



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**SUCCESSION NO. 551 OF 2007**

**IN THE MATTER OF THE ESTATE OF MAMBO**

**NGALA also known as MUMBO NGALA CHITU (DECEASED)**

**PETER NGALA & OTHERS.....APPLICANTS**

**VERSUS**

**JAMES KALUNGU MUMBO**

**CARLOS MUMBO CHARO.....RESPONDENTS**

**AND**

**HARON MWANG'OMBE MAGHANJO**

**PATRICK WAMBUGU NYOIKE.....INTERESTED PARTIES**

**RULING**

1. The deceased herein Mambo Ngala also known as Mumbo Ngala Chitu died way back on 22.9.92. On 4.10.07, James Kalungu Mumba and Carlos Mumbo Charo (the Respondents) in their capacity as sons of the deceased filed a petition in this Court for letters of administration for his estate. The Respondents in their petition stated that the deceased was survived by his widows, themselves and 2 other sons. They further stated that the estate of the deceased was comprised of a property known as Kilifi/Mtwapa/788 (the Property). A grant of letters of administration (the Grant) was issued to the Respondents on 9.2.09 and confirmed on 18.12.09.

2. On 10.4.13, Peter M. Ngala, the Applicant filed a summons for revocation of grant dated 8.4.13. The Applicant also sought a determination whether the Property belonged to the estate of the deceased to the exclusion of the Applicant. He also sought a determination as to the persons legally entitled to the estate of the deceased. The Applicant further prayed that the District Lands Registrar, Kilifi be ordered to apportion the Property and issue titles to those found to be entitled.

3. In his affidavit which he swore on 8.4.13 on his own behalf and on behalf of other applicants he did not name, the Applicant averred that the deceased was their elder step brother; that the Property was initially owned by their late father Ngala Chitu who died in the 1970s; that due to his old age, their father had the Property registered in the deceased's name as his eldest son, in trust for the entire family; that the Applicants have always lived on the Property and have permanent structures erected thereon; that on their request, the deceased subdivided the land and the Applicant and his siblings being the children of the 2<sup>nd</sup> wife were given 4 acres to live and cultivate; that the deceased was however, up to the time of his demise, reluctant to have title deeds issued for the subdivisions; that the Applicant discovered that the Grant had been issued and confirmed without their knowledge when 2 people demanded that they vacate their land as the same had been sold to them by the Respondents; that the Applicant reported the matter to the chief and a meeting of all family members was held on 12.3.11; that it was recommended at the meeting that the Applicants were entitled to the Property as the deceased held the same in trust for the entire family; that in spite of this, the Respondents have been reluctant to recognise the Applicant's share in the Property.

4. The Applicant further states that the Grant was obtained through falsehood; that the Respondents stated that the 2<sup>nd</sup> Respondent is a son of the deceased, a fact they knew to be false as he is a grandson of the deceased; that they stated that the 2<sup>nd</sup> Respondent was a beneficiary of the estate of the deceased when in fact he was not; that the Respondents included the entire Property as belonging to the deceased yet they knew that he held the same in trust for the entire family; that the Respondents are likely to alienate the Property thereby disinheriting the Applicants. This is the reason they have sought the intervention of the Court.

5. The Respondents have opposed the Application in a replying affidavit sworn on 13.6.13 by the 1<sup>st</sup> Respondent. They contend that the entire Property belongs to the estate of the deceased; that the deceased purchased the Property initially known as Plot No. 492, through a government grant under the Mtwapa Settlement Scheme and a letter of allotment was issued to him; that the Property was charged to the Settlement Fund Trustees for Kshs. 5,650/=, being the purchase price; that upon fulfilment of the conditions in the letter of offer, title deed was issued to the deceased; that the Respondents denied the allegations of a trust and assert that if any was intended, a trust instrument would have been created; that “out of affection and humanity”, the deceased allowed their father Ngala Chitu to reside on the Property with his family; that their father, aware that the land was not his, directed that he should not be buried on the Property and he was not buried on the Property.

6. The Respondents deny that they obtained the Grant fraudulently. They state that the 2<sup>nd</sup> Respondent was appointed administrator to safeguard the interests of the estate of his father, Charo Kuze, a son of the deceased. The Applicants were left out of the proceedings as they are not beneficiaries of the estate of the deceased. The Respondents were rightfully registered as proprietors of the Property with the right to deal with it as they deemed fit. The Applicants do not therefore have any right to question the acts of the Respondents. The Applicants lack *locus standi* to seek the orders herein. Further, the chief of Junju location lacks jurisdiction to determine the ownership of the Property. The Applicants were mere licensees and ought to find their own place. They cannot suffer loss and no one can lose what does not belong to them. The Respondents urged that the Application be dismissed with costs.

7. By an application dated 3.7.13, the Applicants sought an order restraining the Haron Mwang’ombe Maghanjo and Patrick Wambugu Nyoike, the interested parties herein from dealing with plots nos. Kilifi/Mtwapa/ 3712-3717 being subdivisions of the Property. The grounds upon which the application was premised were that the Interested Parties had purchased and obtained title to portions of the Property and the Applicants were apprehensive that they would be evicted.

8. In response to the application, the 1<sup>st</sup> Respondent in his affidavit of 22.8.13 confirmed that they did in fact sell 2 plots of the Property as they had the power and authority to do so. He further reiterated that the Property belonged to his father, the deceased and the Applicants are not beneficiaries of the estate of the deceased. The Applicants’ father had land elsewhere to which they are entitled but still want a portion of the estate of the deceased to which they are not entitled. On his part, the 2<sup>nd</sup> Interested Party in his affidavit sworn on 22.8.13 averred that he is the registered owner of plot 3715 having purchased the same from the Respondents. He stated that he has been wrongly enjoined in this matter as he did due diligence and confirmed that the Respondents had the power and authority to sell the plot. The 1<sup>st</sup> Interested Party likewise stated in his affidavit of 22.8.13 that he did due diligence and confirmed that the Respondents had power and authority to sell the plot to him. He proceeded to purchase the same and is now the registered owner of plot 3717. On 17.5.16, the Court allowed an application dated 22.2.16, seeking to join Rachel Mbeyu Chidoti in place of the 1<sup>st</sup> Interested Party who had died.

9. At the hearing, the Applicant reiterated the contents of his affidavit in support of the Application. He confirmed that the deceased is his brother and the Property measuring 12 acres was registered in the deceased’s name. He confirmed that the letter from the Settlement Fund Trustees was in the name of the deceased and that the deceased paid the Kshs. 5,650/= for the Property. He stated that his family has all along lived on the Property which the deceased set aside for them. Upon the demise of their father, they remained on the Property. When the deceased died, the Respondents sold their portions. The portion he occupied was fenced off by the 1<sup>st</sup> Interested Party. He prayed that the Court finds that the title to the Property in the name of the Respondents was obtained fraudulently and the same should be revoked. He claimed to be a beneficiary although the land was in the name of the deceased.

10. Charles Ngala Chitu a half-brother to the deceased testified that their father gave land to the deceased and had it registered in the deceased’s name in 1973. He confirmed that the letter of allotment to the Property was given to the deceased. Their father died in 1980 and they remained on the Property. The deceased called elders and gave the Applicants 4 acres of the property and he remained on 8 acres. He died shortly thereafter. They were born and have all along lived on the Property. His desire is that the Court gives them the 4 acres given to them by the deceased.

11. Dzombo Mwazombo, a neighbour and a village elder, stated that the deceased called them and told them that he wished to subdivide the Property and gave the Applicants 4 acres. The deceased did so because the land was not his but belonged to their father. All the parties, including their father lived on the land. He further stated that many old men did not have identity cards and had their land registered in their son’s names.

12. For the Respondents, James Kaingu Mumbo a son of the deceased stated that the Property was in his father’s name. The deceased brought his own father, step mother and their children to the Property and accommodated them thereon. The half-siblings of the deceased and their families live on the Property to date. The Property belonged to the deceased and not to the deceased’s father. After the Respondents got the Grant, everyone entitled to the Property got their share. The Applicant not being a beneficiary of the estate of the deceased did not get any share. James stated that the Property has been subdivided and he sold a portion to the Interested Parties.

13. James further stated that a dispute arose over the Property and they were summoned by the chief about 5 years ago to resolve the matter. No agreement was reached. James further stated that when he sold portions of the Property, the Applicants were informed. He stated that one of the Applicant’s brothers, Nyawa moved out of the Property after being compensated for the trees he had planted. Charles, another brother moved out a long time ago after purchasing a plot in Bomani, but is also claiming the Property.

14. Rachel Mbeyu testified on behalf of her deceased husband, the 1<sup>st</sup> Interested Party who purchased plot 3717 from the Respondents. She stated that title to the plot was issued in the name of the 1<sup>st</sup> Interested Party in 2012. When she was shown the plot, they found the Respondents’ relatives were in occupation of the same. There are 3 houses on the plot. Rachel has not been able to fence the portion of the plot with the houses. There is a Court order restraining all development. She urged that the matter be concluded so that she gets the plot to develop the same.

15. Patrick Wambugu Nyoike stated that after due diligence, he purchased plot 3715 from the Respondents and title was issued in his name. When he purchased the plot, there was no one in occupation and was not aware of any dispute otherwise he would not have proceeded with

purchase. Subdivision of the Property was done and he participated in placing of beacons with surveyor.

16. Parties filed submissions which I have considered together with the authorities cited. The issues that fall for determination are as set out in the Applicants' submissions as follows:

- i. Whether the deceased held the Property in trust for the Applicants.
- ii. Whether the Applicants are entitled to the Property and in what proportions.
- iii. Whether the Grant should be revoked.
- iv. Whether the Kilifi Lands Registrar should be ordered to cancel the title to the Property and properly apportion the Property and issue respective title deeds.

Whether the deceased held the Property in trust for the Applicants.

17. It is the Applicants' case that the Property belonged to their father but was held by the deceased in trust for the family. They claim that their father due to his advanced age had the Property registered in the name of the deceased, his eldest son, in trust for the family. The Respondents deny this and even produced evidence that the offer by the Settlement Fund Trustees was addressed to the deceased who paid the requisite amount payable for the Property. This Court is now called upon to determine the existence of the alleged trust and in effect, ownership of the title. Although Article 165(3) of the Constitution of Kenya, 2010 confers upon the High Court unlimited original jurisdiction in civil matters, that jurisdiction is limited by Article 165(5) as follows:

**“(5) The High Court shall not have jurisdiction in respect of matters—**

**(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**

**(b) falling within the jurisdiction of the courts contemplated in Article 162(2)”**

Article 162(2) provides as follows:

**“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—**

**(a) ...**

**(b) the environment and the use and occupation of, and title to, land”**

18. By dint of Article 165(5) of the Constitution, this Court lacks the jurisdiction in matters to do with the use and occupation of, and title to, land. As such, this Court is incompetent to entertain and make declarations over the existence or non-existence of a trust in the Property. That jurisdiction is exclusively reserved for the Environment and Land Court under Article 162(2) of the Constitution. As a succession Court, this Court acts on the basis of property ownership documents presented to it and proceeds to distribute such property to the rightful dependants as required by statute. The Court has looked at the ownership documents presented to it. Exhibited by the Respondents is a copy of a letter of offer in respect of the Property by the Settlement Fund Trustees addressed to the deceased dated 8.8.78. The deceased was required to pay the settlement charge of Kshs. 5,650/=. Also exhibited is a Charge over the property dated 27.10.78 in favour of the Settlement Fund Trustees to secure payment by the deceased of the said amount of Kshs. 5,650/=. In the absence of any evidence to rebut the documentary evidence that the Property belonged to the deceased, this Court cannot draw a contrary conclusion. Properly advised, the Applicants' claim in this regard clearly lies elsewhere.

Whether the Applicants are entitled to the Property and in what proportions

19. The record shows that the deceased was polygamous and died intestate leaving 2 widows and children. In line with Section 40 of the Act, the estate was distributed to his widows and children in equal shares. Section 40 (1) provides:

**Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.**

20. Under the foregoing provision, the Applicants, not being widows or children of the deceased are not entitled to his estate.

21. However, it is the Applicants case that the Property belonged to their late father who had had the same registered in the name of the deceased, his eldest son. They dispute the assertion by the Respondents that the deceased had invited his father and his father's second wife and children to stay on the Property. To support their claim, the Applicants contend that the fact that they have lived and settled on the Property and have no other place to call home is an indication that they are entitled to the same. Their legitimate expectation is that the deceased would always provide them with a home. The Applicants further submit that they are dependants of the deceased having been taken in by the deceased when they were young. They stayed with the deceased until his demise thus making them dependent on him for a place to stay. The Respondents were therefore under a duty to disclose to the Court their existence.

22. For the Respondent, it was submitted that the Applicants are not dependants of the deceased as they failed to prove that their dependency. The Applicants have no right to claim ownership of the Property.

23. It is common ground that the Applicants are the half-brothers of the deceased. It is also not disputed that the Applicants have resided on the Property most of their lives and some continue to do so to date. The Applicants submitted that because they lived and settled on the Property all their lives and still do so, they are dependants of the deceased under Section 29 of the Law of Succession Act which provides:

**29. For the purposes of this Part, "dependant" means—**

**(a) ....**

**(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**

24. As half-brothers of the deceased, the Applicants must prove their dependency upon the deceased to qualify as dependants within the meaning of Section 29(b) of the Act. It is accepted that the Applicants lived and settled on a portion of the Property on the invitation of the deceased and remained thereon even after his demise. They know no other home. This to my mind speaks of persons who depended on the deceased for shelter. The term *"as were being maintained by the deceased immediately prior to his death"* is not in my view just limited to matters such as acquisition of parental responsibility, payment of school fees and upkeep. Provision by the deceased to the Applicants and their father a portion of the Property to build, use and settle upon also amounts to maintenance. In this regard, I am in agreement with Mabeya, J in the case of Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others [2016] eKLR where he stated:

**In the present case, there was no dispute that the Applicant was a step mother of the deceased. The evidence on record show that the Applicant not only lived on the portion of one (1) acre given to her by the deceased, but she was utilizing it for her livelihood. She was planting sweet potatoes, bananas, maize and groundnuts for her use. She was in occupation thereof with her children and depended on it for their livelihood. My view is that, the Applicant was a dependent of the deceased since she depended on his one (1) acre that he had given her for her and her family's livelihood.**

25. The deceased made a portion of the Property available to the Applicants for their settlement and use during his lifetime, up to the time of his demise and beyond. Accordingly, I have no difficulty in finding that the Applicants are dependants as envisaged in Section 29 of the Act.

26. Now that the Court has found that they are dependants of the deceased under Section 29 of the Act, are the Applicants entitled to reasonable provision from his estate? The Act allows a dependant for whom no provision has been made from the estate of a deceased person to apply to the Court for reasonable provision. Section 26 of the Act provides:

**Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.**

27. The window of opportunity afforded by the foregoing provision is however limited by time. Section 30 places a time limitation as follows:

**No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by [section 71](#).**

28. The record shows that the Grant was confirmed on 18.12.09 while the Application was filed on 10.4.13. Section 30 of the Act is explicit that no application for reasonable provision shall be brought after a grant of representation in respect of the estate to which the application relates, has been confirmed. The Applicants have been lethargic and only moved to this Court almost 4 years after the Grant was confirmed. In this regard, the maxim rings true that equity aids the diligent and not the indolent. The Applicants are therefore time barred and may not apply for reasonable provision notwithstanding that they are dependants of the deceased.

Whether the Grant should be revoked.

29. The jurisdiction of the Court to revoke and annul grants of representation is contained in Section 76 of the Law of Succession Act. The Applicant in seeking revocation of the Grant has invoked the provisions Section 76(e) of the Act which provides:

**76 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.

30. The grounds upon which the Applicants seek revocation of the Grant are that the same was obtained fraudulently by making of false statements and untrue allegation of facts, *to wit* that the Property was wholly owned by the deceased and that the 2<sup>nd</sup> Respondent is a son of the deceased whereas he is a grandson. Further that there was concealment of facts material to the case, that the deceased held the Property in trust for the Applicants.

29. This Court has found that based on the documentary evidence adduced, the Property belonged to the deceased. The statement by the Respondents that the Property wholly belonged to the estate of the deceased is not, in light of the Court's finding, false.

30. Further, it is not disputed that the 2<sup>nd</sup> Respondent is indeed a grandson of the deceased and not a son as stated by the Respondents in their Application for the Grant. From the explanation given by the Respondents, I am not persuaded that this was done with a fraudulent intention. In any event, the record shows that the consent of the widows and children of the deceased who were entitled to the Grant in a degree higher than the 2<sup>nd</sup> Respondent did give their consent as required by Rule 26 of the Probate and Administration Rules which provides:

**(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.**

**(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.**

31. The foregoing provision also requires that an applicant for a grant of representation must give notice of the same to all persons entitled in same or higher degree than such applicant. The Applicants are half-brothers of the deceased while the Respondents are child and grandchild of the deceased. By dint of Section 39 of the Act, the Applicants' entitlement to the Grant is in a degree lower than that of the 1<sup>st</sup> Respondent, a son of the deceased and the 2<sup>nd</sup> Respondent, a grandson of the deceased. Accordingly, the Respondents were under no legal obligation to give notice to or obtain the consent of the Applicants in their application for the Grant.

32. On the last ground, the Court's position as stated above is that it has no jurisdiction to make declarations over the existence or non-existence of a trust in the Property in favour of the Applicants. As such, the alleged existence of a trust cannot be a ground for revocation of the Grant.

Whether the Kilifi Lands Registrar should be ordered to cancel the title to the Property and properly apportion the Property and issue respective title deeds.

33. The Court has pronounced itself herein on its lack of jurisdiction over the issue of ownership of the Property and the Applicants' entitlement thereto. Accordingly the orders sought to be directed at the Kilifi Lands Registrar to interfere with the title to the Property cannot be granted given the Court's finding.

34. Having considered the facts herein and the law, I have come to the conclusion that the statutory grounds for revocation of the Grant have not been established. Accordingly, the Summons for Revocation of Grant dated 8.4.13 lacks merit and is hereby dismissed. Each party shall bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 24<sup>th</sup> day of January 2020**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

.....for the Applicants

.....for the Respondents

.....for the Interested Parties

.....Court Assistant