alienating, selling, gifting, dealing, developing or in any other way dealing with Donyo Sabuk Komarock Block 1/62 and its subdivisions Nos 84321, 984322, 84323 and 84324 until the application was heard and determined.

7. The major complaint by the applicant was that the estate of her late husband Dishon Kilonzo Mweu had not been involved in the process leading to the confirmation of the grant, and had not been provided for in the sharing of Donyo Sabuk Komarock Block 1/62. In the confirmation, the 1st respondent had been given 24 acres of Donyo Sabuk Komarock Block 1/62; the estate of Thomas Muisyo Mweu had got 34 acres from the parcel and Veronica Mwikali Mweu had got 4 acres from the parcel. The applicant stated that her late husband had got only 5 acres while the deceased was alive. This was Matungulu/Kingoti/1899. She sought the interim injunction because, she said, the administrators had already subdivided the parcel of land with a view to transferring the same. On 3rd June 2019 I granted the prayers for injunction and preservation of the estate in the interim basis. The prayer for revocation was based on concealment of material facts.

8. The respondents filed grounds of opposition together with a replying affidavit sworn by the 1st respondent. Their case was that following the death of the deceased, the sons of the deceased met on 19th October 1996 ("IMMI") and shared out the estate of the deceased among themselves bearing in mind what the deceased had wished. The applicant was present, representing her late husband Dishon Kilonzo Mweu. It was acknowledged that the deceased had given to Dishon Kilonzo Mweu the Land No. 594 Katheka Sub-location and the Land No. 1899 at Kingoti Sub-location in Matungulu Division. The total acreage was 37 acres. Dishon Kilonzo Mweu had settled on Katheka land. He had 8 children. When he died he was buried here. It was agreed in the meeting that the deceased's Plot No. 126 at Komarock measuring 100 acres be shared equally (each 26 ½ acres and Benjamin Musyoka Mweu 20 ½) among the 1st respondent, James Mulwa Mweu, Thomas Muisyo Mweu and Benjamin Musyoka Mweu, the 6 acres at Kamulu and 2 acres at Komarock to be shared among the four sons. All the sons signed as did the applicant. When on 19th April 2011 the 1st respondent applied to confirm the grant that had been issued to him and others, the applicant protested raising the same issues contained in her application for revocation. She complained she had been given 5 acres only and also sought to share in the share that had been allocated to James Mulwa Mweu who had died without a wife or child. The parties had given oral evidence on the protest. The court had on 24th February 2017 dismissed the protest on the basis that she could not lay a claim to the estate due to her late husband without first getting a grant of letters of administration intestate. The application for confirmation was eventually not heard. I find that the court did not determine what was due to the applicant's late husband. The court did not

determine what was going to happen to the land that was due to the late James Mulwa Mweu.

9. The respondents further opposed the application for revocation on the basis that the applicant lacked the *locus standi* to bring the same, because she had not obtained a valid grant in respect of the estate of her late husband and that she was not a dependant of the late Joseph Mulwa Mweu. The applicant had on 18th January 2019 obtained a grant of letters of administration *ad litem* from the Senior Resident Magistrate at Machakos. I notice that the grant issued to the applicant was –

“limited to the purposes of representing the deceased in Succession Cause No. 13 of 1996 Nairobi to its final determination.”

It is a relevant grant. My view, however, is that the applicant was the wife of the son of the deceased. She had children with her late husband. Upon the death of her husband, she stepped in his shoes as a direct beneficiary of the estate of the deceased. It was on the same basis that the 2nd respondent (the widow of a son of the deceased called Benjamin Musyoka Mweu) had become one of the administrators of the estate of the deceased, having been recognised as a beneficiary of the estate of the deceased. The 2nd respondent cannot herself be a beneficiary and administrator of the estate of the deceased and then stop the applicant from being a beneficiary of the same estate. One would ask whether she herself obtained a grant in respect of the estate of the deceased before participating in these proceedings!

10. I should point out that in **Re Estate of the Late M’thigai Muchangi (Deceased) [2020]eKLR, in the Estate of Florence Mukami Kinyua [2018]eKLR** and in **Re Estate of James Kiani Kiranga (Deceased) [2020]eKLR**, and in several other decisions, it has been held that a daughter-in-law of a deceased, in the sense that she was the widow of the late son of the deceased, was a recognised beneficiary of the estate of the deceased. In effect, therefore, the applicant did not require a grant in respect of the estate of her late husband to file the application for revocation, or to participate in these proceedings.

11. It was pointed out that there was the application for confirmation dated 19th October 2011 and filed on 16th December 2011 by the 1st respondent which was accompanied by the consent of the applicant to the proposed distribution of the estate of the deceased. I consider that in the application the 1st respondent, estate of James Mulwa Mweu, Thomas Muisyo Mweu were to get 26 ½ acres each from Donyo Sabuk Komarock Block 1/62 and the estate of Benjamin Musyoka Mweu was to get 20 ½ acres from the same. In the questioned application for confirmation dated 31st October 2017, the 1st respondent was to get 34 acres from parcel Donyo Sabuk Komarock Block 1/62, the 2nd respondent was to get 24 acres, Thomas Muisyo Mweu was to get 34 acres and Veronica Mwikali Mweu was to get 4 acres, all from the same parcel.

12. It is clear that the applicant did not consent to the application for confirmation dated 31st October 2017, and she did not participate in the hearing of the same. It does not matter that she had consented to the application of 16th December 2011. The application of 31st October 2017 was a new application with a different distribution proposal. She was a beneficiary of the estate of the deceased. Her consent was required, the same way it had been required on 16th December 2011 and on 18th October 1996. In the Court of Appeal decision in **Samwel Wafula Wasike –v- Hudson Simiyu Wafula, Civil Appeal No. 161 of 1993** it was held that –

“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”

Further in the **Estate of Ezekiel Mulanda Masai, P & A No. 4 of 1992**, the petitioner filed a petition for the grant of letters of administration and excluded the widow, the step mother of the deceased and a son to the deceased. The court held that the confirmed grant should be revoked on the grounds that it was obtained fraudulently without disclosing all material facts and by excluding some of the survivors of the deceased.

13. Under **section 71 of the Law of Succession Act (Cap. 160)** and **rule 40 of the Probate and Administration Rules**, the administrators filed the application dated 31st October 2017 and swore that the deceased was survived by seven sons, who include the late Dishon Kilonzo Mweu, the late husband of the applicant. In paragraph 4 of the affidavit, they swore as follows:-

“4. THAT all the other dependants of the estate of the deceased have consented to the grant being confirmed”

That was a false declaration in relation to the deceased Dishon Kilonzo Mweu. He was deceased and he had not provided his consent. His widow (the applicant) was a beneficiary who had stepped in his shoes. She was not invited to provide her consent. There was no evidence that she was served with the application. She was denied her right to be heard on the application for the confirmation of the grant of the estate of the deceased.

14. Veronica Mwikali Mweu who was a beneficiary was not in the agreement dated 18th October 1996 or that of 16th December 2011. In the sharing of 31st October 2017 James Mulwa Mweu did not benefit, because he had died. It is apparent that the respondents, Thomas Muisyo Mweu and Veronica Mwikali Mweu were now sharing what was due to James Mulwa Mweu. This was being done without reference to the other beneficiaries of the estate, including the applicant. Following the death of James Mulwa Mweu, his entitlement was supposed to go back to the pool (as part of the estate of the deceased) to be shared among all the beneficiaries. It is clear that the applicant was disinherited of the deceased’s estate that had been given to James Mulwa Mweu who had subsequently died.

15. Deluxe Technologies Limited (1st interested party), Samuel Ngunjiri Gichuki (2nd interested party), Peter Kiiru Mwangi (3rd interested party) and Promised Land Githurai Self Help Group (4th interested party) stated that they were innocent buyers for value without notice who would be adversely affected if the application were to be granted. That was also the case by the respondents. Reliance was placed on **section 93 of the Act**. According to the 1st respondent, on the confirmation of the grant Donyo Sabuk Komarock Block 1/62 was subdivided and he

got Donyo Sabuk Komarock Block 1/8421. He subdivided it into four parcels which he sold to the interested parties. The 1st interested party further subdivided his portion into 198 parcels and the 4th interested party subdivided their parcel into 73 parcels. Each interested party intended to sell the respective parcels. The respondents and the interested parties stated that Donyo Sabuk Komarock Block 1/62 no longer existed, and therefore the grant of the application would be a futile exercise.

16. Mary Matumaini is the widow of Thomas Muisyo Mweu who, apparently, died after the grant was confirmed. She filed summons dated 27th November 2020 under **section 47** of the **Act** and **rule 73** of the **Probate and Administration Rules** asking that the application for revocation be struck out; the injunctive orders issued on 14th June 2019 be reviewed, vacated and/or set aside; and the Land Registrar Machakos be directed to remove the prohibitions, cautions and/or restrictions placed on Donyo Sabuk Komarock Block 1/85317 and 85318. It is clear that the two parcels are the ones that Thomas Muisyo Mweu got following the confirmation of the grant. Following his death Mary Matumaini became the registered owner. The injunctive and preservation orders issued by the court were registered on the titles. She complained that she was not served with the application that led to the orders; that she was adversely affected by them without being afforded a hearing; and that the distribution of the estate having been done, there was no estate available that could form the basis for the application for revocation. She reiterated that the applicant's late husband had been provided for with much bigger land; that the applicant had consented to all the transactions leading to the confirmation; and therefore the application had no legal or factual basis.

17. Then there is the application dated 18th November 2020 by D. B. Wati & Co. Advocates who are on record for the administrators. It sought that the proceedings of 3rd June 2019 and the injunctive and preservation orders granted that day be reviewed and set aside to allow for the fresh hearing of the application that led to the orders. Mr. David Biketi Wati, advocate in the firm, swore a supporting affidavit to say that the application had been served without indicating the hearing date or where the matter would be heard. The next thing they saw were the orders. Counsel denied that Billy Amendi & Co. Advocates who were acting for Mary Matumaini had been served, and stated that the filed affidavit of service was not truthful. He stated that the parcels subject of the orders had already been subdivided and transferred. He deposed that the applicant had consented to the proposed mode of distribution. Reference was made to the ruling on 24th February 2017 on the protest by the applicant. Counsel stated that, because of that ruling, the present application was *res-judicata*. It is notable that the ruling related to an application of protest to the application for confirmation. It was not an application to revoke the grant.

18. Mr Wati's application is easy to deal with. He was not there when Billy Amendi & Co. Advocates were served, and he was not there when the applicant allegedly consented to all the processes leading to the confirmation of the grant. It is now trite that an advocate can only depone to matters which of his own knowledge he can prove. Otherwise, he cannot be permitted to swear in contentious matters. In **Magnolia PVT Ltd – Synermed Pharmaceuticals (K) Ltd [2018]eKLR** the court stated as follows:-

“Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided.....”

On basis of the foregoing, I strike out the supporting affidavit that was sworn by counsel. It follows that the application was not supported by evidence contained in an admissible affidavit. It is therefore struck out as being incompetent.

19. Charles Waweru Wanjohi, a director with the 1st interested party, swore that upon the 1st respondent showing them a copy of title deed for Donyo Sabuk Komarock Block 1/84684 and a copy of certificate of the confirmation of the grant they entered into agreement with him and bought it for Kshs.25,000,000/=, which they paid. The transaction was completed, and they became the registered owner. Subsequent to that they subdivided it into 198 new parcels. While seeking titles for the new parcels they were confronted with the injunction that the court issued. They complained that they had no notice of the application leading to the injunction, and that the Land Registrar did not give them notice before registering the orders of the court against the title. Their case was that they were strangers to the application for revocation; that they procedurally bought the parcel; they acquired a valid title which was not subject to any challenge; that no fraud or misrepresentation to which they were a party had been proved.

20. Samuel Ngunjiri Gichuki (2nd interested party) is treasurer for the 4th interested party. The group bought 6 acres of 1st respondent's 100 acres in Donyo Sabuk Komarock Block 1/62 on 15th June 2017 at Kshs.1.5 million per acre. The transaction begun before the confirmation of the grant and went on after the grant was confirmed on 18th December 2017. While subdividing the parcel they were caught up with the injunction. It is clear that before they entered the agreement to buy the parcel, the 1st respondent showed them the ruling of 21st February 2017. It was evident that the grant had not been confirmed.

21. Under **section 82(b)(ii)** of the **Act**, the 1st respondent had no power to sell the 6 acres, or any part of Donyo Sabuk Komarock Block 1/62 as the grant he was then holding had not been confirmed. The agreement entered into on 15th June 2017 between the 1st respondent and the 2nd and 4th interested parties offended the **Act**, and secondly, by that time the 1st respondent did not own the land that he purported to sell. The sale agreement was illegal and did not confer any proprietary interest on the 1st and 4th interested parties. In **Re Estate of Isaac Kaburu Marete [2017]eKLR**, it was held that the acquisition of land before confirmation is unlawful and does not enjoy property rights under the Constitution.

22. The 3rd interested party Peter Kiiru Mwangi stated that he had known the 1st respondent for many years and they had become friends. After he financially assisted the 1st respondent during the sickness of his wife and during her death, the latter showed appreciation by giving him 0.4046 ha comprised in Donyo Sabuk Komarock Block 1/84686 which was transferred to him on 23rd October 2018. It was a subdivision of Donyo Sabuk Komarock Block 1/84321 which was itself a subdivision of Donyo Sabuk Komarock Block 1/62 which belonged to the deceased. His case was that he was a lawful transferee of the parcel of land; that he had acquired it in good faith, for valuable consideration and therefore has indefeasible claim to the land.

23. Under **section 93** of the Act:

“(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.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.”

It is on the basis of these provisions that the interested parties claim that they innocently bought and/or acquired their respective parcels for value, in good faith, innocently, after due diligence and while not aware of any fraud or misrepresentation.

24. As for the 2nd and 4th interested parties, I have found that they bought the land before the grant was confirmed. In **Jecinta Wanja Karau –v- Rosemary Wanjiru Wanyoike & Another [2013]eKLR**, the Court of Appeal dismissed the case of the appellant who had sought protection under **section 93** of the Act when it stated:-

“Before the appellant could seek protection as a purchaser under Section 93 of the Act she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser. In any case, and as provided by Section 82(b)(ii) of the Act, it would have been illegal for Beatrice Njeri Magondu to sell the land before the confirmation of the grant.”

A purchaser has to be a legal purchaser, in the sense that he bought from a legal representative who had a confirmed grant. The 2nd and 4th interested parties were not legal purchasers.

25. In **Musa Nyaribari Gekone & 2 Others –v- Peter Miyienga & Another [2015]eKLR**, the Court of Appeal reiterated the position that while under **section 93** of the Act a revocation or variation of the grant does not invalidate a transfer by the personal representative, other considerations, such as the disposal of the property in contravention of the confirmed grant may invalidate the transfer.

26. In the instant case, the administrators in applying for the confirmation, purported that the applicant’s late husband had consented to the application. They knew the applicant was available as a beneficiary and made no reference to her. They went on to share the deceased’s estate without reference to her, with the result that they disinherited her. In **Re Estate of Christopher Jude Adela (Deceased)[2009]eKLR**, the widow of the deceased had in the petition for grant failed to mention that the deceased had other beneficiaries. She had obtained the grant, and gone on to obtain the transfer of the land into her name. She had then transferred the property to the interested party. It was contended that the confirmation of the grant was obtained fraudulently and by concealment of material facts. The interested party sought the protection of her title under **section 93(2)** of the Act. The Court stated that –

“In short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative.”

The court observed that the section cannot give absolute immunity against the challenges to transfer of immovable properties of estate by a personal representative. This was because: -

“.....it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of right beneficiaries of the estate.”

27. I determine that the administrators, who included the respondents, of the estate of the deceased were guilty of fraud and concealment of material facts when they had the grant confirmed without taking care of the interests of the applicant and without seeking her consent. They went on to share the whole estate. The 1st respondent proceeded to sell and/or transfer part of what he got to the interested parties. I find that a basic look at the proceedings leading to the confirmed grant, which any due diligence would entail, would have revealed the fraud. In any case, the 1st respondent had a fraudulent title which he could not legally pass.

28. Under **sections 47 and 76** of the Act and **rule 73** of the **Probate and Administration Rules**, I revoke the grant that was issued on 12th March 1996. I set aside and recall the certificate of confirmation that was issued on 18th December 2017. I rescind the transfer of Donyo Sabuk Komarock Block 1/62, or any subdivision of it, to the administrators and/or respondents, to Thomas Muisyo Mweu and/or Mary Matumaini, Veronicah Mwikali and the interested parties. Lastly, I direct the Land Registrar Machakos County to rectify the entries made in the register of Donyo Sabuk Komarock Block 1/62 indicating transfer by transmission to the administrators and others and the subsequent sale and transfer in the names of the interested parties and revert the property into the name of the deceased. The applicant will be paid costs of her application.

29. The applications dated 18th November 2020 and 27th November 2020 are each dismissed with costs.

DATED and DELIVERED at NAIROBI this 22ND day of JUNE 2021.

A.O. MUCHELULE

JUDGE