



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 2 OF 1985

IN THE MATTER OF THE ESTATE OF MWILU NDOLO (DECEASED)

ROSALIA MUENI MWONGA.....1ST APPLICANT

MARTIN MUENDO NGEWA.....2ND APPLICANT

MORRIS MUEMA NGEWA.....3RD APPLICANT

ANGELA MUTHEU VICTOR.....4TH APPLICANT

VERSUS

JOSHUA MWILU MUNYAO & MUTUNGA MWILU

(as administrations of the estate).....RESPONDENTS

RULING

1. By Summons dated 26th September, 2019, the Applicants herein seek the following orders:

1) **THAT** the Application be certified as urgent and the same be heard Ex-parte in the first instance.

2) **THAT** pending the hearing of this application inter-partes, there be an interim order restraining the Respondents from disposing and/or appropriating, subdividing, alienating, wasting, assigning rights over, intermeddling with part of the property belonging to the estate of the deceased and in particular land parcels known as MUPUTI/KIMUTWA/1328, MAVOKO TOWN BLOCK 3/4963, MAVOKO TOWN/BLOCK 3/4962, MUPUTI/KIPANDINI/75, MUPUTI/KIPANDINI/95, MUPUTI/KIPANDINI/1013, MUPUTI/KIPANDINI/120, MUPUTI/KIMUTWA/1033, IVETI/MISAKWANI/801 and MUPUTI/KIPANDINI/125.

3) **THAT** in alternative to prayer 2 pending the hearing of this application inter-partes, there be an interim order maintaining the status quo of the property belonging to the estate of the deceased and in particular land parcels known as MUPUTI/KIMUTWA/1328, MAVOKO TOWN BLOCK 3/4963, MAVOKO TOWN/BLOCK 3/4962, MUPUTI/KIPANDINI/75, MUPUTI/KIPANDINI/95, MUPUTI/KIPANDINI/1013, MUPUTI/KIPANDINI/120, MUPUTI/KIMUTWA/1033, IVETI/MISAKWANI/801 and MUPUTI/KIPANDINI/125.

4) **THAT** the Honourable court be pleased to issue orders to preserve the deceased's Estate and more particularly the property known as MUPUTI/KIMUTWA/1328, MAVOKO TOWN BLOCK 3/4963, MAVOKO TOWN/BLOCK 3/4962, MUPUTI/KIPANDINI/75, MUPUTI/KIPANDINI/95, MUPUTI/KIPANDINI/1013, MUPUTI/KIPANDINI/120, MUPUTI/KIMUTWA/1033, IVETI/MISAKWANI/801 and MUPUTI/KIPANDINI/125 pending the hearing and determination of the application.

5) **THAT** the surviving administrators of the estate; JOSHUA MUNYAO MWILU and MUTUNGA MWILU be and are hereby called upon to render account of their administration of the estate within 21 days of this order.

6) **THAT** the grant made to JOSHUA MUNYAO MWILU, MUTUNGA MWILU, MUANGE MWILU and NGEWA MWILU be revoked and the 1st Applicant be appointed alongside the Respondents as joint administrators.

7) **THAT** in the alternative to prayer 5 above, this Honourable Courts be pleased to issue an order directing the Respondents to co-operate with the Applicants to facilitate transmission and proper management of the deceased's Estate to complete administration of the estate and distribution properly lawfully and fairly within sixty days failing which the grant issued to them will stand revoked.

8) **THAT** the costs of the Application be in the cause.

2. The application was based on the following grounds:

1) **THAT** the deceased left behind four (4) houses comprising his 4 wives and their respective children namely: Mwikali Mwilu (1st wife); Mukulu Mwilu (2nd Wife); Mbitha Mwilu (3rd Wife) and Nzisa Mwilu (4th wife)

2) **THAT** a Grant of Letters of Administration was issued to Joshua Mwilu Munyao, Mutunga Mwilu, Muange Mwilu and Ngewa Mwilu. It was confirmed on 13th June, 1986.

3) **THAT** the administrators were chosen from each house for purposes of representing the interests of the respective houses.

4) **THAT** two of the administrators Ngewa Mwilu and Muange Mwilu are now deceased.

5) **THAT** the Applicants herein are daughters and sons of Ngewa Mwilu (Deceased), and grandchildren to Mwilu Ndolo (Deceased).

6) **THAT** the Estate of Ngewa Mwilu (Deceased) is currently unrepresented in the distribution of the Estate of Mwilu Ndolo (Deceased).

7) **THAT** on 28th March 2019, the Applicants filed a Petition for Letters of Administration of the estate of Ngewa Mwilu in Succession Cause No. 15 of 2019.

8) **THAT** the Petition was allowed and a Grant of Letters of Administration Intestate made to the Applicants.

9) **THAT** the Applicants are therefore the legal representatives of the estate of Ngewa Mwilu (Deceased), who are eligible to substitute Ngewa Mwilu (Deceased) in the administration of Mwilu Ndolo's (Deceased) estate.

10) **THAT** the surviving administrators, Munyao Mwilu and Mutunga Mwilu are administering the estate of the deceased in total disregard of the Applicant's interest and that of the remaining beneficiaries.

11) **THAT** the Applicants are entitled to a share of their deceased father's estate, which extends to their deceased grandfather's estate.

12) **THAT** the deceased left the following assets:

a) Muputi/Kimutwa/1328,

b) Mavoko Town Block 3/4963,

c) Mavoko Town/ Block 3/4962,

d) Muputi/Kipandini/75,

e) Muputi/Kipandini/95,

f) Muputi/Kipandini/1013,

g) Muputi/Kipandini/120

h) Muputi/Kimutwa/1033, and

i) Iveti/Misakwani/801 and

j) Muputi/Kipandini/125

13) **THAT** after confirmation of the grant the various assets of the deceased as particularized above were registered in the joint names of the administrators with the intention of distributing them to the other beneficiaries.

14) **THAT** after the confirmation, a clan meeting was held wherein the distribution of the estate was agreed upon as per the exhibited agreement as follows:

a) Muputi/Kimutwa/1328:

This property was supposed to be distributed among the children of the first house (Mwikali Mwilu). However, it is now in the possession of the children of the deceased administrator, Muange Mwilu.

b) Mavoko Town Block 3/4963, and Mavoko Town/ Block 3/4962:

These two parcels are a subdivision of the original Mavoko Town Block 3/2062, which was to be shared equally among the four houses. The administrators irregularly caused a subdivision and sale of 4 acres giving rise to two new numbers. The remaining two administrators have embarked on disposing off the remaining 36 acres without consulting all beneficiaries and with cautions registered against the title deeds.

c) Muputi/Kipandini/75:

The property was indeed distributed as per the Clan Agreement.

d) Muputi/Kipandini/95:

The property was to be shared equally among the 4 houses. However, one of the remaining administrators Joshua Munyao has allocated it to his son irregularly.

e) Muputi/Kipandini/1013:

The property was allocated to the 2nd house in equal shares which they are currently in possession.

f) Muputi/Kipandini/120:

The property had been allocated and in possession of Ngewa Mwilu before his death.

g) Muputi/Kimutwa/1033:

The property was to be distributed between the first and second houses. The 1st Respondent has however irregularly taken Ngewa's portion for himself.

h) Iveti/Misakwani/801:

The property was to be distributed equally between the first and second houses. However, the 1st Respondent has allocated a bigger portion to his sons. He has also destroyed the fence.

i) Muputi/Kipandini/125:

The property was to be jointly owned by the first and second houses.

15) **THAT** instead of distributing the estate and completing the administration, the Respondents are holding onto the property as absolute proprietors and purporting to displace the interests of the other beneficiaries, particularly the applicants in this matter.

16) **THAT** the beneficiaries and particularly the applicants herein have not benefitted from the estate and have been rendered destitute owing to the failure by the administrators to distribute the estate.

17) **THAT** the provincial administration had tried to intervene in the distribution of the estate, upon which it ordered that no development was to be done before the distribution of the estate.

18) **THAT** failure to complete administration of the estate within six months is a breach of the administrator's duty under the law.

19) **THAT** the administrators have not sought extension of time to complete administration from the Court. There has been inordinate delay in completion of administration.

20) **THAT** the grant issued to the Respondents has become useless and inoperative.

21) **THAT** there is real risk of the estate going into waste and all the beneficiaries are anxiously waiting for their respective shares.

22) **THAT** the current administrators have disinherited some of the beneficiaries of the estate. The interests of the applicants in the estate have been disregarded by the respondents.

23) **THAT** the surviving administrators have failed to account for their administration.

24) **THAT** it is in the interest of justice that the application is allowed to enable the completion of the distribution of the estate.

3. The Summons were supported by an affidavit sworn by **Rosalia Muei Mwonga**, the 1st applicant herein in which she reiterated the foregoing.
4. In response to the application, the Respondents relied on the replying affidavit sworn by **Joshua Mwilu Munyao**, the 1st administrator herein. According to the Respondents, the administration of the estate was concluded in 2006 pursuant to the confirmation of grant made in 1986 hence there is no estate to preserve but a share to the deceased beneficiaries. It was averred that the applicants have refused to co-operate in the sharing of the deceased's estate so that each person gets his or her share as per the clan's distribution which was agreed by all.
5. The Respondents averred that **Peter Ngewa Mwilu** died and the applicants being his sons and daughters refused to take out Succession Proceedings to enable the distribution and they had to be cited but even then they did not do so. The Respondents contended that they only need the co-operation from the applicants to conclude the transfer of the various lands to the beneficiaries which they have been holding as trustees.
6. It was submitted on behalf of the applicants that under Section 76 of the **Law of Succession Act**, a grant of representation may be revoked on three grounds. First, where the process of obtaining the grant was marred by glaring difficulties. Secondly, it may be revoked where the administrator runs into difficulties in the process of administration of the estate such as where he fails to render accounts as and when he is required to do so by the law, and thirdly, where the grant has become useless or inoperative. The Application dated 26th September 2019 is hinged on the founded grounds that the surviving administrators have failed to render account, and also that the grant has become inoperative.
7. It was submitted that in this case the surviving administrators have never rendered account for their administration of the estate of the deceased yet the said Act tasks an administrator with the duty to render accounts. The applicants relied on section 83(g) which provides that the administrators shall within six months of the confirmation of the grant complete the administration of the estate in respect of all matters other than continuing trusts produce to the court a full and accurate account of the completed administration. It was therefore the applicants' prayer that the Respondents are ordered to render account on how they have conducted their affairs in the administration of the estate of the deceased there is no continuing trust in the estate of the deceased.
8. In support of the submissions the Applicants relied on the case of **Matheka and Anor vs. Matheka [2005] 1 KLR pg 456**, where it was held that a grant may be revoked if the administrator has failed to produce to the Court such inventory or account of administration as may be required.
9. It was contended that since the Respondents have abdicated their duty to diligently administer the Estate without giving any reasonable explanation for the breach of section 76 of the **Law of Succession Act**, the grant issued to the Respondents should be revoked.
10. As regards the failure to complete the administration, it was submitted that the confirmation of the grant to the Respondents was made on 13th June 1986 and 33 years since then, the Respondents have failed to complete their dealings in the administration of the same. It was therefore the Applicants' position that the Respondents are in breach of their duty to proceed diligently with the administration of the estate of the deceased, and thus prayed that this Honourable Court is pleased to revoke their grant under section 76 (d) and (e) of the **Law of Succession Act**. In this regard they relied on the case of **Charles Muvisi Kyuli vs. Ann Amanga Nthale & Another [2019] eKLR**, where the Court of Appeal held that the High Court was justified in revoking a grant where the executor had breached the duty to complete administration of the estate meaning that he breached a fundamental statutory duty yet the Respondents have continued to develop the estate of the deceased, before the distribution of the estate has been completed.
11. Regarding the allegation that the grant has become inoperative, it was submitted that where a grant is made jointly to several persons, it becomes useless and inoperative after one of the holders dies and cannot be used so long as it bears the name of a dead person and reliance was placed on the case of **In The Matter of the Estate of Waruhiu Itote (Deceased) [2013] eKLR** and **Estate of Simon Ngugi Nganga (Deceased) [2013] eKLR**, where the Court held that where a grant has been made to joint administrators, it is expected that they will act together to completion. Therefore, the death of one of them is a fundamental issue as it runs to the root of appointment of the administrators. The grant becomes useless and inoperative, meaning that the same ought to be revoked and fresh appointments of administrators be made.
12. In this case it was submitted that two of the administrators **Ngewa Mwilu** and **Muange Mwilu** are now deceased. The Applicants herein are daughters and sons of **Ngewa Mwilu** (Deceased), and grandchildren to **Mwilu Ndolo** (Deceased). The Respondents have been operating notwithstanding that two of the Administrators are now deceased. Based on the decision in **John Munene Muriuki & Another vs. Alice Wambui Ngari & 10 Others [2019] eKLR** it was contended that where the grant has become useless and inoperative, it would be due for revocation.
13. In the alternative, the Applicants prayed that the Respondents are directed to cooperate with the Applicants to facilitate the proper transmission and proper management of the estate to complete administration of the estate and distribution properly lawfully and fairly within sixty days. In case of such failure to complete administration within 60 days, the grant issued to the Respondents to stand revoked. In this regard reliance was placed on the case of **Charles Muvisi Kyuli v Ann Amanga Nthale & Another [2019] eKLR**, where the Court of Appeal noted that the Appellants had been given an extension of 90 days to finalize with the administration of the estate of the deceased which direction they failed to honour resulting in the revocation of their grant.
14. The Court was therefore urged to direct the Respondents to cooperate with the Applicants to facilitate the proper transmission and proper management of the estate to complete administration of the estate and distribution properly lawfully and fairly within sixty days failing which the grant issued to them will stand revoked.
15. On behalf of the Respondents, it was submitted that prayers sought in order 2 to order 7 are made in bad faith because the respondents are

not opposed to distribution of the estate as per the clan agreement. Rather, it is the applicants that have frustrated the efforts of distribution by neglecting to take out grant for the estate of their deceased father in order to facilitate the rest of the distribution. The Respondents insisted that they are ready and willing to continue the distribution. However, unless and until the beneficiaries of the estate **Ngewa Mwilu** (deceased) take out a grant of representation for his estate, distribution of the estate of **Mwilu Ndolo** (deceased) cannot continue because it would amount to intermeddling contrary to section 45 of the *Law of Succession Act*. It was therefore the Respondents' position that the applicants should be ordered to take out a grant of representation of **Ngewa Mwilu's** (deceased) estate so as to facilitate distribution of **Mwilu Ndolo's** estate which will be done in accordance with the clan agreement.

Determination

16. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

17. Section 76 of the *Law of Succession Act* provides as hereunder:

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.

18. However, it is not in every situation where transgressions are alleged that the grant must be revoked.

19. I therefore agree with the position adopted by **Muigai, J** in **Mary Wangari Kihika vs. John Gichuhi Kinuthia & 2 Others [2015] eKLR**, that in exercising its discretion the Court ought to take into account the effect of either revoking the grant or relieving all the administrators of their duties and where more injustice would be caused by such action to instead opt for an alternative that would ensure that the estate is properly administered.

20. Similarly, in **Re the Estate of the Late Suleman Kusundwa [1965] EA 247**, it was held that:

“The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased's property as he was entitled to dispose of by will under the applicable law of inheritance.”

21. This position was clearly appreciated by **Khamoni, J** in **Re Estate of Gitau (Deceased) [2002] 2 KLR 430** where he expressed himself as hereunder:

“Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the Law of Succession Act should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.”

22. In this case, the surviving administrators/Respondents' position is that their inability to distribute the estate as proposed was due to the failure by the applicants to obtain grant of letters in respect of the estate of their deceased father, **Ngewa Mwilu**. The Respondent have confirmed that they are ready and willing to distribute the estate in the agreed manner once the applicants obtain the said grant. The

Applicants have however, exhibited a copy of the grant issued on 27th August, 2019. It is therefore clear that the Respondents no longer have any reason for not proceeding with the distribution in the manner proposed. Just like **Mutende, J in Eric John Mutemi & Another vs. Agnes Mumbanu Kinako [2016] eKLR** it is my view that parties ought to be given a time frame within which to comply with section 83(e) of the *Law of Succession Act* and to show commitment towards diligently administering the estate of the deceased for the benefit of all the beneficiaries, failure to do which this Court would be left with no alternative but to replace the administrators.

23. Accordingly, instead of revoking the grant I hereby direct the Respondents to proceed to diligently distribute the estate of the deceased herein in the manner proposed and render an account thereof within 90 days from the date of this decision.

24. Liberty to apply granted and there will be no order as to costs.

25. It is so ordered.

G V ODUNGA

JUDGE

Read, signed and delivered in open Court at Machakos this 29th day of April, 2020.

Delivered in the absence of the parties at 9.15 am having been duly notified through their known email addresses.

CA Geoffrey