



**KTL.NO.77/2016**

**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 232 OF 2015**

**IN THE MATTER OF THE ESTATE OF KINGA MUTHANGA (DECEASED)**

**KITHIKII KINGA.....APPLICANT**

**VERSUS**

**MUSYA KINGA.....1<sup>ST</sup> RESPONDENT**

**ROBERT MUSINGA MUTHUI.....2<sup>ND</sup> RESPONDENT**

**PETER KATUTU MUTHUI.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

1. **Kithikii Kinga**, the Applicant herein filed summons seeking revocation and/or annulment of the grant issued to Muthui Kinga and Musya Kinga in respect of the Estate of Kinga Muthanga on grounds that:
  - The grant was obtained fraudulently and by forgery by making of a false document, statement and/or concealment from court of material facts relevant to the cause.
  - The grant was obtained by means of untrue allegation, non disclosure of material facts necessary and relevant to the grant and/or that the facts contained in the affidavit in support were untrue and omitted material facts essential in point of law to justify the grant notwithstanding that the allegations were deliberately made.
  - It is in the interest of justice to have the grant revoked and/or annulled to facilitate subdivision and transfer of respective titles to correct beneficiaries of the Estate in equity.
2. The Applicant swore an affidavit in support of the application where he deponed that the deceased was his father while **Muthui Kinga** and **Musya Kinga** are his brother and step-brother respectively. The deceased owned land Parcel No. **Matinyani/Kalindilo/118** measuring about **(0.43) hectares** absolutely while Parcel No. **Matinyani/Kalindilo/121** measuring about **(29.0) hectares** was owned in common and in equal shares with **Muthui Kinga**, **Musya Kinga** and himself (Applicant).
3. That during his lifetime the deceased had given a portion of his land to **Muinde Musyoki** who had been residing on it for **fifty (50) years** a fact not disclosed and the administrators were not willing to transfer the portion to him. **Antony Makau Muthui**, **Francis Mutuku Muthui**, **Judith Muthui** and **Anjelina Moses** children of **Muthui Kinga** a co-owner of land Parcel No. **Matinyani/Kalindilo/121** did not sign any consent, they did not get any portion and were not

- informed of the distribution.
4. Land Parcel **Matinyani/Kalindilo/118** that was owned absolutely by the deceased was given to **Peter Katutu Nguthu** a total stranger in the intestate Estate, an act that violates the **Law of Succession and Probate and Administration Rules**.
  5. The Administrators applied for confirmation of grant while he (Applicant) was in hospital. The Administrators colluded with **Robert Musinga Muthui**, the 2<sup>nd</sup> Respondent, his step-brother's son who got his father's whole share in Parcel **Matinyani/Kalindilo/121** and disinherited his brothers and sisters. Attendance of all surviving family members was not procured. Per the directions of the court, the Respondents and beneficiaries were to be served with the application.
  6. Various people filed affidavits in response. **Antony Makau Muthui** a son of **Muthui Kinga**, now deceased, averred that he was entitled to a share of the intestate Estate but was not consulted when the Estate of his grandfather was being distributed an action that prompted him to lodge a caution against the transfer of Parcel of land **Matinyani/Kalindilo/118**.
  7. **Muia Musangi**, a sister to the Applicant and 1<sup>st</sup> Respondent and daughter to the deceased deponed that her consent regarding administration of the Deceased's Estate was not sought. She denied having been involved in the sale of Parcel No. **Matinyani/Kalindilo/118** which was purportedly transferred to the 3<sup>rd</sup> Respondent. She supported the application for annulment of the grant.
  8. **Samuel Muinde Musyoki** deponed that the deceased gave his family Land Parcel No. **Matinyani/Kalindilo/121** a portion that ought to be carved out of **Matinyani/Kalindilo/118** and transferred to them, a fact within the knowledge of the Deceased's family members. Therefore the purported sale of **Matinyani/Kalindilo/118** was done fraudulently and secretly by the 1<sup>st</sup> Respondent in collusion with the 3<sup>rd</sup> Respondent to the exclusion of the other family members that were equally entitled to share in the proceeds.
  9. The application was disposed off by way of *viva voce* evidence as the Respondents stated that they were illiterate, having not responded to the application.
  10. At the hearing, the Applicant told the court that he learnt of the Succession Cause from his son **Peter Kithikii** and by then the Estate had been distributed therefore he filed the instant application. On Cross examination, however, he admitted having received part of the proceeds of the sale of land belonging to the deceased.
  11. The Applicant's witness **Patrick Peter Kithikii** the son of the Applicant stated that the 2<sup>nd</sup> Respondent purported to have substituted his father in the matter without a court order. Admitting that the 3<sup>rd</sup> Respondent paid for Land Parcel **Matinyani/Kalindilo/118**, he offered to refund the money paid as the sale had not been sanctioned by the family.
  12. In his testimony, the 1<sup>st</sup> Respondent supported the application for revocation of the grant so that the family could agree on the mode of distribution of the intestate Estate of the deceased. On cross examination he admitted that the Applicant was not present when the petition was instituted and he did not sign any document. He stated that after the death of his co-administrator, the 2<sup>nd</sup> Respondent acted as his father without any order from the court. The 2<sup>nd</sup> Respondent signed documents on behalf of **Muthui Kinga** who was deceased as he signed the other part which paved way for the subdivision of the land. He denied knowing how land was transmitted to the 3<sup>rd</sup> Respondent.
  13. The 2<sup>nd</sup> Respondent stated that when his father **Muthui Kinga** died in **2004**, the portion No. **Matinyani/Kalindilo/118** had been sold off by his father, **Kithikii** and **Musya** to the 3<sup>rd</sup> Respondent. When his father passed on, the Applicant and **Musya** asked him to continue with the succession. They filed a Succession Cause in respect of **Peter Muthui Kinga** his father and he was appointed as the Administrator of his Estate on the **25<sup>th</sup> March, 2006**. On Cross examination he stated that he was not formally substituted as a representative of his father in the instant Succession Cause. He admitted having signed documents at the land registry after the death of his father after the family met and agreed on the way forward.
  14. The 3<sup>rd</sup> Respondent stated that **Muthui Kinga**, **Kithikii Kinga** and **Musya Kinga** approached him to purchase land that belonged to their father who was deceased to enable them raise money to file a Succession Cause. He bought the land at **Kshs. 62,500/=**.
  15. Rival submissions filled by the learned counsel, Mr. Kilonzi for the Applicant and the

Respondents have been considered. The application herein is brought pursuant to the provisions of **Section 76** of the **Law of Succession Act** that 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.”*

16. It is not in dispute that **Kinga Muthanga** died in **1988**, the **2nd** day of **October**, and following his death, a **Death Certificate No. 187135** was issued. On the **17<sup>th</sup>** day of **March, 2004** **Muthui Kinga** and **Musya Kinga** petitioned for a grant of letters of Administration intestate in respect of his Estate. According to the affidavit in support of the Petition presented it was disclosed that the deceased was survived by:

1. **Ndui Kinga.**
2. **Muthui Kinga.**
3. **Musya Kinga.**
4. **Kithikii Kinga.**
5. **Muia Kinga.**

It was further indicated that assets the deceased had at the time of his death were:

**Parcel of Land No. Matinyani/Kalindilo/121; Matinyani/Kalindilo/118 and Matinyani/Kalindilo/530.**

17. Looking at the affidavit in support of summons for confirmation of grant it was proposed that:

**Parcel Matinyani/Kalindilo** be given to **Musya Kinga, Kithikii Kinga** and **Robert Musinga Muthui** in equal shares of **9.67 Hectares** each.

**Land – Matinyani/Kalindilo/118** be given to **Peter Katuku Nguthu.**

18. The court without questioning the relationship between **Robert Musinga Muthui** and **Peter Katuku** to the deceased confirmed the grant. Proceedings indicate only the **1<sup>st</sup>** Petitioner was

present. The affidavit in support of the summons bear the name of **Robert Musinga Muthui** who is described as an Administrator of the Estate of deceased yet, there is no application for substitution of the Administrator. On the **14<sup>th</sup> November, 2007** the passing on of **Muthui Kinga** was brought to the attention of court and accordingly recorded by the learned magistrate, **Mwangi T. M. RM**. This information was however not interrogated by **Kibiru Ag. PM** when he confirmed the grant. This was done following misrepresentation of the fact that **Robert Musinga Muthui** was one of the Administrators of the Estate of the deceased.

19. A consent to confirmation of the grant was filed which bears names of **Musya Kinga, Kithikii Kinga, Robert Musinga Muthui** and **Peter Katuhi Nguthu** as beneficiaries of the Estate of the deceased. However, the alleged beneficiaries did not sign the document and it has been seen some of them are not beneficiaries of the Estate. The learned magistrate should have acted with diligence to avert the injustice that was occasioned.

20. Following the confirmation of the grant the assets left by the deceased were distributed as follows:

Land Parcel No. **Matinyani/Kalindilo/121** went to the following people:

**Musya Kinga – 9.67 Ha.**

**Kithikii Kinga – 9.67 Ha.**

**Robert Musinga Muthui – 9.67 Ha.**

Land Parcel No. **Matinyani/Kalindilo/118** measuring **118** was given to **Peter Katutu Nguthu**.

The proceedings are short on what became of Land Parcel No. **Matinyani/Kalindilo/530**.

21. The 2<sup>nd</sup> Respondent was given a share of land measuring **9.67 Hactares** exclusively and by virtue of being the son of **Muthui Kinga**. Evidence adduced reveals that he has siblings. This is a fact that was essential. According to the law these were persons who were entitled to benefit. They were seized of beneficial interest to the intestate Estate of **Muthui Kinga** just like him. (**See Section 38 of the Law of Succession Act**). It was a fact that should have been disclosed to the court.

22. The court on the other hand should have questioned how a stranger as the 3<sup>rd</sup> Respondent was benefiting from the Estate of the deceased prior to confirmation of the grant.

23. The Applicant admitted having received part of the money that was paid by the 3<sup>rd</sup> Respondent. It was stated that the money was to facilitate filing of the Succession Cause. It is apparent that when the three (3) brothers – That is **Muthui Kinga, Musya Kinga** and **Kithikii Kinga** ventured into the transaction of sale of their deceased father's land they were ignorant of the fact that they had no powers to dispose of the deceased's property. (**See Section 45 of the Law of Succession Act**).

24. From the foregoing it is apparent that there was impropriety in the manner in which the proceedings that resulted into confirmation of grant were conducted. The grant was obtained following concealment of material facts from the court.

25. The grant was also obtained following untrue allegations of facts that were essential in point of law to justify granting of the same despite the fact that subsequent events that followed the issuance of the temporary grant may have been made following ignorance of the parties involved.

26. In the result, I allow the application dated **30<sup>th</sup> January, 2012** and order as hereunder:

- The grant issued on the **3<sup>rd</sup>** day of **June, 2004** to **Muthui Kinga** and **Musya Kinga** be and is hereby revoked.
- The 3<sup>rd</sup> Respondent may pursue the persons who received money for the sale of the land or their legal representatives for refund of monies paid and interest thereon.
- A proper application shall be made for a fresh grant of letters of Administration of the Estate of **Kinga Muthanga**.
- No orders as to costs.

27.It is so ordered.

**Dated, Signed and Delivered at Kitui this 24<sup>th</sup> day of February, 2016.**

**L. N. MUTENDE**

**JUDGE**