



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**SUCCESSION CAUSE NO. 125 OF 1994**  
**IN THE MATTER OF THE ESTATE OF SAMUEL KINYOWE NZAU**  
**(DECEASED)**

**JOSEPHINE KINYOWE**

**MATHEW MUOKI WAITA**

**PETER WAMBUA.....APPLICANTS**

**VERSUS**

**LAWRENCE KINYOWE.....1<sup>ST</sup> RESPONDENT**

**HENRY WAMBUA KINYOWE.....2<sup>ND</sup> RESPONDENT**

**JIMMY KIOKO.....3<sup>RD</sup> RESPONDENT**

**PETER SILA.....4<sup>TH</sup> RESPONDENT**

**PHILIP KILONZO.....5<sup>TH</sup> RESPONDENT**

**KATHEO KINYOWE.....6<sup>TH</sup> RESPONDENT**

**NICHOLAS KIMEU MUIA.....7<sup>TH</sup> RESPONDENT**

**RUTH NAMISA.....8<sup>TH</sup> RESPONDENT**

**SUSAN MBITHI.....9<sup>TH</sup> RESPONDENT**

**DAVID MUSEMBI SILA.....10<sup>TH</sup> RESPONDENT**

**JACINTA NJERI CHEGE.....11<sup>TH</sup> RESPONDENT**

**WANZA MUTUKU.....12<sup>TH</sup> RESPONDENT**

**FRANCISCA MUTHINI MUIA.....13<sup>TH</sup> RESPONDENT**

JOHN MUASYA MALITI.....14<sup>TH</sup> RESPONDENT

STEPHEN MULINGE MUIA.....15<sup>TH</sup> RESPONDENT

BELTA WANZA MUTUKU.....16<sup>TH</sup> RESPONDENT

## RULING

### The Summons

The Applicants herein are the daughter and grandchildren respectively of the deceased Samuel Kinyowe Nzau (hereinafter referred to as “the deceased”) who died on 10<sup>th</sup> July, 1990. The 1<sup>st</sup> -9<sup>th</sup> Respondents are children of the deceased, while the 10<sup>th</sup> to 16<sup>th</sup> are purchasers of properties belonging to the deceased. The Applicants have filed an application by way of Amended Summons dated 26<sup>th</sup> June 2015, wherein they are seeking the following orders:-

1. THAT this court be pleased to issue an order that the Grant of Letters of Administration issued to Naumi Mumbua Kinyowe (now deceased) on the 19<sup>th</sup> day of December 2011 be revoked.
2. THAT this Court be pleased pending the hearing and determination of this application, to issue a temporary injunction order restraining the Respondents herein by themselves, their agents, employees or servants and or person acting under their authority from selling, alienating, transferring and/or in any other manner dealing with the deceased’s estate till the appointment of a new administrator of the estate of the deceased.
3. THAT the court be pleased to punish the Respondents for intermeddling with the estate of the deceased.
4. THAT the Court be pleased to have the Respondents compelled to furnish and account for their dealings with the assets of the deceased’s estate from the 27<sup>th</sup> of March 2013 to date.

The grounds for the said application are stated in the said application and in a supporting and two supplementary affidavits both sworn by the 1<sup>st</sup> Applicant on 26<sup>th</sup> June 2015 and 11<sup>th</sup> December 2015 respectively. The grounds are that the grant of letters of administration intestate was issued to Naumi Mumbua Kinyowe (now deceased) on the 19<sup>th</sup> December 2011, and that the said Naumi Mumbua Kinyowe died on the 27<sup>th</sup> March, 2013. Further, that upon the death of the said Naumi Mumbua Kinyowe, none of the dependents of the deceased including the Respondents herein has ever moved to be appointed as the administrator of the estate of the deceased.

The Applicants allege that they have been unilaterally excluded from benefiting from and entitlement to the deceased’s estate by the Respondents, who have taken advantage of the vacuum left by the death of the last holder of the grant to transfer, charge, sell, alienate, and deal with the assets making up the estate of the deceased without the courts authority, and who are now enriching and plundering properties forming the said estate.

The Applicants’ learned counsel R.A. Onchuru & Company Advocates, files written submissions dated 14<sup>th</sup> March 2016, wherein they reiterated the facts stated by the Applicants, and relied on section 76 of the Law of Succession Act to urge that the grant issued to Naumi Mumbua had become useless and inoperative by virtue of her death. Reliance was also placed on the decisions in **Julia Mutune M’Mboroki vs John Mugambi Mboroki & 3 Others (2016) e KLR** and **Stephen Gikonyo Waweru s Caroline Wawira Kamutu & 2 Others (2004) e KLR** for this position. Further, that it would be appropriate for a temporary injunction to issue pending the appointment of a new administrator since the Respondents have taken possession of all the assets of the deceased.

### The Response

The 1<sup>st</sup>, 6<sup>th</sup> and 11<sup>th</sup> Respondents filed replying affidavits sworn on 10<sup>th</sup> December 2015, and 24<sup>th</sup> November 2015 respectively. The 1<sup>st</sup> Respondent stated that they all agreed to confirmation of the grant to their father's estate on 12/8/1998, and further amended the grant and a rectified grant was issued on 25/7/2012. He attached copies of the confirmed and rectified grants. He alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicant's mother passed away and they got their share of land and sold the same, and that the 1<sup>st</sup> Applicant has been selling and disposing the deceased's properties even before his death.

The 1<sup>st</sup> Respondent averred that the Applicants were invited but failed to attend a meeting held by their family on 21/11/2015 to resolve the issue but, and that ten of the family members agreed at the said meeting that he should be appointed the administrator to replace their deceased mother. The 1<sup>st</sup> Respondent prayed that he be appointed as such, and he attached a copy of the said family agreement, and also stated that it had been agreed that the 1<sup>st</sup> Applicant be given one of the deceased's properties. He also denied that he had sold, squandered, or leased the deceased's properties and that the properties remained as distributed in the confirmed grant.

The 6<sup>th</sup> Respondent on his part averred that the 1<sup>st</sup> Applicant was adequately provided for, as she was given a parcel of land within Mavoloni Company Limited measuring approximately 10 acres, and that Beth Mueni (deceased), the mother of the 2<sup>nd</sup> & 3<sup>rd</sup> Applicants herein, was also given a parcel of land in Yatta Area measuring approximately 5 acres, and the 2<sup>nd</sup> & 3<sup>rd</sup> Applicants stand to inherit the said parcel of land. Further, that the deceased had made a gift inter-vivos and nominated the 6<sup>th</sup> Respondent to hold Share Certificate No. 2932 with Mavoloni Company Limited, which bears Plot No. 53 within Mavoloni Company Limited which measures approximately 10 acres, and transferred the same to him in 1988.

According to the 6<sup>th</sup> Respondent, in 1992 he sold a portion of the said parcel of land which measures approximately 5 acres to Jacinta Njeri Chege, and also sold portions of the said land to David Musembi Sila and John Muasya Maliti measuring 2.5 acres each. Further, that he transferred to Jacinta Njeri Chege the said Share No. 2932 within Mavoloni Company Limited which bears Plot No. 53 within the said Mavoloni Company Limited, who has been in open occupation of the said parcel of land since 1994. He denied intermeddling with the deceased's estate.

The 11<sup>th</sup> Respondent on her part reiterated the averments by the 6<sup>th</sup> Respondent that she purchased Share Certificate No. 2932 which bears Plot No. 53 within Mavoloni Company Limited, which was transferred to her and that she has been in occupation of the said portion of land.

J.A Makau & Company Advocates for the 1<sup>st</sup> to 10<sup>th</sup> Respondent filed submissions dated 11<sup>th</sup> April 2016, wherein they urged that the Applicants had not provided any evidence to show that the Respondents had intermeddled with, or transferred the deceased's properties, and are therefore not entitled to the orders of account. The Respondents however do not object to the grant of letters of administration issued to Naumi Mumbua Kinyowe being revoked, and prayed that the Court uses its discretion to appoint Lawrence Kinyowe as the new administrator of the deceased's estate pursuant to the provisions of section 66 of the Law of Succession Act.

J.Mutua & Co Advocates, the learned counsel for the 11<sup>th</sup> Respondent, argued in written submissions dated 22<sup>nd</sup> March 2016 that the proceedings herein do not affect the 11<sup>th</sup> Respondent as she bought her land from the 6<sup>th</sup> Respondent before the death of the administrator, and that there was no evidence tendered by the Applicants that she had intermeddled with the deceased's estate.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions filed by the Applicants and Respondents. The issue to be decided are firstly, whether the Petitioner's confirmed grant of letters of administration should be revoked; and secondly, whether the orders of injunction sought should issue; thirdly if the Respondents have intermeddled with the deceased's estate; and lastly whether the

Respondents should account for dealings with respect to the deceased's estate.

On the first issue, section 76 of the Law of Succession Act provides that any interested party can bring an application for revocation of grant. Section 76 reads as follows in this regard:

**“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 has ordered or allowed; 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.”**

In the present application the Respondents do not object to the revocation of grant, and I agree with the Applicants' submissions and the holding by Gikonyo J. in **Julia Mutune M'Mboroki vs John Mugambi Mboroki & 3 Others (2016) e KLR** that the said grant has become inoperative as a result of the death of the sole administrator, namely Naumi Mumbua Kinyowe, and that the proper course of action to be taken in such circumstances is the appointment of a new administrator and not substitution. The 1<sup>st</sup> to 9<sup>th</sup> Respondents who are children of the deceased have asked the Court to appoint the 1<sup>st</sup> Respondent herein, Lawrence Kinyowe, as the new administrator arising from an agreement they attached that was reached at a family meeting.

The 1<sup>st</sup> Applicant in her supplementary affidavit averred that the alleged meeting where the decision and agreement as to the new administrator was made was hurriedly orchestrated, to defeat the fair determination of the Applicants' application, as the alleged meeting was convened on the 21<sup>st</sup> November, 2015 after the Applicants had filed their application in court. She however did not contest the proposal to appoint the 1<sup>st</sup> Respondent as Administrator.

Given that the succession proceedings herein were commenced in 1994 and have been highly contested by the 1<sup>st</sup> Applicant, it is my opinion that to propel these succession proceedings to an expeditious conclusion it is in the interests of justice and of the beneficiaries that the said appointment of the 1<sup>st</sup> Respondent as administrator be done. This Court is empowered to do so pursuant to the provisions of sections 47 and 66 of the Law of Succession Act, as well as Rule 73 of the Probate and Administration Rules. In any event the Applicants still have the opportunity to participate in the distribution proceedings,

which appears to be their main area of contention, during proceedings for confirmation of the grant.

As regards the remaining three issues, I agree with the averments and submissions by the Respondents that the Applicants did not bring any evidence to demonstrate the intermeddling and/or dealings with the deceased's estate. I however also note from the pleadings that it is alleged that there were *inter vivos* gifts made to the beneficiaries by the deceased before his death. It is however not evident whether the said gifts form part of the deceased's estate that is sought to be distributed. It is also not clear if the sales to third party purchasers were of properties that formed part of the deceased's properties at the time of his death.

Lastly, after having perusing the Court record I note that there is no document that identifies the deceased's beneficiaries, and they were not listed in the affidavit in support of the petition for letters of administration filed herein on 17<sup>th</sup> June 1994, neither was the consent of the said beneficiaries obtained. Of additional concern to this Court is that there seems to be no basis and/or consent given to the distribution set out in the certificate of confirmation of grant issued on 12<sup>th</sup> August 1998. It was in this respect averred by the 1<sup>st</sup> Respondent in his replying affidavit that the beneficiaries consented to the said confirmation of grant on that date.

I have perused the court record of 12<sup>th</sup> August 1998, and note that all that Mwera J. (as he then was) did was to adopt the consent of the parties to dispose of the application dated 14<sup>th</sup> April 1997, which was for the substitution of one of the administrators. There was no prayer for confirmation of grant in the said application, neither is there any summons for confirmation of grant filed on the Court record. It is therefore the case that there was no consent by the beneficiaries to the proposed distribution set out in the said confirmed grant as later rectified on 25<sup>th</sup> July 2012, and the confirmed grant is therefore amenable to revocation.

It therefore necessary from the foregoing that the deceased's properties be preserved, pending a determination of all the issues arising from this ruling, and the Applicants' Amended Summons dated 26<sup>th</sup> June 2013 is accordingly allowed only to the extent of the following orders:

1. The grant of letters of administration intestate issued to Naumi Mumbua Kinyowe on 9<sup>th</sup> November 2011 with respect to the estate of Samuel Kinyowe Nzau (Deceased) be and is hereby revoked.
2. The Certificate of Confirmation of a grant issued Naumi Mumbua Kinyowe on 12<sup>th</sup> August 1998 with respect to the estate of Samuel Kinyowe Nzau (Deceased) be and is hereby revoked.
3. The "Rectified" Certificate of Confirmation of a grant issued Naumi Mumbua Kinyowe on 25<sup>th</sup> July 2012 with respect to the estate of Samuel Kinyowe Nzau (Deceased) be and is hereby revoked.
4. Lawrence Kinyowe be and is hereby appointed as the new Administrator with respect to the estate of Samuel Kinyowe Nzau (Deceased).
5. The new Administrator, Lawrence Kinyowe, shall within 60 days of the date of this ruling file and serve on all beneficiaries a Summons for Confirmation of Grant to which shall be attached a letter from the Chief of the location in which the Deceased's Samuel Kinyowe Nzau was resident, listing all the beneficiaries of the deceased.
6. The Applicants shall be at liberty to file and serve an Affidavit of Protest after service of the said Summons for Confirmation of Grant.
7. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 25<sup>th</sup> day of July 2016.

**P. NYAMWEYA**

**JUDGE**