



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

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

**SUCCESSION CAUSE NO.618 OF 2005**

**IN THE MATTER OF THE ESTATE OF THE LATE DANIEL NZIOKA MUTISO**

**ALIAS DANIEL MUTISO NZYOKA (DECEASED)**

**ROSELINE DANIEL.....1<sup>ST</sup> APPLICANT**

**MONICA NDUNGE DANIEL ALIAS**

**MONICA NDUNGE NZIOKA.....2<sup>ND</sup> ADMINISTRATOR/APPLICANT**

**CYROSE MBULA DANIEL.....3<sup>RD</sup> APPLICANT**

**MARY ZAKAYO ALIAS**

**MOLLY M.D. ZAKAYO.....4<sup>TH</sup> ADMINISTRATOR/APPLICANT**

**CARO MUTETI.....5<sup>TH</sup> APPLICANT**

**BRIGIT BEN.....6<sup>TH</sup> APPLICANT**

**REGINA ONYANA ALIAS**

**REGINA MWIKALI ONYUNA.....7<sup>TH</sup> APPLICANT**

**FELISTAS MUSYOKA.....8<sup>TH</sup> APPLICANT**

**ROSEMARY MWANZIA.....9<sup>TH</sup> APPLICANT**

**-VERSUS-**

**JOSHUA MUTHAMA DANIEL.....1<sup>ST</sup> ADMINISTRATOR/RESPONDENT**

**FRANKLIN NZIOKA DANIEL.....2<sup>ND</sup> RESPONDENT**

**PATRICK KYALO NZIOKA.....3<sup>RD</sup> ADMINISTRATOR/RESPONDENT**

**AND**

**WINFRED MUTILU.....1<sup>ST</sup> INTERESTED PARTY**

**FREDRICK MUSAU.....2<sup>ND</sup> INTERESTED PARTY**

## RULING

1. This ruling relates to the application dated 29.7.2020.

2. The Applicants herein filed summons dated 29.7.2020 under section 45, 47 & 74 of the Law of Succession Act and Rules 43, 49 & 73 of the Probate and Administration Rules seeking the following orders: -

**1. Spent**

**2. Spent**

**3. THAT this honorable court be pleased to order the respondents do forthwith render an account for all the rent collection from the tenants in the deceased's houses on the parcels of land No. MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/1573 since the year 2012 to date.**

**4. THAT a fresh grant of letters of administration (Letter 41) do issue in the names of the 4 administrators herein as per consent order of 20.1.2020.**

**5. THAT this court be pleased to order for the cancellation of the entries of the names of the respondents in the lands register and cancellation of the resultant title deeds unlawfully and irregularly issued to them with regard to parcels of land No. MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/1573 in purported reliance to the confirmed grant issued herein on 26.5.2008 and dated 3.6.2009.**

**6. THAT this honorable court be pleased to order that parcels of land No MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/1573 be registered in the names of the administrators herein who shall be mandated to collect the rents due therefrom and distribute the same equally to all beneficiaries herein and a rectified certificate of confirmation of grant do issue including the names of the administrators herein and reflecting the proposed redistribution.**

**7. THAT the court do revoke, annul, nullify and/or cancel any and all sales, transfers, dispositions, charges, leases or any other transactions whatsoever made by the respondents, their servants, agents and or employees or any other person whomsoever claiming under them or through them with respect to parcels of land No MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/1573.**

**8. THAT costs of this application be borne by the respondents**

3. It is supported by an affidavit sworn by **Monica Ndunge Nzioka** on **29.7.2020** and filed on **30.7.2020**. In the said affidavit, the deponent avers that an amended certificate of confirmation of grant dated 26.5.2008 and issued on 3.6.2009 to her late mother Alice Mwelu Daniel and her brother Joshua Muthama Daniel, the 1<sup>st</sup> administrator/respondent (MNN1). It was pointed out that as per the mentioned amended certificate of confirmation of grant, the parcels of **land No MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/1573** were to be registered in the names of Daniel's venture Company for the benefit of all the beneficiaries and instead of implementing the terms of the grant as confirmed the respondents caused the suit property to be registered in their three individual names as evidenced by search marked MNN3. It was averred that the respondents had been enjoying the rental income from the estates hence the deponent sought an order for account.

4. According to the deponent, the titles issued in the names of the respondents was irregularly done and that the parcels of **land No. MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/1573** ought to be registered in the names of the administrators who were to be mandated to collect the rent and distribute the same equally to the beneficiaries. It was revealed that the interested parties were up to date with their rent payments but however face the imminent threat of eviction in distress for rent and attachment of their properties (MNN4). It was averred that the four administrators ought to carry out their duties as per the consent order of 20.1.2020 hence the court was urged to grant the orders sought.

5. In reply to the application are affidavits deponed by Patrick Kyallo Nzioka and a further affidavit deponed by Cyrose Mbula Daniel on 16.10.2020. In the replying affidavit, Patrick Kyallo Nzioka averred that the estate of the deceased had already been distributed to the beneficiaries of the deceased who were free to deal with their shares as they please. It was averred that as a result of the distribution **Land No. MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/1573** were transferred to Daniels venture, a business registered in the names of the deponent, Joshua Muthama Daniel and the 2<sup>nd</sup> applicant. It was averred that none of the respondents had laid claim to the suit properties and that the proceeds of the same belonged to the respondents and Joshua Muthama Daniel. The deponents denied any obligation to give an account.

6. In the further affidavit deponed by Cyrose Mbula Daniel she averred that all the beneficiaries of the estate of the deceased including the applicant Monica Ndunge Daniel received their shares. It was pointed out that the mentioned applicant was given a parcel of land measuring one hectare that was to be excised from **LR KALAMA/KIITINI/1067** as evidenced by the schedule of distribution (MNN1). It was averred that the applicant could not be said to have a share in **LR No. MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/1573** as the said parcels belonged to the respondents together with Joshua Muthama Daniel. The court was urged to dismiss the application.

7. The court directed the parties to file and exchange submissions.

8. Counsel for the Applicants in his submissions took issue with the failure of the respondents to implement the grant as confirmed hence caused the **parcels No. MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/1573** to be registered in the names of the respondents. The

court was urged to allow the application as prayed.

9. Counsel for the Respondents vide written submissions filed on 22.10.2020 pointed out to court that the land *No. MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/1573* were given to Dennis Venture Company whose partners are the respondents and that the applicants had no interest in. It was submitted that the grant of the estate of the deceased was confirmed on 3.6.2009 and that the same had not been challenged. It was the argument of counsel that title deeds had been issued to the beneficiaries of the estate of the deceased including *No MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/1573* that was issued in the names of Daniels Ventures. It was submitted that if the applicants had a claim to the suit property then they ought to go to the Environment and Land Court.

10. In this application it appears that there is a contest over the interest in *No. MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/1573* and whether or not the applicants had an interest that would defeat the interest of the respondents over the disputed property and, after going through the evidence on record, I find the following issues necessary for determination:

*i. Whether the Application has merit.*

*ii. Whether grounds have been raised to warrant an order for account.*

*iii. Whether a fresh grant in the names of the administrators in terms of the consent dated 20.1.2020 may be issued.*

*iv. Whether the court can order cancellation of title deed in respect of No. MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/1573 and order re- issue of the title deed in the names of the administrators.*

*v. Whether the court may order a nullification of transactions made by the respondents in respect of No. MUPUTI/KIIMA-KIMWE/60 and KALAMA/KIITINI/ 1573.*

*vi. What orders may the court grant?*

11. The petition herein was filed on 18.11.2005 by Alice Mwelu and Joshua Muthama Daniel. The grant was issued on 17.2.2006 and which was confirmed on 28.5.2005 on the terms inter alia that the two suit properties were to go to Daniels Venture Co; further the 1<sup>st</sup> applicant Roseline Daniel, the 2<sup>nd</sup> applicant Monicah Daniel and the 3<sup>rd</sup> applicant Mbula Daniel were given 1ha each from Plot Kalama/Kiitini/1067. The 8<sup>th</sup> applicant was given 2.8 ha out of the same plot. On record is an application for annulment of grant that was dated 25.9.2019 and which challenged the acts of the 2<sup>nd</sup> respondent in giving himself chunks of prime land. On record is a consent dated 20.1.2020 that is to the effect that one of the deceased administrators' Alice Mwelu Daniel was to be substituted with Joshua Muthama Daniel, Monica Ndunge Nzioka, Patrick K. Nzioka and Molly M.D Zakayo. The same was adopted as an order of the court. There is also another consent that was issued on 19.5.2020 that was to the effect that tenants on the property Muvuti/Kiima Kimwe 60 would deposit rent in a bank account that was to be opened in the names of Daniel Nzioka. Vide application dated 3.6.2020, the said consent issued on 19.5.2020 was challenged and that the applicants sought that the said consent be set aside. Annexed to the affidavit in support of the application was a copy of a title deed issued on 19.12.2012 to Franklin Nzioka Daniel, Joshua Muthama Daniel and Patrick Kyalo Daniel in respect of the property Muputi/Kiima Kimwe/60. Vide order issued on 17.7.2020, the consent issued on 19.5.2020 was set aside. There is another application filed on 8.7.2020 that seeks to set aside the orders of the court that were issued on 17.7.2020.

12. It is against this background that orders are sought for account; a fresh issue of grant in the names of the 4 administrators; cancellation of titles and fresh issue of the same in the names of the 4 administrators and revocation of transactions made by the respondents in respect of the suit properties.

13. In respect of the order for account, section 83(h) of the Law of Succession Act provides that the legal representatives are liable: 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.

14. In the case of **Re Estate Of David Kyuli Kaindi (Deceased), Succession Cause No. 3403 Of 2005**, it was pointed out that:

***“[18] The most potent remedy in the hands of a beneficiary is that of calling personal representatives to account. Beneficiaries who are not personal representatives have no control over the estate. The property of the deceased does not vest in them. They have no power over it; neither do they have any obligations with respect to it. When aggrieved by the manner the estate is being run their remedy lies in seeking accounts from the personal representatives, and, in extreme cases of maladministration and misconduct by the personal representatives, in applying for revocation of the grant.*”**

***[19] The obligation to account is tied up with the fact that personal representatives are also trustees. They are defined as such in the Trustee Act, Cap 167, Laws of Kenya, at Section 2. This is so as property belonging to another vests in them in their capacity as personal representatives, and they hold the same for the benefit of others – beneficiaries, heirs, dependents, survivors, creditors, among others. They stand in a fiduciary position in relation to the property and the beneficiaries. As they hold the property for the benefit of others or on behalf of others – they stand to account to the persons for whose benefit or on whose behalf they hold the property. It is an equitable duty and a statutory obligation.”***

15. I have noted that the 2<sup>nd</sup> applicant is not happy with the share of land that she was given. It is noted that the estate of the deceased had already been distributed and titles to the suit land issued. The certificate of confirmation of grant clearly shows the distribution of the estate and that all the beneficiaries appear to have been given their respective shares. It is only the two assets now in dispute namely Muputi/Kiima-

Kimwe/60 and Kalama/Kiitini/1573 that the applicants are after. It is noted that the two assets had been agreed that they be transferred to Daniel's Ventures Company a business registered in the names of Patrick Kyalo Nzioka, Joshua Muthama Daniel and Monica Ndunge Daniel alias Monica Ndunge Nzioka. The confirmation of the grant was made on the 28.5.2008 which is a period of twelve (12) years ago. It was expected that the distribution of the estate had been completed. The question then would be whether an order for account would serve any useful purpose. The role of this court is to ensure the distribution of the estate of the deceased and preserve the same if there is wastage. Under section 3(1) of the Law of Succession Cap 160 Laws of Kenya an estate is defined as follows; "*the free property of a deceased person.*" Is the suit property free? Is it the property of the deceased? The answer is no as there is a title deed to the suit property that I have seen on the record that is in the names of Franklin Nzioka Daniel, Joshua Muthama Daniel and Patrick Kyalo Daniel in respect of the property Muputi/Kiima Kimwe/60. It is trite law that a title is indefeasible and as such if the applicant had any claim to the property then the same ought to go to the ELC court. I am guided by section 25 (1) of the Land Registration Act No. 3 that states that the rights of a proprietor are indefeasible except as provided under the Act. Section 25(1) provides:-

*"The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever but subject to:-*

a) *To the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register and*

b) *To such liabilities, rights and interest as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register."*

16. Similarly Section 26 of the same Act states that

*"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by a proprietor shall be taken all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances easement, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except:-*

a) *On the ground of fraud or misrepresentation to which the person is proved to be a party or*

b) *Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme."*

17. I have not seen any title to the property **KALAMA/KIITINI/1573**. However, the confirmed grant stated that the same was to go to Daniel's Ventures Company. The said grant had never been revoked. On the strength of the grant as confirmed, the said property would cease to be the free property of the deceased and therefore would be dealt with according to the confirmed grant and the laws relating to land. This means that prayer No. 3 lacks merit.

18. In respect of prayer 4, the applicants seek that Joshua Muthama Daniel, Monica Ndunge Nzioka, Patrick K. Nzioka and Molly M.D. Zakayo be appointed administrators to the estate of the deceased in place of the deceased original administrator Alice Mwelu Daniel. Substitution of a deceased administrator could not be dispensed of by way of consent as there were conditions to be met before the order is granted.

19. The applicants/proposed administrators are not exempt from applying for a fresh grant as there is no room for substitution of a deceased administrator. I am guided by the case of **Julia Mutune M'mboroki v John Mugambi M'mboroki & 3 others [2016] eKLR** where the Court held;

*"There is absolutely no room of substitution of the deceased administrator under the Law of Succession Act. In my view, therefore, where the sole administrator is a natural person, and he or she dies, the grant becomes useless or inoperative by reason of subsequent event of his demise.....*

*Accordingly, in such case, the proper procedure is to apply for revocation of grant of letters of administration under section 76(e) of the Law of Succession Act on the reason that the grant has become useless and inoperative through subsequent circumstances and a grant to be made to another person named in the application."*

20. Therefore there could not be any substitution in the manner envisaged by the consent that was entered on 20.1.2020 and this court notes that there was an error in allowing the consent and accepting the effect thereof. The provisions of the said consent that relate to substitution ought not to stand as the effect is not supported by any law and this court in *suo moto* must set aside the same and await the parties to institute the requisite application. The applicants seek to be appointed administrators on the footing of the consent in terms of prayer 4, but in view of the court's finding aforesaid the prayer sought must fail.

21. The applicants have sought an order of cancellation of the titles that were issued in respect of the suit property and annulment of any transactions that the administrators made in respect of the suit property. The power to do so was discussed in the case of **Santuzza Bilioti alias Mei Santuzza (deceased) v Giancarlo Falasconi (2014) eKLR** where the court held:

*".. the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased's property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before a grant is confirmed."*

22. In this regard I find that it is not in order for the court to grant prayer 5, 6 and 7 of the application as there is a confirmed grant that had not been set aside or annulled; during the confirmation proceedings not one of the applicants sought to object to the proposed distribution hence the distribution remained unchallenged. In the case of **Peter Muchiri Kamiri & Another v David Kabugo Kamiri [2005] eKLR**, the Court held that once the confirmation of grant is duly certified it is a decree absolute which is a final order of the court in respect of administration of the estate. None of the beneficiaries raised a finger since 2008 regarding the distribution of the estate until now yet they had full knowledge of the matters. The applicants who had agreed to the proposed distribution and taken their entitlements should not be allowed to turn around several years later and purport to challenge the distribution since a lot of water will have gone under the bridge.

23. The respondents have presented a copy of title deed to one of the suit properties showing that they are the proprietors thereof. The applicants have not pleaded or even raised issues of fraud against the respondents and hence I do not find merit in their challenge against them. The applicants are best advised to pursue the respondents in the Environment and Land Court for redress.

24. The upshot is that the application dated 29.07.2020 lacks merit and is dismissed. As parties are members of one family I order each party to bear their own costs.

It is so ordered.

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

**D. K. Kemei**

**Judge**