



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 232 OF 2013**

**IN THE MATTER OF THE ESTATE OF TOM NZIOKA SAMUEL (DECEASED)**

**MARY SAMMY MUSILA )**

**SABINA NDUKU SAMMY ).....PETITIONERS/RESPONDENTS**

**VERSUS**

**ESTHER NDULU MUTUKU.....APPLICANT**

**AND**

**MUTUKU NGEI.....OBJECTOR**

**RULING**

1. **Tom Nzioka Samuel**, the deceased, died domiciled in **Kenya** on the **24<sup>th</sup> April, 1990**. A grant of Letters of Administration intestate (the grant) were issued to **Mary Sammy Musila** and **Sabina Nduku Sammy** in respect of the Estate of **Tom Nzioka Samuel** (deceased) on the **24<sup>th</sup>** day of **June, 2013**.
2. On the **10<sup>th</sup> November, 2014** **Esther Ndulu Mutuku** filed an application for revocation of the grant in order for a fresh one to be issued reflecting **Mutuku Ngei** as a person entitled to be registered as proprietor of Title Number **Machakos Town Block 1/88** on the grounds that: the grant was obtained fraudulently by making of a false statement in relation to title number **Machakos Town Block 1/88** or by concealment from court of the purchaser's interest of **Mutuku Ngei** in the said title and that the grant has been misused or is likely to be made an instrument of fraud by the Respondents who intend to use the same to deprive the Applicant's husband his purchaser's interest in the title number **Machakos Town Block 1/88**.
3. The Applicant deponed an affidavit in support of the application where she stated that prior to her husband suffering a major stroke in **1985** he had purchased land from **Tom Nzioka Samuel a.k.a. Nzioka Sammy Musila** (Deceased) a leasehold property known as **Machakos Town Block 909/366** now known as **Machakos Town Block 1/88**. Pertinent transfer documents were signed and a consent to transfer the plot to the purchaser was obtained from the **Municipal Council**. The purchaser was put in possession of the land though the transfer was not effected. This fact was not disclosed hence the land in contention being obtained fraudulently.
4. In response thereto the 2<sup>nd</sup> Respondent swore an affidavit in reply where she deposed that the Applicant lacks capacity to present the application as she has no protectable interest in the Estate. The Applicant has no authority to commence legal proceedings for or on behalf of the Estate of **Mutuku Ngei**. Documents annexed to the application are unrelated to title number **Machakos Town Block 1/88** and she is not a family member of the deceased.

5. On the **4<sup>th</sup> October, 2014 Mutuku Ngei** who described himself as the Objector entered an appearance through the firm of **F. M. Mulwa Advocate**.
6. The application was canvassed by way of written submissions that I have taken into consideration.
7. It has been averred and demonstrated that **Mutuku Ngei** suffered a stroke on the **7<sup>th</sup> July, 1985** and as a result he has a severe speech deficit. His physician opined that he could not participate in any proceedings in a court of law. However, the Applicant has no power of attorney that would authorize her to act on his behalf in any legal matter or even his private affairs. Ordinarily she lacks capacity to institute any suit on his behalf and it is on that basis that the Respondent has urged this court to strike out the summons. That notwithstanding, the application herein is brought pursuant to the provisions of **Section 76 of the Law of Succession Act** and **Rule 44 and 73 of the Probate and Administration Rules** that provide thus:

*Section 76 “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.”*

*Rule 44 “(1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate’s registry.*

*(2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him—*

*(a) whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and*

*(b) the extent to which the estate of the deceased has been or is believed to have been administered or to remain unadministered, together with any other material information.*

*(3) The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application*

*and his grounds therefor.*

*(4) When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.*

*(5) Where the High Court requires that notice shall be given to any person of its intention of its own motion to revoke or annul a grant on any of the grounds set out in section 76 of the Act the notice shall be in Form 69 and shall be served on such persons as the court may direct.”*

In the matter of the Estate of Njau Ndungi (deceased) **Nairobi High Court Probate and Administration Cause No. 863 of 1991** the court dismissed the objection raised but moved to revoke the grant issued on its own motion as provided by **Section 76** of the **Law of Succession Act**.

8. It is stated that the grant was obtained fraudulently. The fact that the only asset the deceased possessed had been sold was concealed from court. This allegation falls within the ambit of **Section 76(b)** of the **Law of Succession Act**.
9. An agreement of sale between the deceased and **Mutuku Ngei**, the transfer form duly signed by both the vendor and purchaser and a consent to the proposed transfer in respect of **Machakos Town Block 1/88** was adduced by way of affidavit evidence.
10. According to the affidavit in support of the Petition for letters of administration, the deceased was survived by **his mother, Mary Sammy Musila** and the only asset he left was **Machakos Town Block 1/88**. **Sabina Nduku Sammy** described herself as his sister. These two identified themselves as the only beneficiaries of the Estate of the deceased.
11. They did not disclose any information concerning a purchaser's interest in the asset. The asset was consequently transmitted to **Sabina Nduku Sammy**, the 2<sup>nd</sup> Respondent. Looking at the affidavit in response to the application, the Respondents dismissed the Applicant as a busy body not recognized as an agent of **Mutuku Ngei** who lacked legal capacity to represent him. Further, they averred that the documents annexed to summons were not related to title number **Machakos Town Block 1/88**. The transfer of lease document signed by both the vendor and purchaser and consent to the proposed transfer in respect of Title No. **Machakos Town Block 1/88** were availed. Such an assertion establishes dishonesty on the part of the Respondents.
12. **Rule 73** of the **Probate and Administration Rules** provides thus:

*“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”*

The law mandates this court to do what is just. To revoke or annul the grant pursuant to the provisions of **Section 76**, the court can either be moved by an interested party or may act suo

*moto*. Where the court acts on its own motion the action taken must be founded on the grounds for revocation of grant set out in **Section 76 of the Law of Succession Act. (See Matheka and Another vs. Matheka. Nairobi (2005) 1EA 251).**

13. Looking at the grounds set out in the body of the application and the affidavit in support, it has been demonstrated that some information was concealed from the court at the time of petitioning for the grant.
14. Revocation of the grant would be followed by issuance of a fresh one. This court has the discretion of appointing the Administrator of the Estate of a person who died intestate. But this must be done in the interest of all persons concerned.

**Section 66 of the Law of Succession Act** gives a general guidance acceptable. The alluded to section provides thus:

*“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*

*(a) surviving spouse or spouses, with or without association of other beneficiaries;*

*(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*

*(c) the Public Trustee; and*

*(d) creditors:*

*Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”*

15. The deceased herein left no surviving spouse or children therefore the Net Estate devolves upon his kindred following order of priority; in this case his mother and sister, the Respondents herein. **(See Section 39 of the Law of Succession Act).**

The fresh grant would still issue to them. In the premises I do not find it a proper case for revocation of the grant. However, considering the irregularity that may have been occasioned following deceit on the part of the Respondents, on my own motion, I do set aside the order dated **28<sup>th</sup> July, 2014** confirming the grant and order as follows:

- ***The certificate of confirmation of grant dated 30<sup>th</sup> July, 2014 be and is hereby revoked.***
- ***The Land Registrar, Machakos shall cancel a certificate of lease issued to Sabina Nduku Sammy.***
- ***Mutuku Ngei or his authorized agent shall file an affidavit in protest as provided by the law to the application for confirmation of the grant within 21 days.***
- ***Thereafter the matter shall be fixed for hearing in accordance with the law.***

16. No order as to costs.

**Dated at Kitui this 15<sup>th</sup> day of December, 2015.**

**L. N. MUTENDE**

**JUDGE**

**Dated, Signed and Delivered at Machakos this 20<sup>th</sup> day of January, 2016.**

**P. NYAMWEYA**

**JUDGE**