



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT VOI**  
**SUCCESSION CAUSE NO.50 OF 2015**  
**IN THE MATTER OF THE ESTATE OF EDWARD LENJO MUSAMULI (DECEASED)**  
**ISANGWA WISH GROUP RANCH .....INTERESTED PARTY/APPLICANT**

**R U L I N G**

1. What is before this honourable court is summons for revocation application dated 22 October, 2019 supported by the affidavit of MICHAEL BRUNO IRENGE sworn on 23<sup>rd</sup> October, 2019 seeking the following orders;

**a. Spent**

**b. The grant of letters of administration to Everest Matolo Lenjo and Dominy Lenjo Musamuli made on the 4<sup>th</sup> /11/2016 and confirmed on 31/7/2017 be revoked on the grounds that;**

**i. The administrators while aware that the estate of the deceased was indebted to isangawishi ranch in the sum of kshs 7,434,045 together with accrued interests being costs awarded by the high court at Mombasa in misc.civil appl .no.225 of 2000 failed to include that amount as a debt to the estate.**

**ii. The letters of administration were procured contrary to the provision of law in that the administrators used untrue allegation file purposely to mislead the court to avoid payment of a lawful debt/liability due and payable by the estate contrary to section 76 c of cap 160.**

**iii. Unless the letters are revoked the applicant cannot in law pursue the estate of the deceased to recover the kshs 7,434,045 together with accrued interests.**

**iv. The application is urgent.**

**c. That the costs of the application be provided for.**

2. The applicant in his sworn affidavit stated that grant made to Everest Matolo Lenjo and Dominy Lenjo Musamuli on the 4<sup>th</sup> November, 2016 was procured through concealment of material facts in the following manner;

**a. There exists a pending suit at the stage of the execution being HCC MISC CIVIL APPLICATION NO.255 OF 2000 MOMBASA, between the interest party, the deceased and 7 others.**

**b. In the Mombasa case the court awarded the applicant costs in the sum of Kshs 7,434,045 plus interest at court rates.**

**c. Prior to his death, on 29<sup>th</sup> October, 2012 the deceased filed an application for review and setting aside of attachment against the property of the deceased.**

**d. We opposed the application by filing grounds of opposition dated 27<sup>th</sup> November, 2017.**

**e. The high court delivered its ruling on the application by the deceased on 19<sup>th</sup> April, 2018 in which the court dismissed the application by the deceased with costs.**

**f. It is within my knowledge that the decision in the Mombasa case is still binding and has not been set aside or varied.**

**g. A further process of execution was initiated by the applicant in the Mombasa case as garnishee proceedings.**

**h. I am informed by Mr.Munyithya and which information I believe to be true that the firm of Odongo B.O Advocates were appointed by Dominy Lenjo Musamuli, Everest Matolo Lenjo ,Alphonse Mkala Lenjo And Perpetual Khalid Abdessalam to represent them in the Mombasa case. Further, these parties filed a replying affidavit against garnishee proceedings on 18<sup>th</sup> November, 2016.**

**i. I am aware the court allowed the garnishee proceedings.**

**j. From the above while filing the application for confirmation of grant the administrators and beneficiaries should have included the costs outstanding in the Mombasa case as a liability to the estate. However, the administrators and the beneficiaries only filed a nil return on the liabilities of the estate.**

3. The applicant further stated that since the letters of administration did not include the liability in the Mombasa case this application is merited in terms of provisions of section 76 of cap 160 and urged the court to allow the same.

4. The applicant filed a supplementary affidavit sworn on 4<sup>th</sup> November,2019 attaching a bundle of documents and stated that they have only recovered Kshs 80,000 in the execution process done in **ELC MISC.APPLICATION 225 OF 2000-MOMBASA**.

5. The administrators of the deceased's estate filed a replying affidavit sworn on 18<sup>th</sup> December, 2019 and stated that the application lacks bonafide, made in bad faith and an afterthought .that they filed this petition in Mombasa sometimes in the year 2014, and was allotted **No.213 Of 2014** before it was transferred to this honourable court in the year 2015 and the applicant and its advocates were aware of the existence of the same since then.

6. The administrators further stated that by an application dated 24<sup>th</sup> November,2015 made in **HCCC NO.86 OF 2008 ,AMESNET ENTERPRISES LTD –VS- EDWARD LENJO MUSAMULI** the applicant's advocate's Ms.Munyithya ,Mutugi ,Umara & Muzna And Co. Advocates ,sought to join them in their capacity as the administrators of the estate of their late father .and that the applicant and its advocates were therefore all along aware of this petition and if at all they were interested in challenging their grant ,they would have done it then.in fact by the year 2015 they had not been issued with subject grant .the applicant would have even applied to be joined if it could prove its case.

7. The administrators averred that their father did not leave any liabilities .the claim that costs in misc.no.225 of 2000 is part of his liabilities is a misplaced claim. That judicial review application was brought by six(6) ex-parte applicants.It was not solely their father's responsibility .five(5) of those applicants are still alive ,and the applicant herein has never made any attempt to recover the same from them.

8. The administrators further averred that before his death, their father, the deceased herein, made an application dated 29<sup>th</sup> October, 2012 where he denied ever having the knowledge of the existence of the said judicial review, but unfortunately he died before he could prosecute it.

9. Further it is apparent from the foregoing that the applicant is not interested in pursuing its costs but only keen in tormenting their family. And that they have administered 90% of the deceased's estate. What is outstanding is only one of the shares which has ever been sold, and which they wanted to deal with and file a complete account of their work, and have this file closed.

10. The administrators stated that they have been informed by their advocate ,which information they don't doubt with the passing of the community land act ,2016 ,all group ranches, the applicant herein included ,were dissolved and are no longer in existence .the plaintiff therefore has no locus to apply for re vocation. And that Mr.Michael Bruno Mzungu should accept this reality that things have changed and the group ranch which he purports to chair is no longer in existence .this explains why he did not even annex to his supporting affidavit the proof of chairmanship.

11. The administrators urged this court to dismiss the applicant's application and costs to be paid personally by Mr.Michael Bruno Mzungu Irengi.

12. The application herein was disposed of by way written submissions.

13. The applicant through its advocate filed its submissions dated 9<sup>th</sup> December,2020 and submitted that failure by the administrators to give full and accurate account of the liabilities owing to the estate ,this court is entitled to revoke the certificate of confirmation of grant dated 31/7/2017 and placed reliance on section 76 of the law of succession act.

14. The applicant further submitted that pursuant to rule 44 of the probate and administration rules provides that any person interested in the estate of the deceased and seeks to have the grant revoked or annulled shall apply to high court for such relief. And relied on the case of **IN RE ESTATE OF JULIUS NDUBI JAVAN (DECEASED) [2018] eKLR** and section 51 of the Law of Succession Act.

15. The applicant submitted that it's application is grounded on the point that the estate of the deceased was indebted to Isangawishi Ranch in the sum of Kshs 7,434,046 together with accrued interest being costs awarded in the high court of Mombasa in MISC CIVIL APPLICATION NO.255 OF 2014 and urged the court to allow its application and grant the orders sought.

16. The respondents through their advocate Mr.Odongo filed written submissions dated 24<sup>th</sup> may 2021 and submitted that section 76 of cap 160 gives 5 provisions upon which a grant can be revoked ,grounds which the applicant has enumerated in its submissions and that none of

those grounds has cited by the applicant in its application herein.

17. The respondents submitted that the debt raised by the applicant in its application is not a debt due from the estate of the deceased as the MISC. CIVIL APPLICATION NO.225 OF 2000 was brought by six (6) persons, one of them being the deceased herein.it was not a matter which was solely instituted by the deceased and that among the six only the deceased herein has died the rest are alive.

18. The respondents further submitted that the ruling delivered on 28<sup>th</sup> march,2008 did not expressly specify that the costs was to be entirely born by the deceased and that this is cost which could be recovered from any of the said six.

19. The respondents submitted that the death of the deceased did not stop the applicant from recovering the same from the surviving five. Its therefore not only absurd ,but also malicious, to see the applicant boldly averring at ground that unless the letters of administration herein is revoked it cannot pursue the deceased estate for the said costs while nothing stops it from the recovering it from the said surviving five.

20. The respondents further submitted that the subject costs cannot, under whatever circumstances, be treated as a debt due from the subject estate, and there is nothing material in it. A grant cannot be revoked as a result of failure to disclose an alleged debt of this kind. And that the ruling of justice F.Gikonyo in Succession Cause No.720 Of 2013 in the ESTATE OF JULIUS NDUBI JAVAN (2018) eKLR relied on by the applicant is inherently irrelevant.

21. The respondents submitted that the situation they are faced with in the current scenario is that of a judgement creditor setting its mind and focus on that person among the judgement debtors whom it think has some kind of fortune sufficient to satisfy its decree. Further the allegation in ground (c) to the application herein that unless the grant is revoked the applicant cannot pursue the estate is not only incorrect in law, but also a deliberate lie.

22. The respondents submitted that the subject application is nothing but an afterthought and that the applicant has been aware of the existence of this petition right from its institution and if the applicant, or as the case may be, its advocates, was interested challenging the issuance of the grant herein to the petitioners, it would have done so in the year 2015.

23. The respondents further submitted that the applicant is no longer in existence .In fact, the description by Mr.Michael Bruno Mzungu Irengé as the applicant's chairman is a fallacy as with the repealing of the Land (Group Representative) Act CAP 287 by The Community Land Act, 2016, group ranches, the applicant included, together with group representative ceased and relied on section 47 of the community land act.

24. The respondent relied on PART VIII of The Community Land Regulations, 2017 and submitted that if the subject group ranch has since been registered as community land then by virtue of section 47(2) Mr.Michael Bruno Mzungu Irengé ceased to hold office and if it has not been registered to date, or put the other way round, if no such application for conversion was made within 12 months from the 24<sup>th</sup> November, 2017, then both its title and certificate of incorporation are now deemed cancelled. Further, this an issue which was raised in the replying affidavit, but the applicant did not make a mention of it in its supplementary affidavit and urged the court to take it that the applicant is in agreement with their position.

25. In conclusion the respondents submitted that Mr.Bruno Mzungu Irengé lack the requisite capacity to institute the application herein and therefore the application is incompetent and urged the court to dismiss the application.

### **Analysis and Determination**

26. Have considered the application herein, the responses thereof and rival submissions for both counsels and the issues that arise for determination are;

- a. Whether the grant of letters of administration made on the 4/11/2016 and confirmed on 31/7/2017 should be revoked.
- b. Whether the representative of the applicant one Michael Bruno Mzungu Irengé has the capacity to swear an affidavit on its behalf.
- c. Whether the applicant has capacity to institute the application herein.

27. On whether the grant should be revoked the applicable law is Law of Succession Act section 76 which provides:

**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.

28. The court in the case of **In re Estate of Mukhobi Namonya (Deceased) [2020] eKLR** stated that, “under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining the grant was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his mind or is adjudged bankrupt.

29. Further in the case of **In re Estate of Magangi Obuki (Deceased) [2020] eKLR** the court quoted the authority **In the case of Albert Imbuga Kisigwa v Recho Kawai Kisigwa, Succession Cause No.158 OF 2000**, Mwita J. made remarks on the guiding principles for the revocation of a grant. He 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.

30. The applicant in its pleading stated that the letters of administration were procured contrary to the provision of the law in that the administrators used untrue allegation file purposely to mislead the court and void payment of a lawful debt/liability due and payable by the estate contrary to Section 76 c of CAP 160. That since the letters of administration did not include the liability in the Mombasa case this application is merited in terms of provisions of Section 76 of CAP 160. Further the grant was procured through concealment of material facts and that since the letters of administration did not include the liability in the Mombasa case this application is merited in terms of provisions of section 76 of CAP 160.

31. The respondents submitted that what the applicant is saying can only come near to second limb of clause (b) of the said provision which makes the following provision; that the grant was obtained fraudulently by making of false statement or by concealment from the court of something material from the case.

32. The respondent further submitted that the debt being referred to by the plaintiff was not a debt due from the estate of the deceased and it was a debt against six plaintiffs out of which only one has died who is the deceased in this case and that nothing stops the applicant from recovering the debt from the remaining five. Further a grant cannot be revoked as a result of failure to disclose an alleged debt of this kind.

33. The respondent submitted that if the applicant, or as the case may be, its advocates, was interested in challenging the issuance of the grant herein to the petitioners, it would have done so in 2015 as its advocates sought to join the respondents herein in Civil Suit No. 86 Of 2008 where one of their client had sued the deceased.

My understanding of the applicants case is that it is based on section 76 (b) which states that a grant can be revoked if **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.** in this case the concealment is on the failure to include the alleged debt in the petition for grant of letters of administration and the question that follows is whether the omission amounts to concealment or non-disclosure and can warrant the revocation of the grant.

The court in **In re Estate of Mukhobi Namonya (Deceased) [2020] eKLR** stated that, “the omission of persons who claim to be claimants from or creditors of the estate is not a ground for revoking a grant. After all, creditors of an estate are entitled to have their debts settled. It is for this reason that debts and liabilities are given priority over distribution of the estate. Debts and liabilities ought to be settled first. Distribution is of the net estate, after the debts and liabilities have been met. The administrators have a duty to identify the creditors of the estate and to pay them off before proposing distribution, or to make provision for them at confirmation of grant. Such claimants and creditors have an obligation to place their claims before the administrators, and should the administrators fail to settle the same or acknowledge them, move the Environment and Land Court to prove their claims, since the High Court no longer has jurisdiction to determine questions around ownership of immovable property in view of Articles 162(2) and 165(5) of the Constitution.

Who exactly is the creditor of the estate or what ought to be treated as a liability of the estate. The most obvious candidates are individuals or entities that transacted with the deceased during his lifetime. Debts that the deceased left unsettled are a

burden that the administrators of his estate ought to take care of. Transactions that he left incomplete, such as for sale of land by him or to him, should be completed by the administrators. The administrators are able to do so through the powers conferred upon them by section 82 of the Law of Succession Act, being mindful of section 79, which vests the assets of the estate in the administrator. Section 83 imposes a duty on administrators to settle such debts before distributing the estate.....

One of the duties of administrators, set out in section 83(d) of the Law of Succession Act, is to ascertain and pay out of the estate all the debts of the deceased. Ascertainment of the debts of the estate is about identifying them, in terms of finding who the creditors were, how the debts were incurred, what documentation is available, before pay out can be done. If the debts arose during administration, and were necessitated by the exigencies of administration, such as where funds were needed to pay for the administration process, in terms moneys for court fees, advocates costs, land rents and rates, taxes, and attendant expenses, then section 83(c) of the Law of Succession Act would be relevant. That provision requires administrators to pay out of the estate all the expenses of obtaining the grant and all other reasonable expenses of the administration. Where estate assets have been dissipated to address the expenses envisaged in section 83(c) then it must be stated what these expenses were, how they arose and how they were settled. The same would apply where certain debts and liabilities of the estate needed to be settled and estate assets had to be sold to facilitate the settlement of such debts. Section 83(d) of the Law of Succession Act requires administrators to ascertain and pay, out of the estate, all the debts of the deceased. In addition, section 83, at paragraph (e), requires the administrators to render accounts of their administration within six months of their appointment.”

From the above extract the question on what amounts to liability is settled as well as the duties of the administrators. This leaves one with the question whether the subject debt amounts to a liability or debt against the estate.

34. I have looked at the certificate of costs in page 26 of the supplementary affidavit of the applicant and it states that ; **Deputy Registrar of the High Court of Kenya, MOMBASA, do hereby certify that under rule 68 of remuneration order 1997, the interested parties bill of costs dated 30<sup>th</sup> September, 2009 is taxed at Kenya shillings six million, seven hundred & thirty three thousand two hundred ninety five only(6,733,295.00) and that the same are allowed as against the applicants.**

35. In the ruling of 28<sup>th</sup> March, 2008 the Judge held that;

**“In the end I dismiss the motion with costs to the interested party and the respondents”.**

36. From the certificate of costs it’s clear that the costs were awarded to the applicant in this case against the applicants in MISC.CIVIL APP.NO.225 OF 2000 who are six in number. The same position has not been disputed though one would wonder why the applicant in this case would pursue the payment of the debt from one applicant or the deceased estate instead of pursuing the same from all the applicants.

37. It’s also not clear whether the applicant made its claim known and or notified the administrators of the debt after the demise of the deceased and or after learning that the administrators had petitioned the court for grant of letters of administration. Though there is no mention in the application of how they learnt about the omission or the issuance or confirmation of the grant .it’s also not clear why the applicants did not apply for the debt to be included in the petition or for the same to be provided for in the distribution of the estate.

The court in **In re Estate of Barrack Deya Okul (Deceased) [2018] eKLR** stated that,

**“My clear understanding of this requirement is that once a Petitioner is notified of the existence of a liability (debt) by a creditor or once the Petitioner comes to learn of an existing proven liability (debt) owed by the estate, it is mandatory to include such a liability or debt as required above**

**A decree against a deceased person, in the absence of a variation, setting aside or otherwise being stayed is in my view a proven liability against the estate of the deceased. It must be included in the list of liabilities in form 5 alluded to above.**

**Such a debt shall, as provided for in Section 86 of the Law of Succession Act, be paid before any legacy. For emphasis, that section provides;**

**“Section 86: Debts of every description enforceable at Law and owed by or out of an estate shall be paid before any legacy”**

**I have no doubt in my mind that a decree of Court against a deceased person is a debt enforceable at Law. From sub-section (b) above, it is quite clear that the duties of personal representatives would include getting in all free property of the deceased including debts owing to him and moneys payable to his personal representative by reason of his death and in the same vein under Sub-section (d), to ascertain and pay out of the estate of the deceased, all his debts”.**

38. Accordingly, it’s my view that though there has been litigation throughout against the estate of the deceased, the subject debt is not a debt or a decree issued against the estate but against several plaintiffs and therefore the applicant cannot purport to claim the entire sum from the deceased estate. It’s also my view that the applicants have not established any ground to warrant the revocation of the grant as an omission of a creditor or liability as seen in the cited case law above is not a ground to revoke a grant.

39. On whether the applicant and Mr.Michael Bruno Mzungu Irene have locus and or capacity and to institute the subject application.

40. The respondents submitted that the applicant is no longer in existence .In fact, the description by Mr.Michael Bruno Mzungu Irene as

the applicant's chairman is a fallacy as with the repealing of the Land (Group Representative) Act CAP 287 by The Community Land Act, 2016, group ranches, the applicant included, together with group representative ceased and relied on section 47 of the Community Land Act. The respondent also relied on PART VIII of The Community Land Regulations, 2017 and submitted that if the subject group ranch has since been registered as community land then by virtue of section 47(2) Mr. Michael Bruno Mzungu Irengi ceased to hold office and if it has not been registered to date, or put the other way round, if no such application for conversion was made within 12 months from the 24<sup>th</sup> November, 2017, then both its title and certificate of incorporation are now deemed cancelled and relied on regulation 26(3). Further, this an issue which was raised in the replying affidavit, but the applicant did not make a mention of it in its supplementary affidavit and urged the court to take it that the applicant is in agreement with their position.

41. The respondents submitted that Mr. Bruno Mzungu Irengi lack the requisite capacity to institute the application herein and therefore the application is incompetent and urged the court to dismiss the application.

42. The applicant submitted that pursuant to rule 44 of the probate and administration rules provides that any person interested in the estate of the deceased and seeks to have the grant revoked or annulled shall apply to high court for such relief.

**Section 47 of the Community Land Act provides;**

**(1) In relation to land held under the Land (Group Representatives) Act, the respective group representatives together with the communities they represent shall be registered as a community in accordance with the provisions of this Act.**

**(2) Upon registration, the respective group representatives shall cease to hold office.**

**Regulation 26(3) provides; within twelve months of the commencement of these Regulations, the groups shall make an application to register as a community.**

**Regulation 26(6) provides; where the existing title document and certificate of incorporation are not surrendered to the registrar in accordance with this regulation, they shall be deemed cancelled at the expiry of thirty days.**

43. My view on the above provisions is that with the enactment of the Community Land Act it is mandatory for all groups to register as a community within 12 months and upon registration the group representatives cease to hold office. Regulation 26(6) means title document and certificate of incorporation are to be surrendered to be surrendered to the Registrar and if not surrendered they are automatically deemed cancelled at the expiry of 30 days.

44. In this case the certificate of incorporation annexed as "mb-9" is under the repealed Land (Group Representatives) Act 1968 registered on 12<sup>th</sup> October, 1983 and Mr. Michael Bruno Mzungu Irengi is not one of the listed representatives. No evidence tendered to show whether an application to register the group as a community was made, or whether the group was registered as a community and how and when Mr. Michael Bruno Mzungu Irengi was appointed as the chairman of the group.

45. Accordingly, the applicant's application it is allowed to the extent that the Applicants shall file their claim as interested parties in the cause and have the same proved during trial.

**DATED, SIGNED AND DELIVERED ONLINE THROUGH MS TEAMS, THIS 29TH DAY OF JULY, 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:**

Court assistant: Ogwel

Ms. Wangeci holding brief for Mr. Muniyithya Advocate for the Applicants – virtually.

Ms. Wangeci holding brief for Odongo Advocate for the Respondents – virtually.

**COURT**

Copy of the Ruling to be supplied to the Applicants Advocate on payment of copying charges.

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**