



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

SUCCESSION MISC. APPLICATION NO. 225 OF 2015

IN THE MATTER OF THE ESTATE OF TERESIA MUNYAMAI NGUU (DECEASED)

MARGARET NZEMBI MULWA.....APPLICANT

VERSUS

BONFACE KITHUKI NGUU.....RESPONDENT

**R U L I N G**

1. On the 17<sup>th</sup> day of **January, 2014**, **Margaret Nzembi Mulwa**, the Applicant filed herein summons for revocation or annulment of grant dated **18<sup>th</sup> December, 2013** in respect of the Estate of **Teresia Munyamai Nguu** who died on the **4<sup>th</sup> July, 1984** which was made to **Boniface Kithiia Nguu**, the Respondent on the **28<sup>th</sup> July, 1987** and confirmed on **24<sup>th</sup> May, 1988**.

2. The application is premised on grounds that: the grant was obtained fraudulently by making of a false statement or by concealment from the Court of something material to the case; 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 and that the proceedings to obtain the grant were defective in substance.

3. The Applicant deposed an affidavit in support of the application where she averred that she was married to **Joseph Mulwa Maithya** now Deceased, a son of **Maithya Nguu** also Deceased, who was a son of **Kasyoka Nguu** and his siblings were **Teresia Munyamai Nguu** (Deceased herein) and **Anna Nguu**. **Boniface Kithuki Nguu**, the Respondent, (Administrator of the Estate of **Teresiah Munyamai Nguu**) is the son of the stated **Teresiah Munyamai Nguu** and a Cousin to the Applicant's father-law-law.

4. That their grandmother, **Kasyoka Nguu** died leaving an asset, a Parcel of Land known as **Kyangwithya/Kaveta/508** which was registered in her name at the outset but later fraudulently registered in the name of **Teresiah Munyamai Nguu** her daughter.

5. That while **Kasyoka Nguu** was ailing **Teresia Munyamai Nguu** tricked her into transferring the land to her excluding her siblings and without their knowledge and/or consent. When **Teresia Munyamai** died, her son **Boniface Kithiia** applied for Letters of Administration (**Kitui Resident Magistrate Civil Case Succession Cause No. 3 of 1986**). On realizing what happened their grandmother **Kasyoka Nguu** filed a case in **Machakos High Court – High Court Civil Case No. 160 of 1987** against **Boniface Kithiia**. The matter was referred to elders. They heard and determined that the land was registered

fraudulently in the name of **Teresia Munyamai** and ordered that the land do revert to the original owner **Kasyoka Nguu**. The elders decision was confirmed by the High Court sitting at **Machakos** on the **13<sup>th</sup> October, 1995** and no Appeal was preferred. In order for the land known as **Kyangithya/Kaveta/508** to be shared as directed by the Court the grant should be revoked and a fresh grant be issued in the names of **Boniface Kithiia Nguu** and **Margaret Nzembi Mulwa**.

6. The application was served upon the Respondent per the affidavit of service dated **30<sup>th</sup> March, 2014** filed on the **6<sup>th</sup> May, 2014** but no reply was made. All along he would be notified of the hearing dates but he refused and/or neglected to appear. Directions in the matter were given on **22<sup>nd</sup> September, 2015** whereby the matter was disposed off by way of written submissions.

7. In his submissions, **Mr. Kilonzi**, learned Counsel for the Applicant stated that the Respondent ignored the Court order and distributed the land belonging to their grandmother to his siblings leaving out his Cousins from the first home made up of the Applicant's husband, **Mutinda Maithya, Bernard Maithya, Kavisa Maithya** and now the other generation including **Alex Maithya, Judy Kavengi, Regina Mueni** and **John Nguu**.

8. I have taken into consideration the averment in the affidavit, submissions by Counsel for the Applicant and the evidence in **Machakos High Court Civil Case No. 160 of 1987**.

9. A grant of representation may be revoked if the threshold set by **Section 76** the **Law of Succession Act** is met. The alluded to provision of law provides 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.”*

The Deceased herein died on the **4<sup>th</sup> July, 1984**, **Mutinda Maithya** petitioned for Letters of Administration Intestate in respect of her Estate in his capacity as his nephew. A list of persons who survived her was given as:

- **Wanja Kivindyo – Daughter**
- **Ng'elu Kithome – Daughter**

- ***Kithia Nguu*** – Son
- ***Kiema Nguu*** – Son
- ***Mutinda Maithya*** – Nephew
- ***Bernard Maithya*** – Nephew
- ***Margaret Joseph*** – Niece

The only asset that was indicated as having been left by the Deceased was: **Land Parcel No. Changithya/Kaveta/508.**

Consequently a grant of Letters of Administration Intestate were issued to **Boniface Kithiia Nguu** on **28<sup>th</sup> July, 1987** and confirmed on the **24<sup>th</sup> day of May, 1988.** Land Parcel No. **Kyangwithya/Kaveta/508** was to be shared and registered in the names of **Boniface Kithiia Nguu 0.6 Hectares** and **Kyeni Nguu 0.6 Hactares.**

10. On the **14<sup>th</sup> October, 1987,** **Joseph Mulwa Maithya** the late husband of the Applicant and **Kasyoka Nguu** filed a suit against the Respondent and Administrator of the Estate of **Teresia Munyamai Nguu.** They averred that **Kyangithya/Kaveta/508** was registered in the name of **Nguu Isika** in **1972** and after his death it passed to **Kasyoka Nguu.** The land was subdivided into three on the ground and given to the father of **Joseph Mulwa, Munyamai Nguu** the mother of the Respondent while **Kasyoka Nguu** retained the third portion. In **1981** the Deceased tricked her mother into signing a document believing she was to transfer the portion that belonged to the Deceased to her. As a result of the fraud the whole land ended up on the name of the Deceased.

11. The dispute was referred to Elders for arbitration. The Elders award was adopted and confirmed as the Judgment of the Court. It was ruled that the land reverts to the original owner (**Kasyoka Nguu**) so that she could subdivide it amongst her grandchildren. The judgment was dated **8<sup>th</sup> July, 1990.** The Respondent disregarded the Court process. He did not appear to defend the Cause.

12. From the evidence adduced before elders, on the ground all grandchildren of the original owner of the land that was indicated as belonging to the Deceased herein have settled on the parcel of land.

13. From the foregoing, when the Respondent applied for confirmation of the grant in **1988** he was aware there was a matter pending in Court where he had been sued in his capacity and the Administrator of the Estate of the Deceased.

14. Without any explanation from the Respondent. It is apparent that the grant was obtained following concealment of some material facts regarding the case from the Court. Had the Court been aware of the true state of the case then other parties would have been included in the matter.

15. In the result I make orders as following:

- i. The grant issued herein and confirmed be and is hereby revoked.
- ii. Title deeds, if issued shall stand cancelled.
- iii. Parties herein shall file a fresh application for grant of Letters of Administration in the Lower Court that is seized of jurisdiction to hear and determine the matter.
- iv. Costs to the Applicant.

16. It is so ordered.

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

**L. N. MUTENDE**

**JUDGE**