



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 261 OF 2009**

**IN THE MATTER OF THE ESTATE OF AARON MUSOMI MUNUVE (DECEASED)**

**DOROTHY MUNYIVA MUNUVE.....PETITIONER**

**VERSUS**

**1. TEDDY MUTHAMA MUSOMI**

**2. STEPHEN MUNUVE MUSOMI.....OBJECTORS**

**RULING**

1. The objectors filed a summons dated 6<sup>th</sup> February, 2014 for revocations of grant under section 76 of the Succession Cause Act and Rule 44 of the Probate and Administration Rules. The summons was supported by the affidavit of the 2<sup>nd</sup> objector and the grounds in support thereof. He alleged that the grant was fraudulently obtained by making false statements or by concealment of material facts and that the same was obtained contrary to section 39 and 51 of the Law of Succession Act. He particularly contended that the petitioner deliberately omitted the objector's names from the list of the deceased's beneficiaries with the sole intention of disinheriting them.

2. He stated that prior to his death the objectors and their mother lived with the deceased on Mumbuni/Usalala/881 within Makeni County. That the petitioner does not have a home on the said parcel of land and has never lived there. That he only came to see the petitioner after the deceased's death. That the said property is registered in the names of Mwaniki Munuve Wali and not the deceased.

3. In response thereto, the petitioner filed a replying affidavit dated 5<sup>th</sup> December, 2014. She contended as follows. That she is the widow of the deceased and was appointed the administrator of his estate jointly with her brother in law Kamani Munuve. That Kamani Munuve was so appointed since the petitioner's children were still minors. She denied that the objector's mother, Victoria Mutinda was her co-wife and stated that Victoria was neither married under customary law or otherwise as alleged. That after the death of Victoria in the year 2012, the High Court in Civil Case No. 261 of 2009 barred the interment of Victoria's remains on Mumbuni/Usalala/881 or any asset of the deceased's estate. That the objector's birth certificates were obtained four (4) years after the deceased's death an indication that it was a scheme to create documentary evidence in their favour. That the objector's mother invaded the said parcel of land and moved in five (5) years after the death of the deceased.

4. The 2<sup>nd</sup> objector filed a supplementary affidavit in response to the replying affidavit. He contended that Kamani Munuve was coerced to sign papers without an explanation to him and that he is aware that the objectors are the deceased children. He contended that the applicant has not produced the final order concerning the burial of Victoria but has just produced an order which lapsed on 16<sup>th</sup> January, 2013. That his birth was registered on 21<sup>st</sup> September, 1998 when the deceased was still alive. He denied that the Petitioner does not reside in Mumbuni/Usalala/881 since the objectors live on the land. He further stated that Kisau/Usalala/244 is jointly registered in the names of the deceased and the late Victoria.

5. Teddy Muthama Musomi (OW1) explained that his late registration of birth did not mean that the same was done for purposes of this suit. He stated that Victoria was not buried in the deceased's land due to family problems and a court order.

6. Stephen Munuve Musomi (OW2) stated that it is Victoria who processed his birth certificate, six (6) years after the deceased's death. That title deeds for the two plots were issued on the same day. He stated that they lived with their father without any problems until his death.

7. Dorothy Munyiva (PW1) in her evidence essentially reiterated her averments in the replying affidavit. On cross examination, she admitted that she separated with the deceased sometimes between 1993 – 1994 but later reconciled a year later. That she was then living in Nairobi but used to communicate with the deceased. She stated that she inquired from the relatives and was informed that the deceased did not have another wife. That she only came to know Victoria when she invaded her land.

8. Agnes Mitya Vundi (PW2) the deceased's brother stated that she knows the petitioner as his brother's wife. He denied that Victoria was

the deceased's wife. That his deceased's brother never introduced him to a wife other than the petitioner. He however admitted that he was not in a position to know the deceased's love life.

9. The petitioner's submission was a reiteration of her averments in the affidavit and evidence on record. The objectors submitted that the birth certificates produced reveal that the objectors are the deceased's children. That of curiosity is that from the marriage certificate produced, it is revealed that the petitioner was aged 22 years while the deceased was aged 45 years and that the petitioner was married four days after the birth of the 1<sup>st</sup> objector who was born on 5<sup>th</sup> May, 1987. That the petitioner admitted in her evidence that she knew there were people on the land but never bothered to visit the land. The objector cited **S.M.M. v. W.K. [2009] eKLR** and submitted that the information on the birth certificate was conclusive evidence. That the certificates and the fact that the objectors are still on that land is conclusive evidence that they are the deceased's beneficiaries. It was further submitted that the objectors testified that the deceased supported and educated them and that they to-date use his surname. Citing section 3 (5) of the Law of Succession Act, S.M.M (supra) and **Estate of Fredrick Clavence Kittany [2002] eKLR**, it was submitted that they were in law beneficiaries of the deceased.

10. I have carefully considered the Application herein. It emerges from the record that the Petitioner separated from the deceased and moved to Nairobi. In her evidence, she states that she was in communication with the deceased but does not come out clearly on whether or not she lived with the deceased thereafter. His witness stated that she knew the petitioner only as the deceased's wife. As he correctly stated however, he was not in a position to know his love life. On the other hand, the objector's evidence was that they lived peacefully with the deceased who provided for them. While I acknowledge the fact that there is a court order barring Victoria being buried on the deceased's land, it must be noted that the circumstances under which the orders were granted differed considering that this is a succession cause. In a succession cause, what is considered is whether or not the deceased provided for the objectors. From the objector's evidence that they lived on Mumbuni/Usalala/881 without contention from the petitioner coupled with the certificates indicating that the deceased was their father I draw an inference that the deceased acknowledged his relationship with Victoria and maintained the objectors. I draw an inference of paternity from the birth certificates for the reason that they have not been objected to the required standard. Other than alleging that the said were fraudulently made, the petitioner did not bring an officer from births and death's offices to disprove the same. The same thereby remains to be just mere allegation. The birth certificates thereby remain conclusive evidence. See: **S.M.M** (supra). There is therefore clear evidence that the objectors had been provided for by the deceased prior to his demise and therefore they ought to have been listed as beneficiaries of the deceased. The Petitioner appeared therefore to have concealed some material facts from the court when lodging this cause.

11. In the circumstances, I find merit in the Application and make orders as follows:

- a) The grant of letters of administration made to Dorothy Munyiva Kivai and Kamami Munuve on 5/5/2010 is hereby revoked.*
- b) A fresh grant be issued in the names of DOROTHY MUNYIVA KIVAI, KAMAMI MUNUVE and TEDDY MUTHAMA MUSOMI who shall be the administrators of the estate.*
- c) The objectors herein be included in the list of the deceased's beneficiaries.*
- d) The new administrators to proceed to file an amended summons for confirmation of grant within the next sixty (60) days.*
- e) As the matter involved members of one family I make no order as to costs.*

Dated and delivered at Machakos this 15<sup>th</sup> day of March, 2018.

**D.K.KEMEI**

**JUDGE**

**In the presence of:-**

Miss Kenya for Gathara for the Petitioner

Mulonde for Nthiwa - for the Objectors

Kituva - Court assistant