



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 154 OF 1993**

**IN THE MATTER OF THE ESTATE OF MUSYOKI MULU (DECEASED)**

**1. SCOLA MUMO MUTETI**

**2. CHARLES WAMBUA PAUL**

**3. ROSEMARY NGII KITAVI.....PETITIONERS/RESPONDENTS**

**VERSUS**

**JOHANA MUNYAO.....OBJECTOR/APPLICANT**

**RULING**

1. The Petitioners herein are the administrators of the estate of Musyoki Sulu by virtue of the grant issued to them on 4<sup>th</sup> October, 2016. The objector is on the other hand an administrator of the estate of **Peter Munyao Kitunu alias Munyao Kitunu Mawa**. He brings this motion dated 8<sup>th</sup> December, 2016 seeking revocation or annulment of the grant issued to the petitioners. The said motion is brought under Section 45, 47, 51, 52, 70 and 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. He contended that **Plot No. Mutituni/86** should not have been included as one of Musyoki Mulu's assets during confirmation of grant since his father Peter Munyao Kitunu bought **plot No. Mutituni/86** from one Philes Mukulu Musyoki and Paul Muteti Musyoki on or about the year 1976 and transferred to him in the year 1992. He further stated that the petitioners have demolished a toilet structure that was on the said plot and evicted tenants therein and locked the business premise, Joy Hotel.

2. In response thereto, the petitioners through the 3<sup>rd</sup> petitioner filed a replying affidavit on 17<sup>th</sup> January, 2017. They contended that the objector's father, Peter Munyao Kitunu was a tenant on the said property having leased it from their father, the late Paul Muteti Musyoki. That the rent had accrued to KShs. 36,600/-. When the rent arrears was demanded from him, he summoned Philes Mukulu and Paul Muteti Musyoki to the Municipal Council where they were made to sign some documents with an understanding that they were acknowledging receipt of Kshs. 7,600/- as part payment of the rent arrears. Unknown to them, they had been duped by Peter Munyao Kitunu to transfer the property to him. The late Paul Muteti subsequently filed Machakos PMCC No. 346 of 1994 seeking the nullification of the transfer of the said plot which case was later transferred to the High Court. The said suit was however dismissed for non-attendance since the parties therein had both died. In addition to the replying affidavit, the petitioner's filed a preliminary objection on grounds that the objector lacks capacity to institute the summons.

3. The Objector filed a further affidavit on 6<sup>th</sup> February, 2017 contending that the replying affidavit by the 3<sup>rd</sup> Respondent filed on 17<sup>th</sup> January, 2017 is fatally defective for lack of signature, date and commissioner for oaths' stamp. That the petitioners have acknowledged that the property is still registered under the name of the objector's father thereby could not form part of the estate of Musyoki Sulu. That the issue of ownership or transfer of the suit property can only be determined by the Environment and Land Court.

4. In his submissions, the objector sought to rely on Succession Cause No. 122 of 2012, Re Estate of Moses Wachira Kimotho (2009) eKLR where a confirmed letters of grant was annulled for concealment of material information. He acknowledged that this court has no jurisdiction to deal with land matters but that it can annul the grant where false statements of material facts are made to it. On the preliminary objection, the objector submitted that succession cause proceedings are not like civil cause proceedings and he therefore does not need to have taken out a grant for him to be an objector. That as long as one has interest in the deceased's estate, he has a right to be an objector. He cited section 76 (1) of the Act and rule 44 of the Probate and Administration Rules. He cited **Wangari Gichuki v. Daniel Wanjigo Muchemi (2014) eKLR** where the court applied the said section and rule. He further argued that the preliminary objection herein does not meet the threshold of a preliminary objection since it requires the calling of evidence for example to confirm whether or not the objector has a grant.

5. The Petitioners on the other hand contended that injunctive orders are not available in succession causes since Order 40 of the Civil Procedure Rules is not applicable to succession matters and the Probate and Administration Rules does not provide for any injunctive relief. That the petitioner's exercised their right under section 45 of the Act to evict Peter Munyao Kitunu for failure to pay rent. It was further argued that the objector has not produced a valid sale agreement to prove that his father bought the land as alleged.

6. The issue of fatality of the replying affidavit was cured by the filing of another/proper replying affidavit on 3<sup>rd</sup> March, 2017. It is clear from the record that the deceased, Musyoki Mulu's case claiming Plot No. Mutituni/86 was dismissed for non-attendance and there is no indication of any attempt to revive the said suit. In the circumstances, that court's order stand as final orders. Additionally, while the petitioners claim that their father, the deceased was defrauded by Peter Munyao Kitunu, no such evidence has been tendered before this court. The court is thereby left with the presumption that the property is owned by Peter Munyao Kitunu bearing in mind that it has not been contended that it is registered in his name. As to locus of the objector, I find that he has locus to be party to this suit considering that he is a son to Peter Munyao Kitunu a fact the Petitioners have not disputed.

7. In the end, I find that the objector has proved that the property was in the name of **Peter Munyao Kitunu** and ought not to be included in the grant. That being the position, I find if there is any dispute regarding ownership of **Plot No. Mutituni/86** the same should be resolved before the Environment and Land Court. In the result, I proceed to make the following orders:-

***i. The grant issued to the Petitioners on 4<sup>th</sup> October, 2016 is hereby annulled/revoked and a fresh certificate of confirmed grant be issued and which excludes Plot No. Mutituni/86 from the list of the deceased's assets.***

***ii. Each party to bear their own costs.***

It is so ordered.

Dated and delivered at Machakos this 24<sup>th</sup> day of **May 2018**.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Janet for Muvindya- for the Petitioners/Respondents

No Muumbi- for the Objector/Applicant

Josephine - Court Assistant