



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**SUCCESSION CAUSE NO. 4 OF 2015**

**IN THE MATTER OF THE ESTATE OF THE LATE MWAURA MAKURO**

**DECEASED**

**JAMES KIMANI KABATA ..... 1<sup>ST</sup> APPLICANT**

**PATRICK NJERU MUNENE ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**MICHAEL KINUTHIA MAKURO ..... RESPONDENT**

**RULING**

**INTRODUCTION**

1. By their Summons for Revocation/ Annulment of Grant dated 19<sup>th</sup> August 2021, James Kimani Kabata, Patrick Njeru Munene and Simon Mwaura Wanja (the Applicants herein) seek the following orders;

a) That the Grant of Letters of Administration issued to Michael Kinuthia Makuro on 11<sup>th</sup> of April, 2016 and confirmed on 15<sup>th</sup> April 2016 as the administrator of the estate of Mwaura MAkuro be annulled and revoked.

b) That this court issues a temporary injunction restraining, Michael Kinuthia Makuro or his agents from further dealings with the estate of Mwaura Makuro (deceased) including;

**i. ELDORET MUNICIPALITY BLOCK 12/38**

**ii. ELDORET MUNICIPALITY BLOCK 12/39**

**iii. NZOIA SCHEME LR NO. PLOT NO. 113**

**iv. NZOIA SCHEME LR NO. PLOT NO. 114**

**v. NZOIA SCHEME LR NO. PLOT NO. 115**

**vi. NZOIA SCHEME LR NO. PLOT NO. 116**

**vii. CHEBARUS FARM LR NO. 11564/ PLOT 1**

**viii. KENYA COMMERCIAL BANK MOI'S BRIDGE A/C NO. xxxx.**

**ix. FAMILY BANK ELDORET BRANCH, A/C NO. xxxx.**

**x. NATIONAL BANK OF KENYA, KITALE BRANCH, A/C NO. xxxx**

**xi. STANDARD CHARTERED BANK, ELDORET BRANCH, A/C NO. xxxxx**

**xii. KENYA COMMERCIAL BANK ELDORET BRANCH A/C NO. xxxx**

- c) That this Honourable court cancels any subsequent irregular and unlawful transfers and or transactions resultant from the Grant of Letters of Administration issued to Michael Kinuthia Makuro and on the 15<sup>th</sup> of April, 2016.
- d) That this Honourable Court do order that Micheal Kinuthia Makuro produces for good record and account detailed statement of accounts and affairs of the estate up to and until the date of such order.
- e) That the Honourable Court issues a fresh grant to James Kimani Kabata and Patrick Njeru Munene.

2. The application is premised on the grounds set out therein and the Supporting Affidavit sworn by James Kimani Kabata on 19<sup>th</sup> August 2021. The deponents deposed that on 15<sup>th</sup> April, 2016 this Court issued a Certificate of Confirmation of Grant to Michael Kinuthia Makuro (the administrator), who has failed and or refused to administer the estate to the detriment of the beneficiaries without just cause or reason. The Applicants further deposed that the administrator has frustrated the beneficiaries of the estate with endless unsound applications attempting to among other things, cite them for intermeddling as well as failing to render an account of the affairs of the estate not only to this Court but also to the beneficiaries. The Applicants further averred that in a ruling delivered 26<sup>th</sup> July, 2021 this Court took keen notice of the administrator's ineptitude and sanctioned the beneficiaries in the interest of justice, to proceed to either move the Deputy Registrar to distribute the estate or seek to revoke the grant and pursue an alternative administrator.

3. The Applicants are apprehensive that owing to the continued refusal by the administrator to account and distribute the estate, the estate is continually wasting away and not much may be left to keep for the benefit of the beneficiaries.

4. It is the Applicants' contention that the administrator wants the estate for his exclusive benefit demonstrated by the move, borne of his own admission and record in court, of registering a limited liability company with himself and another beneficiary as the sole directors and shareholders to the exclusion of all others.

5. The Applicants further averred that in a ruling delivered on 24<sup>th</sup> October, 2019 this Court while pronouncing itself in an application seeking to compel the administrator to distribute the estate of the deceased directed the administrator to distribute the estate to all the beneficiaries equally within (6) months from the ruling date and thereafter also render an accurate account of the estate within 3 months post distribution.

6. The Applicants further faulted the administrator for seeking leave to appeal against the ruling of 24<sup>th</sup> October, 2019 directing him to distribute the estate, while failing to undertake his legal obligations to distribute the estate. Therefore the administrator has controverted section 76 (d) (ii) and (iii) of the Law of Succession. Accordingly, the Applicants propose that they be appointed as administrators to the deceased's estate. They already have a mode of distribution of the estate in place and are ready to administer the deceased's estate.

7. Michael Kinuthia Makuro, the Petitioner herein in a Replying Affidavit sworn on 13<sup>th</sup> September, 2021 opposed the application for revocation of grant stating that these proceedings relate to the estate of his father Simeon Mwaura Makuro. The Petitioner denies that the Applicants are heirs or beneficiaries of the estate of his late father but rather are grandchildren having been born of Teresa Wangui Kabata and Joyce Wanjiku Munene respectively while Simon Mwaura Wanja, on the other hand is the son to Peter Kamau Makuro (deceased) who is a brother to the Petitioner.

8. The Petitioner further alleges that the said Simon Mwaura Wanja has supported this Summons and was not aware of it nor was he consulted prior to its filing.

9. The Petitioner contends that prior to the filing of these proceedings all the beneficiaries herein gave their consent signing Form No. 38 (r26 (2) and that mandate has never been withdrawn by either of them.

10. The Petitioner also contested the allegations by the Applicants that he has failed to distribute the estate while stating that there exists on record a certificate of confirmation of grant complete with shares over the estate to the (10) beneficiaries made on 15<sup>th</sup> April, 2016. The Petitioner further stated that each of the beneficiaries is aware of their share and entitlement in the estate.

11. The Petitioner contends that Simon Mwaura Wanja is grandchild representing the family of their late brother Peter Kamau Mwaura (deceased) and is not strictly speaking as a beneficiary but a trustee of his late father's household which comprises others who are not before court. The Petitioner further states that counsel for the Applicants, Mr. Mwaura Kabata is seriously conflicted in this matter as he is a son to the Petitioner's sister (Teresia Wangui Kabata) and a brother to the 1<sup>st</sup> Applicant and cannot therefore continue giving impartial advice or participate in these proceedings without hurting the said relationships.

12. The Petitioner further contends that the Applicants have not tabled before this court any evidence to show that the estate of the deceased is in danger of extinction and neither have, they produced any evidence of impropriety on the part of the petitioner or that of any other beneficiary. Therefore, according to the petitioner, this instant application is bad in law as it is proffered by persons appointed by an unregistered instrument, that is, a power of attorney that is ordinarily registerable under the Land Registration Act (General Regulations, 2017 rule 18 thereof. The Petitioner further contends that even if the instruments appointing the Applicants were valid their power is only limited to dealing with the specific shares and entitlements of their donors and not the administration of the entire estate.

13. The Petitioner further contends that his father's estate comprises farmlands that are undefined parcels of land which need to be processed through consolidation, amalgamation and finally distribution, which exercise his late father could not accomplish in the 50 years that he held them and which the Petitioner is doing his best to accomplish. He averred that he has always rendered the status of the estate to court

whenever called upon to do so and shall continue to do so.

14. The 7<sup>th</sup> beneficiary, Francis Muigai also in opposition to the application filed a Replying Affidavit dated 14<sup>th</sup> September, 2021 in which he averred that the estate has been distributed to the 10 beneficiaries entitled under the grant.

15. The 10<sup>th</sup> beneficiary, Simon Mwaura Wanja also in opposition to the application filed a Replying Affidavit dated 14<sup>th</sup> September, 2021 in which he reiterated the contents of the affidavit filed by the Petitioner herein.

16. The application was canvassed by way of written submissions.

### **DETERMINATION**

17. I have carefully considered the application, the affidavits and the submissions filed as well as the authorities relied upon. The only issue is **whether the Grant of Letters of Administration intestate issued to Michael Kkinuthia Makuro on 15<sup>th</sup> April, 2016 should be revoked?**

18. For such application to succeed, the party applying must prove one or more of the grounds set put in section 76 of the Law of Succession Act which provides as follows:

#### **76 Revocation or annulment of grant**

***A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—***

***(a) that the proceedings to obtain the grant were defective in substance;***

***(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***

***(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***

***(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—***

***(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.***

19. In this instant case, the Applicants appear to anchor their case on two grounds; that the administrator has failed to proceed diligently with the administration of the estate, and secondly, that the administrator has failed *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.*

20. The record herein indicates that the deceased was not survived by a spouse, but by four sons and five daughters. All nine children had equal right or entitlement to apply for administration, going by section 66 of the Law of Succession Act. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants herein are grandchildren to the deceased.

21. A grandchild only becomes a direct heir to the estate of the grandparent where the parent pre-deceased the grandparent. The grandchildren step into the shoes of their deceased parents and take the parent's share in the estate of the grandparents as was enunciated in **RE Estate of Wahome Njoki Wakagoto (2013) eKLR** where it was held: -

***“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1<sup>st</sup> July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”***

22. The evidence on record suggest that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants herein brought these proceedings on behalf of their mothers; Teresa

Makuro Gechanga and Joyce Wanjiku Munene (who are still alive) and who are the beneficiaries to their father's estate. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants' interest emanates from the fact that their mothers are beneficiaries to the deceased's estate, but they are not dependents within the provisions of section 29 of the Law of succession Act as they do not acquire an interest in their grandfather's estate in the suit property by virtue of their mothers' share. The record before court indicates that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants herein are Attorneys at Law having been given the power of attorney to act on behalf of their mothers. From the foregoing, it is my view that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants therefore have locus standi to seek the revocation of grant issued to the administrator herein.

23. The Petitioner has submitted that the deceased was from Agikuyu Community and it thus Agikuyu customary practices about the appointment and removal of administrator or "Muramati" are applicable. The Petitioner has further submitted that a "Muramati" can only be appointed or removed by elders and therefore the Applicants herein cannot undo what they did not make. The Petitioner has further submitted that the Kikuyu culture is patrilineal with a pattern of inheritance that is based on equal distribution of a man's property among his sons with a proviso that the eldest son may get a slightly larger share.

24. The Judicature Act allows the application of customary Laws where applicable and is not repugnant to justice and morality. **See Section 3(2) of the Judicature Act Cap 8 Laws of Kenya. The appointment of the administrator in this present case was not based on Agikuyu Customary Laws and therefore the argument by the administrator does not hold any water. Section 38 of the Law of Succession Act, enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried. The argument by the Petitioner that the Kikuyu culture is patrilineal is therefore not applicable in the present case.**

25. Failure to distribute a deceased's estate is a ground for revocation of a grant for letters of administration as provided under Section 76 (d) of the Law of Succession. However, such revocation is not automatic. It is conditional. It is dependent on the Applicant demonstrating that notice has been issued to the person who has applied for the grant and that person has failed;

- a. To apply for confirmation of the grant within a year from the date of such notice or such time fixed and/or prescribed by the court; or**
- b. To administer the deceased's estate; or**
- c. To produce an inventory or account of administration as required by the law within a time prescribed by the court.**

26. The Applicants herein did not furnish the court with such notice but instead chose to rely on this Court's ruling that was delivered on 24<sup>th</sup> October, 2019 directing the Petitioner; to distribute the estate of the deceased as per the Certificate of Confirmation of Grant, and to complete the administration of the deceased's estate within six months from the date of the ruling and that a full and accurate inventory of the assets and liabilities of the deceased be filed along with an accurate account of all dealings therewith up to the date of account. I am therefore not satisfied that the Application had proven the ground set out in Section 76(d) of the Law of Succession for the revocation of the said Grant.

27. However, the relationship between personal representatives of a deceased and his heirs is a fiduciary one. The administrator herein is in a fiduciary relationship with the beneficiaries of the deceased. **Section 83** of the Law of Succession Act on the duties of personal representatives provides as follows:

**"83. Duties of personal representatives**

**Personal representatives shall have the following duties—**

- (a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;**
- (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;**
- (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);**
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;**
- (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;**
- (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;**
- (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;**
- (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all**

dealings therewith up to the date of the account;

**(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”**

28. The duty to account for the assets, liabilities and dealings of any estate purely lies on the personal representatives. There is no short cut about it. It is a statutory obligation to which the administrator of an estate must adhere without any discretion.

29. **Rule 73** of the Probate and Administration Rules enshrines the inherent power of the court as follows:

**“Nothing in this rule shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court”.**

30. Section 83(e) requires an administrator to within six months from the date of the grant, produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account. Under Section 83(g) an administrator is obligated to complete the administration of the estate in respect of all matters within six months from the date of confirmation of the grant and to produce to the court a full and accurate account of the completed administration.

31. There is no evidence that the administrator completed the administration of the estate within the period specified by law. The administrator has also not filed accounts 6 months from 14<sup>th</sup> May, 2015 when the Grant was issued or within 6 months from 15<sup>th</sup> April, 2016 the date of confirmation of the Grant. Section 83(e) and (g) have therefore not been complied with.

32. The production of accounts is a key component of the administration process of a deceased person’s estate. From the moment a grant is issued to a personal representative of a deceased person, the grant holder becomes responsible to the Court in the carrying out of the duties of administrator. Accounts are an accountability tool that will tell the Court whether the administrator has been faithful to the role entrusted to him or her. When an administrator fails to file accounts as required, questions as to the integrity of the process are bound to arise as in the present case. The law has empowered the Court on either of its own motion or on the application of any interested party in the estate, to order an administrator to produce a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.

33. From the foregoing, I am satisfied that the administrator has not diligently proceeded with the administration of the estate. The administrator is also liable to produce full and accurate account of his dealings with the estate as required by law.

34. **Rule 73** of the Probate and Administration Rules enshrines the inherent power of the court as follows:

**“Nothing in this rule shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court”.**

35. Indeed, the Applicants have made a good case for the removal of the administrator on account of failing to proceed diligently with the administration of the estate and failure 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. These are some of the statutory grounds set out in Section 76(d) of the Act upon which the grant may be revoked.

36. It must be noted that the objective of the court is to uphold substantive justice. Having considered all the circumstances herein, I find that no useful purpose will be served by revoking the Grant. It is for that reason, that I invoke the inherent powers of this court granted under Section 76 of the Law of Succession Act and Section 73 of the Probate and Administration Rules and make the following orders:

**i. Michael Kinuthia Makuro (the administrator herein) shall within 90 days from the date hereof produce a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.**

**ii. Michael Kinuthia Makuro (the administrator herein) be and is hereby ordered to distributed the estate of the deceased as per the Certificate of Confirmation of Grant; and to complete the administration of the deceased’s estate within 120 days from the date hereof.**

**iii. That in default of (i) and (ii) above, the Grant of Letters of Administration Intestate made herein on 14<sup>th</sup> May, 2015 and confirmed on 15<sup>th</sup> April, 2016 shall stand revoked, and the applicants James Kimani Kabata and Patrick Njeru Munene shall be appointed administrators of the estate of the deceased herein by thjis Court during a mention of this matter on 9/5/2022.**

**iv. No order as to costs**

Dated, Signed and Delivered at Eldoret this 20<sup>th</sup> day of December 2021.

**E. O. OGOLA**

JUDGE