



**REPUBLIC OF KENYA**

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

**SUCCESSION MISC. APPLICATION NO. 1 OF 2016**

**IN THE MATTER OF THE ESTATE OF BRETTA BENJAMIN MUTHIANI (DECEASED)**

**JENNIFER MUTONGOI KAVUNGA.....1<sup>ST</sup> APPLICANT**

**NANCY MWENDE KYALI.....2<sup>ND</sup> APPLICANT**

**BETTY MWENDE MWETU.....3<sup>RD</sup> APPLICANT**

**MARY KAVINYA.....4<sup>TH</sup> APPLICANT**

**BENARD MWETU.....5<sup>TH</sup> APPLICANT**

**VERSUS**

**JACKSON MWETU.....1<sup>ST</sup> RESPONDENT**

**KIOKO MWETU.....2<sup>ND</sup> RESPONDENT**

**MUSYOKA MWETU.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. **Bretta Benjamin Muthiani**, died intestate. A grant of Letters of Administration Intestate (grant) were issued to **Jackson Muthui**, **Kioko Benjamin Mwetu** and **Richard Musyoka Benjamin** on the **4<sup>th</sup> June, 2015**.

2. On **3<sup>rd</sup> June, 2016**, **Jennifer Mutongoi Kavunga**, **Nancy Mwendu Kyalo**, **Betty Mwendu Mwetu**, **Mary Kavinya** and **Benard Mwetu**, Applicants, filed an application seeking *inter alia* that orders do issue:

(i) Restraining the Administrators from receiving and/or collecting any rent proceeds in respect of properties – **Kitui Municipality Block No. 111/223** and **Bondeni/249** and/or any other properties of Deceased pending hearing and determination of the application.

(ii) Rent proceeds collected from the aforesaid properties or any other property forming the Estate of the Deceased be deposited in Court until further orders of the Court and tenants of the said premises be served with the Court order pending hearing and determination of the application.

(iii) An order do issue transferring the matter to the Court for hearing and disposal.

(iv) The grant be revoked and or in the alternative **Jennifer Mutongoi Kavunga** be added as the Co-administrator of the Estate.

(v) The Administrators do give a detailed account of all rent proceeds received on behalf of the Estate.

(vi) Costs of the application be paid by the Administrators.

3. The application is premised on grounds that the estimated value of the Estate is about **25 million** on the lower side; The Chief Magistrate Court has no jurisdiction to hear the matter; The Administrators commenced the proceedings herein without involving other beneficiaries whose consent was not obtained. Since the death of the Deceased the Administrators have collected **Kshs. 840,000/=** every three (3) months in form of rents from the Estate of the Deceased and completely ignored other beneficiaries of the Estate; The Administrators here refused to share the proceeds of the Estate with other beneficiaries; Beneficiaries (**Julius Kyali Kwelu, Elizabeth Queen, Doris Mutanu Mwetu, Alice Nzisa Mwetu**) All Deceased, left dependants surviving them, information that was concealed from the Court. Money has been withdrawn from the Co-operative Bank in the name of the Deceased and shared amongst the Administrators disregarding other beneficiaries.

4. The Applicant deponed an affidavit in support of the application where he stated that the Deceased was survived by dependants. Some of her children pre-deceased her. **Julius Kyali Kwetu** who was survived by:

- **Nancy Mwendu.**

- **Margaret Kyali.**

- **Mwetu Kyali.**

- **Mwanzia Kyali.**

- **Matei Kyali.**

**Elizabeth Queen** (Daughter) who was survived by:

- **Mary Kavinya.**

- **Abdulariz K. Maingi.**

- **Rose Musenya.**

- **Jennifer Munanie.**

- **Ann Ndinda.**

- **Jamila Osman.**

- **Benjamin Maingi.**

**Doris Mutanu Mwetu** (Daughter) who was survived by:

- **Betty Mwendu.**

- **Melody Kangu.**

- **Yvonne Mbite.**

- **Wallet Majie.**

**Alice Nzisa Mwetu** (Daughter) who was survived by:

- **Benard Mwetu.**

- **Gabriel Gicogo.**

She was also survived by:

- **Jennifer Mutongoi** (Daughter).

- **Jackson Muthui Mwetu** (Son).

- **Kioko Benjamin Mwetu** (Son).

- **Richard Musyoka Benjamin** (Son).

5. The dependants were not included in the list of beneficiaries in the affidavit in support of the Petition for the grant of Letters of Administration. The value of the Estate was estimated at **Kshs. 100,000/=** yet the properties are estimated at over **twenty five (25) Million.**

6. The Administrators have been sharing proceeds of the Estate of the Deceased in total disregard of dependants of the Estate.

7. The Respondents (Administrators) filed grounds of opposition in response stating that the application is bad in law and incompetent; That the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> beneficiaries are not beneficiaries to the Estate of the Deceased therefore strangers to the Estate and that the Respondents have been administering the Estate of the Deceased diligently and in accordance with the law.

8. **Jackson Muthui Mwetu** swore a replying affidavit on his own behalf and that of other Administrators of the Estate of the Deceased. He deposed that himself and the 3<sup>rd</sup> Respondent opposed the application while the 2<sup>nd</sup> Respondent (**Kioko Mwetu**) decided to abide by the Court's decision. He stated that the Estate of the Deceased comprised of her own original Estate and that of her late husband **Benjamin Mwetu Muthiani** which devolved on her as an Administrator of the Intestate Estate through a grant made in **Succession Cause No. 155 of 2009** in the **High Court of Kenya Machakos**. He denied the allegation that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Applicants are beneficiaries to the Estate of the Deceased.

9. Further, he denied the averments that the Applicants were dependants of the Deceased. that they disclosed all material facts in the Petition and they diligently, faithfully and prudently administered the Estate which is ready to be distributed. That failure to allow them complete with the Administration of the Estate will be harmful, disastrous and prejudicial to the fair completion of the Administration of the Estate. That the application is premature and the best course is to apply for Confirmation of the Grant.

10. The application was disposed off by way of written submissions.

11. It was submitted by **Ms. Gladys Gichuki**, learned Counsel for the Applicant that the fact that the Estate of the Deceased was lumped up together with the Estate of her late husband does not disentitle the beneficiaries from inheriting from both Estates as all of them were dependants of both Deceased persons. That there was no proof that the Estate was administered prudently, diligently and faithfully.

12. That averments that the application is premature and should await Confirmation of the Grant is untenable as one year four months have lapsed since the grant was issued but the Administrators have taken no step to seek confirmation of the same. Grandchildren of the Deceased who lived and depended on her prior to her death have not been considered. The Administrators were not accounted for the rent

and income received on behalf of the Estate from the time of her demise.

13. **Mr. Kinyua Musyoki**, learned Counsel for the Respondents submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents have no problem giving detailed accounts of the rent proceeds received on behalf of the Estate as long as the order is made at an appropriate time but stated that the application was made prematurely as the Administration of the Deceased's Estate is still at the preliminary stage of getting in all free property of the Deceased as required by **Section 83(a)(b)(c) and (d)**.

14. Regarding the prayer for revocation of the grant, he argued that no sufficient reasons had been given by the Applicants to support the prayer. That none of the grounds stated meet the threshold of the provisions of **Section 76 of the Law of Succession Act**.

That the beneficiaries of the Estate of the Deceased having been Deceased their consent could not be sought. That the 1<sup>st</sup> Applicant, a beneficiary of the Estate has been receiving **Kshs. 20,000/=** every 3 months which is benefits from the Estate of the Deceased therefore she has no reason to complain. That grandchildren are not beneficiaries of the Estate of the Deceased. They can therefore only present applications under **Section 26 of the Law of Succession Act** which application can only be brought against the net Estate. Therefore at this stage they have no legitimate action against the Administrators.

15. Looking at the application prayers 1 and 2 were granted at the outset. Prayers 3 and 4 having not been granted I will be addressing prayers 5, 6, 7 and 8. The prayer of substance being prayer 6 is the one I will deal with first for it will be of consequence to other prayers.

16. Revocation of grant is provided for in **Section 76 of the Law of Succession Act** that stipulates thus:

***“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.”***

I wish to emphasize that as clearly provided a grant of representation can be revoked whether or not confirmed and such an application can be made by any interested party. Therefore whether or not the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Applicants are beneficiaries and/or dependants of the Estate of the Deceased they have a

right of making the instant application in their capacity as Interested Parties. The law also mandates the Court to make the order on its own motion if the threshold set out is met.

17. A perusal of **Form P&A 5** (Affidavit in Support of the Petition for Letters of Administration Intestate, the Assets of the Estate of the Deceased as listed by the Administrators were as follows:

1. *Nzambani/Kyanika/886.*
2. *Mwingi/Kanzanzu/1755.*
3. *Kisasi/Mbitini/22.*
5. *Kitui Municipality Block 111/223.*
6. *Mutonguni/Kaimu/1355.*
7. *Bondeni/249.*
8. *Equity Bank Kitui Branch Account No. [particulars withheld].*
9. *Co-operative Bank Kitui Branch Account No. [particulars withheld].*

The estimated value was given as **Kshs. 100,000/=**. It has been stated and not disputed that the Estate is above **Kshs. 25 million**. The **Magistrate's Court Act, 2015 (Act)** was assented to on **15<sup>th</sup> December, 2015**. The date of commencement was **2<sup>nd</sup> January, 2016**. The Act amended the **Law of Succession Act** by repealing **Section 48(1)** where a Magistrate could entertain an application under the Act depending on the pecuniary limits set out in the Act. The grant herein purported to have been issued by **A. S. Lesootia – Senior Resident Magistrate** but was signed by **Ombata – Resident Magistrate** per the signature thereon. A **Resident Magistrate** can issue a grant where the value of the Estate does not exceed **Five Million Shillings** while a **Senior Resident Magistrate** can issue a grant where the value is not more than **Seven Million Shillings**.

18. However as at **4<sup>th</sup> June, 2015** the **Resident Magistrate** was only seized of jurisdiction to determine an application under the **Law of Succession Act** where the gross value of the Estate did not exceed **One Hundred Thousand Shillings**. Therefore in the instant case the learned Magistrate had no jurisdiction to determine the matter which makes the orders that emanated from him null and void. Needless to add that by stating that the value of the property was **Kshs. 100,000/=** was a false statement.

19. The Administrators herein were appointed to administer the Estate of the Deceased. It has been stated and not denied that the Respondents have been collecting rental income belonging to the Estate of the Deceased which they have been squandering. They even argued that they have been giving the **1<sup>st</sup> Applicant Kshs. 20,000/=** in a period of three (3) months. The Deceased did not leave any debts. It is alleged that they have been using the money to pay off any expenses. They were expected to produce to the Court a full and accurate inventory of the Estate within **six (6) months** but this was not done. (**See Section 83(e) of the Law of Succession Act**). What they have done so far is to take possession of monies that form part of the Estate of the Deceased. Giving the **1<sup>st</sup> Applicant** some of the money was intermeddling with the Estate Without the authority of the Court. They can therefore not claim to have administered the Estate diligently. If anything they have been depleting it. They will be required to account for what was received on behalf of the Estate during the period they were Administrators of the Estate.

20. From the foregoing the threshold of **Section 76** of the **Law of Succession Act** has been met. Today the Magistrate's Court has the jurisdiction to hear and determine a Succession Cause where the value of the Estate does not exceed **Twenty Million Shillings**. Parties herein would be required to have the Estate valued prior to telling in which court such a Petition should be filed. In the premises I order as follows:

- 1) The grant of Letters of Administration Intestate issued herein be and is hereby revoked.*
- 2) The file shall be returned to the Lower Court for purposes of filing a Petition for Letters of Administration of the Estate of the Deceased.*
- 3) The Respondents are condemned to pay costs of the application.*

21. It is so ordered.

**Dated, Signed and Delivered at Kitui this 23<sup>rd</sup> day of August, 2017.**

**L. N. MUTENDE**

**JUDGE**