



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Coram: D. K. Kemei - J**

**SUCCESSION CAUSE NO.277 OF 2007**

**IN THE MATTER OF THE ESTATE OF JAMES MUASA MUTIA (DECEASED)**

**NTHENGE MUASA.....1<sup>ST</sup> PETITIONER**

**NZWII MUASA.....2<sup>ND</sup> PETITIONER**

**P. MUTIA MUASA.....3<sup>RD</sup> PETITIONER**

**-VERSUS-**

**JOEL WAMBUA MUASA.....4<sup>TH</sup> PETITIONER/OBJECTOR**

**RULING**

1. The Objector herein filed an application dated 3.4.2012 seeking for the revocation of grant issued on 8.11.2007 and confirmed on 11.2.2009. He claims that he was entitled to be included as one of the petitioners for letters of administrators of the estate of the deceased. He accuses the petitioners for failing to disclose *inter alia* the fact that the parcel number Matuu/Ikatini/570 never belonged to the deceased as well as the fact that the deceased had distributed assets to the 1<sup>st</sup> to 3<sup>rd</sup> petitioners which they later sold. He also blames his co- petitioners for concealing material facts hence the certificate of grant issued on 8.11.2007 and confirmed on 11.2.2009 should be revoked. He also proposes that the only asset remaining namely Matuu/Ikatini/730 should be shared equally by the beneficiaries.

2. On record is a further affidavit deponed on 12.5.2015 by Theofrey Nthenge Muasa the 1<sup>st</sup> administrator in opposition to the objector's application that was stated to be in furtherance of an affidavit deponed on 11.9.2012. It was averred that the deceased bought the parcel of land Matuu/Ikatini/570 and got the transfer dated 22.9.93 (Marked TNM1) duly signed by the registered owner and which was allocated to the objector. It was averred that the objector sold the same with the intention of defeating the interest of the estate as evidenced by sale agreement marked TNM2(a) and (b). and who is now attempting to make a claim on parcel Matuu/Ikatini/730.

3. Directions were issued that the application be canvassed vide viva voce evidence. There are on record witness statements by the objector, Bernard Kivulu Mutwii, Michael Kituku Wambua, Theofrey Nthenge Muasa, Nzwii Muasa, Peter Mutia Muasa and Peter Munyao Kitaka.

4. The matter came up for hearing before Justice E. Ogolla on 11.10.2016 where Joel Wambua Muasa testified as OB Pw1. He sought to rely on his statement and told the court that the deceased was his father and who had two wives, Wanzila Muasya and Mukenya Muasya; that the 1<sup>st</sup> wife had five children and that he was the only child of his mother Mukenya Muasya from the second house. In the written statement, he stated that the deceased owned plot 572, Machakos/ Matuu/4213 and 5 acres of land at Mavoloni Plot 126 that he sold during his lifetime. He denied that plot 570 had been given to the 2<sup>nd</sup> family while plot 730 had been given to the 1<sup>st</sup> family. He testified that plot 570 did not belong to Kitaka Musyoki though his written statement stated that the same did not belong to the deceased. He then testified that the petitioners wanted him to take plot 570 yet the same did not belong to the deceased. He lamented that plot 730 that was 27 acres was distributed by his co-petitioners and who gave him nothing. He told the court that he stayed on plot 730 that the petitioners wanted to take. He testified on cross examination that his father did not buy plot 570. He was then stood down as he was recorded as being unruly to the cross examining counsel.

5. On 21.3.2017, the parties consented that the part heard matter proceed from where it had reached. The objector's cross-examination continued. He testified that his mother Mukenya Muasya died on 12.12.2010. He denied selling plot 570. He testified that his father was given plot 571 but which was cancelled by the adjudication department. On reexamination he testified that parcel 730 is ancestral land and that parcel 572 was sold by his mother on instructions from his father who was then ailing in hospital and needed money for medication. He testified that plot 570 did not belong to his father and later told the court that the same did not belong to Kitaka Musyoka.

6. OB PW2 was Bernard Kivulu Mutwii who sought to rely on his witness statement. In the said statement he stated that he was the chairman

of Aombe clan and that he knew the deceased had four parcels of land being Plot 730 Kithimani Adjudication, Plot 572 Ikatini, Plot 126 Mavoloni and another plot in Matuu Munina. He stated that he was a witness when the deceased purchased the Ikatini Plot 572, the plot at Munina but was not aware if the deceased sold them. He stated that the deceased divided his plot 730 between his two wives. He reiterated this during the evidence in chief and on cross examination he testified that he did not know if the deceased owned plot 570 and could not tell if the deceased had more than four parcels of land.

7. OB Pw3 was Michael Kituku Wambua who sought to rely on his written statement where he stated that he knew that the deceased had two wives. He stated that he was present when the deceased divided his land parcel number 730 between his two wives. He testified on cross examination that he was present when parcel 730 was divided.

8. The petitioner's first witness was Theoffrey Nthenge Muasa who sought to rely on his witness statement where he stated that the deceased had left behind parcels 730 and 570. He stated that the deceased divided his land before his death and gave parcel 730 to the 1<sup>st</sup> family and parcel 570 to the 2<sup>nd</sup> family. He stated that the objector sold parcel 570 and now wanted to take away the petitioners land. He testified that his father, the deceased had purchased plot 570 from Kitaka Makovo and that the objector sold the same as evidenced by the sale agreement marked as MFI 6a and b. On cross examination, he testified that he was not aware that parcel 572 belonged to his father. He admitted that the objector resided on parcel 730.

9. Pet Pw2 was Peter Muasa who sought to admit his statement dated 9.7.2015 and he reiterated that the deceased left behind parcels 730 and 570. He stated that the deceased divided his land before his death and gave parcel 730 to the 1<sup>st</sup> family and parcel 570 to the 2<sup>nd</sup> family. He stated that the objector sold parcel 570 and now wanted to take away the petitioners land. He testified that parcel 570 had no title deed and that parcel 730 had not been divided by the deceased before he died. He admitted that the objector resided on parcel 730 from 1963 to date. He testified that parcel 570 was bought for the objector's mother and that the deceased had directed the objector to move to the said land. He testified on cross examination that the objector became violent when he was ordered to move to parcel 570.

10. The Petitioner's third witness Peter Munyao Kithaka in his statement that he sought to rely on stated that his father sold land to the deceased on 26.9.1993. He testified that plot 570 was sold to the deceased as per sale agreement dated 12.12.1984(Pexh6a) and that the land was given to the objector. He testified that the objector did not live on plot 570 as the same had been sold.

11. Pet Pw4, Michael Nzwii Muasa sought to rely on his written statement where he stated that the deceased had left behind parcels 730 and 570. He stated that the deceased divided his land before his death and gave parcel 730 to the 1<sup>st</sup> family and parcel 570 to the 2<sup>nd</sup> family. He stated that the objector sold parcel 570 and now wanted to take away the petitioners land. He testified that the objector sold parcel 570 to Munyao Kithaka. On cross examination, he testified that the objector did not sign the P& A forms 80 and 12. He testified that he and the 1<sup>st</sup> petitioner sold portions of their land and that the purchasers had built homes. He denied that parcel 570 was sold to defray the deceased's medical expenses.

12. Counsels filed submissions in support of their cases. Counsel for the objector submitted that there was no evidence that the objector sold plot 570. It was submitted that the grant issued on 8.11.2007 and confirmed on 11.2.2009 be revoked because the same was obtained by concealment of the fact that the beneficiaries had consented to the proposed mode of distribution and yet this was not true. It was submitted that parcel 570 did not belong to the estate of the deceased and what formed the estate was plot 572 that was sold to defray medical expenses. The court was invited to consider the case of **in the matter of the Estate of the late Jackson Muriungu Muindu (2014) eKLR**

13. Learned counsel for the petitioners submitted that there was no fraud or non-disclosure on the part of the petitioners and as such the grant ought not to be revoked. It was pointed out that the objector did not attend court when the matter was coming up for confirmation of grant on 9.2.2009 despite being aware of the hearing and that he had earlier been directed to file an affidavit of protest if need be but he did nothing and thus the turnabout herein is in bad faith and that the application for revocation should be rejected. Reliance was placed in the case of **Re Estate of John Mulwa Nzioki (2020) eKLR**. Counsel submitted that there was no evidence that the deceased did not own plot 570 and that there was evidence that the same was purchased by the deceased and later sold by the objector. The court was urged to uphold the terms of the confirmation by giving plot 730 to the 1<sup>st</sup> family and plot 570 to the 2<sup>nd</sup> family.

14. The issues I have to determine are; *whether the applicant has raised sufficient grounds for revocation of grant and whether the court may grant the orders sought.*

15. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the Law of Succession Act as follows:

***“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.*

16. The applicant's application seems to raise the following grounds: -

**(a) 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; or**

**(c) 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.**

17. Applying the test of law in section 76 of the Law of Succession Act, the applicant alleges that plot 570 did not belong to the deceased and yet it was included in the grant; that there were properties that were left out of the grant and that not all the beneficiaries consented to the distribution made in the grant. This being a civil matter, the burden of proof lies with the applicant. To decide in his favour, the court has to be satisfied that the plaintiff has furnished evidence whose level of probity is such that a reasonable man, even in a case such as this where the defendant has not adduced any evidence, might hold that the more probable conclusion is that for which the plaintiff contends, since the standard of proof is on a balance of probabilities / preponderance of evidence (see *Lancaster v. Blackwell Colliery Co. Ltd (1918) WC Rep 345*).

18. Non-disclosure of material facts to the succession court is another ground that the applicant imputes upon the petitioner namely that the substance of those material facts and the proof that plot 570 did not belong to the deceased and yet it was included in the grant; that there were properties that were left out of the grant and that the petitioners were fraudulent in obtaining the grant and which have not been satisfactorily demonstrated to this honorable court. Going through the evidence of the objector and his witnesses one notices a thread of lies. First and foremost, the objector herein is and has been an administrator as he is the 4<sup>th</sup> petitioner. It is not believable that he has never known that he was one of the administrators of the estate of his late father because on 3.11.2008 he was summoned to appear in court and duly appeared on 1.12.2008 together with his mother when he was directed to file an affidavit of protest to the proposed distribution. However, he did not file any and thus the grant was confirmed as proposed by his co-administrators on the 9.2.2009. Secondly, the documents filed and relied upon left no doubt that parcel number Matuu/Ikatini/570 had been purchased by the deceased from one Kitaka Makovo as confirmed by the evidence of his son Peter Munyao Kitaka (Pet Pw3) who witnessed the sale agreement dated 12/12/1984 and the translation thereof. The witness went ahead to state that the deceased gave the said parcel to the objector's family while parcel 730 was given to the 1<sup>st</sup> family. Contrary to the objector's assertion that parcel 570 did not belong to the deceased, the evidence of the said son of the seller put paid the objector's claims. Again, the objector attempted to claim that the deceased had bought parcel 572 which was later sold by the objector's mother to defray medical expenses incurred by the deceased but this did not convince me since he did not provide evidence of existence of such property. It seems the same was a diversionary tactic by the objector in a bid to avoid scrutiny. The objector's vociferous denial that plot 570 did not belong to the deceased could not stand the test in view of the available evidence to the contrary. I am satisfied that the two properties formed part of the estate of the deceased and should be distributed among his beneficiaries. I have seen the copy of search certificate on plot Matuu/Ikatini/570 which shows that the ownership is still in the names of the seller and in which the seller's son confirmed that his family will transfer to the family of the deceased. The said plot measures about 3.5 acres which is smaller in size as compared with plot 730 that measures about 27 acres. The objector has also failed to avail evidence of more properties belonging to the deceased which had not been factored by the petitioners. Both parties revealed that the objector still resides on plot 730 like the petitioners and that most of them have sold portions of the land to purchasers. If any of them sold any land, then they will have to reckon with that fact during the redistribution of the properties as their shares will be affected by what they have sold. None of the beneficiaries will be allowed to get more than the other as the properties will be shared equally. Finally, the petitioners claimed that the deceased had shared out the properties as per the confirmed grant but no such evidence was availed to prove the same and hence it is my view that the assets should be shared equally. This will call for revocation and or cancellation of the certificate of grant to pave way for a fresh one in line with the above finding.

19. As regards the objector's quest to have the grant revoked, it is my view that no sufficient grounds have been established to warrant the same. It seems to me that the objector has come to realize that he is likely not to get land having sold the one that had been allocated to his family by the deceased and has opted to throw a spanner in the works. However, any such fear need not be entertained since the properties will be shared equally and that whoever had sold any portion will have to sort out the purchaser in his own ways as long as he does not interfere with another beneficiary's portion and that during the sub division the portion already taken up by a beneficiary will have to be factored up. Revoking the grant is not the proper thing to do. The appropriate way is to revoke the certificate of confirmation of grant and a new one be issued reflecting the new distribution. As the objector and petitioners are children of the deceased then the two assets will have to be shared equally between them.

20. In the final analysis it is my finding that the Objector's application dated 3.4.2012 succeeds to the extent as follows;

**a) The certificate of confirmation of grant issued on 11.2.2009 is hereby revoked and or cancelled.**

**b) A fresh certificate be and is hereby issued in which the two properties namely Matuu/Ikatini/730 and Matuu/Ikatini/570 shall be shared equally among the Petitioners and the Objector.**

**c) Any portion already sold by any of the beneficiaries to be factored during the distribution.**

**d) Each party to bear their own costs.**

Orders accordingly.

**Dated and delivered at Machakos this 15<sup>th</sup> day of December, 2020.**

**D. K. Kemei**

**Judge**