



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.624 A OF 2010**

**IN THE MATTER OF THE ESTATE OF THE LATE NZOVE WAMBUA (DECEASED)**

**DANIEL MULI JUSTUS.....APPLICANT**

**VERSUS**

**RICHARD MUTUA NZOVE**

**ANTHONY WAMBUA NZOVE.....ADMINISTRATORS/RESPONDENTS**

**RULING**

1. The Applicant herein **Daniel Muli Justus** has filed a summons dated 15/02/2016 for revocation and annulment of grant and seeks the following orders namely:-

*(i) That there be stay in the use of letters of confirmation of grant issued by this court in that the Machakos County Lands/Registrar be prohibited from registering any dealings in all that parcel of land known as MAVOKO TOWN BLOCK 3/2997 until the Application is heard and determined.*

*(ii) The Administrators/Respondents be further restrained from disposing and or alienating the said parcel MAVOKO TOWN BLOCK 3/2999 until the Application is heard and finalized.*

*(iii) That the grant of letters of administration issued to Richard Mutua Nzove and Anthony Wambua Nzove and confirmed on 22/04/2008 be revoked and or annulled.*

*(iv) That the costs of the application be provided for.*

2. The Application is supported by the affidavit of **Daniel Muli Justus** the Applicant herein sworn on even date and further on the following grounds namely:-

*(a) That there was non-disclosure of the material facts.*

*(b) That the administrators obtained grant and had it confirmed without disclosing material information to the court.*

*(c) That the distribution of the deceased's estate was not equitable and proportionate to the deceased's dependents.*

*(d) That the Applicant's mother Rose Mwikali Justus and who was the third wife of the deceased has been excluded from the distribution of the estate.*

*(e) That the administrators are in the process of disposing of the deceased's properties and that the Applicants family stands to suffer irreparable loss and prejudice.*

3. The Application was opposed by the Respondents. The 1<sup>st</sup> Respondent **Richard Mutua Nzove** swore a replying affidavit denying the Applicants claim and sought for the dismissal of the Application since the Applicant was a stranger to the estate and further the Applicant's alleged mother had not been married by the Respondent's father.

4. Parties herein agreed to canvass the Applicants Application by way of viva voce evidence.

**Protestor's evidence:**

The Protestor herein Daniel Muli Justus stated that the deceased herein was his father having married his mother one **Rosina Mwikali Justus** who was the deceased's third wife. The Applicant went on to aver that upon the death of his father, the Respondents herein commenced the present Succession Cause without involving him and his mother and that the grant as well as the confirmed grant had been obtained fraudulently as he and his family have been left out and denied inheritance. The Applicant finally stated that his father had allocated him and his mother parcel number **Mavoko Town Block 3/2997** where they erected a structure but that the Respondents have denied him access thereon and he has not been able to bury the remains of his late mother now lying at Kathiani Sub-District Hospital mortuary. The Applicant now prays for the revocation of the confirmed grant.

**Nzesya Wambua Mwithui** testified and stated that the deceased **Nzove Wambua** was his elder brother who had married the Applicant's mother as a third wife. He stated that the Applicants mother was properly married by the deceased as dowry was paid and that the deceased had taken up the Applicant as one of his children and who should inherit the properties.

**Peter Kasyula Mumbilu** testified and stated that he was present during the dowry ceremony for the Applicant's mother Rose Mwikali.

**Pauline Paul** testified and stated that she had accompanied the deceased to the home of the Applicant's mother Rose Mwikali where dowry was paid.

**Petitioner's case:**

The two Petitioners herein testified that the Applicant and his mother Rose Mwikali Justus are strangers to the estate of the deceased. They further maintained that the deceased had not married the Applicant's mother as claimed and that if indeed she was, then she was just a cohabitee who cohabited with the deceased briefly before the deceased passed on and she left for her parent's home. The Petitioners maintained that the Applicant was not a child of the deceased and therefore his claim to the estate should be rejected.

5. Learned counsels filed submissions:-

**Applicant's submissions:**

It was submitted that the deceased herein had married the Applicant's mother Rose Mwikali Justus under Kamba customary law and that the deceased took in the Applicant as his own child and provided for him by paying school fees and as such should benefit from the estate pursuant to Section 29 of the law of succession Act. Reliance was sought in the cases of **ESTATE OF JOHN MUSAMBAYI KATUMANGA [2014] eKLR** and **RE JOSHUA ORWA OJODE [2014] eKLR** where it was held that it must be established that the Applicant was a dependant of the deceased immediately prior to his death.

It was finally submitted that the grant issued to the Petitioners should be revoked or annulled on the ground that they had concealed material facts from the court in that they deliberately failed to indicate the presence of the Applicant and his deceased mother as dependants of the deceased.

**Respondents submissions:**

It was submitted for the Respondents that the Objector's late mother Rose Mwikali had not been married by the deceased herein so as to entitle them inheritance to the deceased's properties. It was further submitted that the Applicant failed to avail the agreement allegedly made during his late mother's dowry negotiations despite the witnesses claiming that there was such an agreement. It was also submitted that the deceased died in 2006 whereas the Applicant's mother Rose Mwikali died in 2015 a whole 9 years while living away and with her parents or her husband one Justus.

It was also submitted that the Applicant had no blood relationship with the deceased at all and was not a dependant of the deceased prior to his death. The Applicant who admitted that his mother got married to the deceased 60 days prior to his demise left no doubt that he had not been a child or a dependant of the deceased since he was aged 35 years old at the time of the alleged marriage of his mother to the deceased. It was finally submitted that if the Applicant's mother Rose Mwikali had cohabited with the deceased then she could only benefit to the extent of a life interest in the estate which terminated in her death and did not devolve to the Applicant who was not a dependant of the deceased, hence his Application be dismissed with no order as to costs.

6. I have considered the Applicant's Application as well as the affidavit in support. I have also considered the Petitioners/ Respondents replying Affidavits, I have also considered the oral evidence of the Applicant and Administrators together with their witnesses as well as the submissions of learned counsels. The issues which I raise for determination are as follows:-

***(i) Whether the objector/Applicant's mother Rose Mwikali Justus was a wife of the deceased.***

***(ii) Whether the Objector/Applicant is a beneficiary of the estate of the deceased Wambua Nzove.***

***(iii) Whether the grant herein should be revoked.***

7. As regard the first issue, it is the Applicant's claim that his late mother Rose Mwikali Justus was the third wife of the deceased herein as she had been married under Kamba customary laws. All the Applicant's witnesses maintained that the deceased had married the Applicant's mother as dowry was paid and that there was an agreement entered into but which was not availed to court as proof and further there was no

matrimonial home built for the Applicant's mother to signify that she had been married to the deceased. It also transpired from the evidence that the Applicant's mother had been married to one Justus hence the name of Rose Mwikali Justus and it did not come out clearly as to whether the Applicant's mother had already been divorced by her husband Justus before getting married to the deceased. It also transpired from the evidence that the deceased died on 9/2/2006 while the Applicant's mother died on 19/02/2015 while still residing at her parent's home and all this period of about ten years after the death of the deceased did not bother to raise any claim to the estate of the deceased. There is no cogent reason given by the Applicant why he and his mother had to wait for nearly ten years to seek to lay claim onto the estate of the deceased if indeed they knew that they were beneficiaries of the deceased. It is noted that the Applicant only made the move after his mother died when he filed a Civil Suit at **Machakos CMCC 788 of 2015** seeking to bury his mother's remains on one of the deceased's parcel of land which suit was strenuously opposed by the Administrator's. It would seem therefore that had the Applicant's mother not died the Civil Suit and these objection proceedings might not have been commenced at all. Even though the Applicant's mother Rose Mwikali Justus had cohabited with the deceased for about sixty days as revealed in the evidence before the deceased died, I find such a short period could not be taken as sufficient to presume a marriage. Again there was no matrimonial home built for the Applicant's mother during the said short stint and that is why she left for her parents home where she stayed for about ten years and upon her death the Applicant brought the present Application. The evidence of the Objector's witness namely **Nzesya Wambua Mwithui** appears rather intriguing in that whereas he supports the Objector's claim he also admitted that the Objector's mother Rose Mwikali Justus had never lived with deceased on plot Mavoko Town Block 3/2997 yet it is the same land that the Applicant seek to bury the remains of his late mother. Again the said witness had actively participated in the initial filing of this Succession Cause when he duly signed form P&A 57 as a guarantee by personal surety to the Administrators herein and at that time he did not raise any interests due to the Applicant's mother yet he was a younger brother of the deceased. The said witness's about turn speaks volumes about his candidness and sincerity as regards the status of the Applicant's mother to the deceased. I find the Applicant and his witnesses have not convinced this court that Rose Mwikali Justus had indeed been a wife to the deceased since the issue of whether or not the said Rose Mwikali Justus had divorced her husband Justus before marrying the deceased was not properly explained. It is also noted that none of the family members of Rose Mwikali Justus were called as witnesses to shed light and confirm whether she had been married to the deceased and whether the former husband Justus had divorced her. Even if family members were not available then clan members would have been called to corroborate the issue of the alleged dowry payment by the deceased Wambua Nzove. This is because the Applicant confirms that he was not present during the dowry negotiations. The Applicant's conduct in seeking to change his names from Daniel Muli Justus to Daniel Muli Nzove much later in 2014 showed that he was angling to latch onto the deceased's name for the sole aim of benefitting from the estate yet he could not explain why he had maintained the names of his biological father Justus all along and left out names of the deceased.

8. As regards the second issue, it is not in doubt that the Applicant herein was not a biological son of the deceased. In his evidence he stated that his father was one Justus but he maintains that even though the deceased had cohabited with his mother for sixty days and took him up as one of his children he should be made a dependant. Under Section 29 of the Law of Succession Act dependants who are step children are described as:-

***“Such of the deceased parents step parents, grand children, children whom the deceased had into his family as his own, brothers, sisters and half brothers and half sisters as were being maintained by the deceased immediately prior to his death”.***

The Applicant in his evidence claimed that the deceased had maintained him prior to his death and even gave him and his mother parcel **Mavoko Town block 3/2997** where they erected a house yet the evidence of his witness Nzesya Wambua Mwithui who was a younger brother of the deceased denied the same when he stated that the deceased had not given the Applicant or his mother the land as it had been given to two other children of the deceased. Indeed the Applicant admitted that he was already an adult when the deceased allegedly married his mother Rose Mwikali Justus and that he was not even present when the alleged dowry was being given. The Applicant who had been a son to one Justus had maintained the names Daniel Muli Justus until around 2014 when out of the blues he decided to change his names to Daniel Muli Nzove so as to give him room to lodge a claim in the estate. The Applicant has not given any plausible explanation as to why he had to change his name almost ten years after the death of the deceased yet he knew his biological father was one Justus. I find the present Application is just an afterthought since the question would be ***“why did he have to wait nearly ten years after the death of the deceased to come to court to claim what he believes rightly belonged to him?”*** The evidence clearly showed that the Applicant had been residing with his mother at her parents home all this time and now that his mother has passed on he wants to use the issue of the burial to gain entry into the estate of the deceased herein. It is noted that the Applicant has already filed a civil suit before the Chief Magistrate's Court being **CMCC No. 788 of 2015** over the burial of his mother and which should proceed independently of these proceedings for the simple reason that the Applicant's mother Rose Mwikali Justus could only have been entitled if any to the life interest of the deceased's estate which terminates upon her death and does not devolve to the Applicant who was her son and who was not a dependant of the deceased. The Civil Case therefore would deal with the issue of the place of burial of the Applicant's late mother and which would not confer upon the Applicant any proprietary rights to the properties of the deceased since he has not established on a balance that he was a dependant of the deceased Wambua Nzove.

9. As regards the last issue and going by the above observations, I find the Applicant has not convinced this court that the confirmed grant should be revoked. The Applicant has not proved the allegations he has raised against the administrators of the estate. It has transpired that the Applicant is a stranger to the deceased and who wants to use his late mother to access the properties of the estate of the deceased yet he had not been a dependant of the deceased prior to his death. Even if the Applicants' mother Rose Mwikali Justus was to be assumed to have been a spouse of the deceased then she only had a life interest in the estate which automatically terminated upon her death and could not devolve to the Applicant in any way as he was not a dependant and beneficiary. The Applicant has claimed that the remains of his late mother are still lying at the mortuary. The Civil Case the Applicant has already filed will determine the issues relating to the burial of his late mother but as pointed out above the life interest was extinguished upon her death and cannot devolve to the Applicant and therefore the place of burial is not likely to entitle him to any proprietary rights. In the premises I see no reason why the grant should be annulled or revoked as sought by the Applicant.

10. In the result it is the finding of this court that the Applicant's Application dated 15/2/2016 lacks merit. The same is dismissed. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 22<sup>nd</sup> day of **May, 2018**.

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

Musyimi - for the Applicant

Masika - for the Respondents

Josephine - Court Assistant