



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**SUCCESSION CAUSE NO. 220 OF 2015**

**IN THE MATTER OF THE ESTATE OF PAUL MUTEMI KAMWAKI (DECEASED)**

**ERIC JOHN MUTEMI     )**

**SOPHIE NJERI MUTEMI     ).....APPLICANTS**

**VERSUS**

**AGNES MUMBANU KINAKO.....RESPONDENT**

**R U L I N G**

1. By way of Summons for Revocation or Annulment of Grant, dated **6<sup>th</sup> May, 2015**, the Applicants seek revocation or annulment of the Grant of Letters of Administration (Grant) issued in respect of the Estate of **Paul Mutemi Kamwaki** (deceased) granted to **Agnes Mumbanu Kinako** in **Kitui Chief Magistrates Succession Cause No. 147 of 2011** on **6<sup>th</sup> January, 2012**.

2. At the interim stage the Applicants prayed for orders restraining the Respondent, her servants, agents and employees from drawing money from the Deceased's bank account, selling, alienating any of the Deceased's property or suing on behalf of the Estate of the Deceased (Estate).

3. The application is premised on grounds that the proceedings were defective in substance; no consent was obtained either from the Applicants or other beneficiaries of the Estate to the appointment of **Agnes Mumbanu Kinako** as the Administratrix of the Estate of **Paul Mutemi Kamwaki**; no assets or liabilities of the Deceased were listed or disclosed in the petition and therefore the grant issued is inoperative and useless; and that the grant was obtained fraudulently, illegally and unprocedurally by actively concealing material facts which ought to have been disclosed.

4. The 1<sup>st</sup> Applicant swore an affidavit in support of the application where he deposed that the Deceased was survived by:

***“1. Agnes Mumbanu Kinako – Daughter (Adult).***

***2. Timothy Muimi Mutemi – Son (Adult).***

***3. Elizabeth Muiya Mutemi – Daughter (Deceased).***

***4. Eric John Mutemi – Son (Adult).***

***5. Caroline Musangi Mutemi – Daughter (Adult).***

6. *Sophie Njeri Mutemi – Daughter (Adult).*

7. *Judy Tabitha Mutemi – Daughter (Adult).*

8. *Diana Kanini Mutemi – Daughter (Adult).*

9. *Douglas Kyalo Mutemi – Son (Adult).*

10. *Catherine Kavutha Mutemi – Daughter Adult*

11. *Nancy Koki Mutemi – Daughter (Adult).*

The Deceased, his father, left behind a vast Estate comprising of agricultural land, fully developed commercial and residential plots, shares, bank accounts and even livestock; He learnt of the Respondent's appointment as an administratrix of the Estate of the Deceased when she sued him and his brothers in **High Court ELC No. 99 of 2015**; As a beneficiary of the Estate he has never appointed anyone as an administrator because some of the properties of the Deceased are in the process of adjudication.

5. On perusal of copies of the Petition filed on the Succession Cause he discovered that it was obtained illegally as none of the beneficiaries consented to appointment of the Respondent as an administratrix of the Estate; Actual properties owned by the Deceased were not listed; the death certificate was obtained fraudulently, the grant was issued on the same day as **Gazette Notice No. 121** giving the statutory **30 days** to make any objection was published.

6. The Respondent presented herself as the sole administrator of the Estate of the Deceased, the Estate is in danger of being sold, wasted or alienated. The property listed as **Nzambani/Malima/838** is not owned by the Deceased but by **Dater Enterprises Co. LTD** where the Deceased was a Director. **Miambani/Nzaaya/271** is non-existent.

7. Two sets of grants were issued dated **10<sup>th</sup> September, 2014** and **17<sup>th</sup> February, 2015** in the matter which raises suspicion. The Deceased died domiciled in **Nzaaya Sub-location Miambani Location** where he was buried. **Mutito Location** Chief gave the court misleading information.

8. The 2<sup>nd</sup> Applicant also swore an affidavit in support of the application stating that on learning of the existence of a grant that was fraudulently obtained by the Respondent, her sister, their other siblings were in shock and concluded that if the Respondent is not restrained as the administratrix of the Estate, it stood to suffer irreparable loss and damage.

9. In response thereto, the Respondent filed a replying affidavit where she deposed that she petitioned for letters of administration in respect of his late father being the eldest child after the Applicants and her other siblings refused to co-operate due to bad blood that developed after three of her brothers were charged with the offences of forgery, uttering a false document and malicious damage to property following a complaint that she made. That she acquired the death certificate and introduction letter lawfully from the Chief, **Mutito** where the Deceased resided at the time of his demise. The property **Nzambani/Malima/838** is a subject of two (2) court cases. All beneficiaries are disclosed in the Petition.

10. Denying having interfered with the Estate of the Deceased she averred that the Applicants are the ones who have intermeddled with the Estate by selling livestock and many valuable household items. She called upon the court to make the Applicants joint administrators of the Estate as she did not trust the Applicants.

11. By consent of all parties the application was canvassed by way of *viva voce* evidence.

12. At the hearing, the 1<sup>st</sup> Applicant, **Eric John Mutemi** gave a list of his siblings and all beneficiaries to the Estate as listed on the affidavit in support of the Petition for Letters of Administration Intestate (P&A 5). He stated that the Deceased who was a businessman amassed wealth including Agricultural Land,

Commercial Plots that he developed. He was a Director and Shareholder of **Dater Limited**. He operated Bank Accounts and had shares in companies and a herd of cattle. He estimated his wealth at a value of **Kshs. 10 Million**.

13. Further, he stated that most of the Land was under Adjudication Process and they intended to apply for Letters of Administration in respect of the Estate after obtaining title deeds. He learnt of a Succession Cause having been filed in respect of the Estate of the Deceased on being sued in a land case. A perusal of the Petition made him discover that not all assets that belonged to the Estate of the Deceased were listed while some of them like **Nzambani/Malima/838** did not belong to the Estate. The Deceased died leaving liabilities that were not included. Rent that was to be credited to the Estate was not being collected.

14. On cross examination he denied having acquired the title to **Nzambani/Malima/838** in the name of **Dater Enterprises Company LTD** fraudulently. He admitted having been jointly charged with his two (2) brothers with the offence of forgery, uttering a document with intent to defraud and malicious damage to property stated to be owned by the Respondent. He denied having the intention to become one of the administrators of the Estate of the Deceased. He was not for the idea of the Respondent administering the Estate of the Deceased.

15. The 2<sup>nd</sup> Applicant, **Sophie Njeri Muteti** denied having been involved in the process of taking out Letters of Administration.

16. **Agnes Mumbanu Kinako**, the Respondent, stated that she notified her siblings of the issue of filing of the Succession Cause but none of them was willing to discuss the matter. She added that prior to the Deceased's demise he gave her a gift, title No. **Nzambani/Malima/838**, a parcel of land that she took possession of and developed. In **2007** she had a ceremony in thanksgiving that was attended by her siblings and local administrators.

17. After the demise of the Deceased she got information that her brothers wanted to take her land. In **2011, July**, she received a notice to leave the land. It was alleged that it belonged to **Dater Enterprises Company Ltd**. She responded through her lawyer urging them to go to court. In **September, 2011** she got information that her grafted mango trees were destroyed/damaged by his brothers **Timothy Muimi Mutemi, Eric John Mutemi** (1<sup>st</sup> Applicant) and **Douglas Kyalo Mutemi** and that they were in the process of damaging buildings. She reported the matter to the police who arrested them and subsequently charged them in court. Denying the allegation that she did not disclose the fact of taking out Letters of Administration, she stated that she did it as the eldest child of the Deceased after requesting his siblings to do it but they declined. She included all their names in the Petition. Praying that the grant of representation should not be revoked, she prayed for identification of some of her siblings to be joint administrators of the Estate.

18. On cross examination she said that the Deceased had many assets but she did not include them in the list of assets because she was waiting for her siblings to reach an agreement and identify all properties. Regarding issuance of two separate documents (Grant of Letters of Administration Intestate) she denied having any knowledge and stated that the court was the one capable of explaining what happened. The Respondent called **Lilian Kola Kimanzi**, the Chief, **Mutitu** who wrote a letter that listed her siblings and indicated that the Deceased was domiciled at **Mutitu**.

19. In their written submissions, the Applicants argued that the grant of representation was defective in substance as the first grant was issued on the same day it was published in the **Kenya Gazette Notice No. 121**. A second one was issued which makes both of them null and void. No notice issued to other beneficiaries which was non-disclosure and concealment of material facts. Failure to disclose all assets of the Deceased was also concealment of facts. Part of the properties declared to belong to the Estate of the Deceased do not form part of the Estate.

20. The Respondent on the other hand submitted that proceedings to obtain the grant were not defective in substance as the Petition for Letters of Administration contained correct names of the Deceased and a list

of Dependents, the two (2) Applicants inclusive. Failure to obtain the consent of other Dependents was inconsequential at that stage as the Estate was not being distributed. The Deceased having been a shareholder of a company that owned one of the properties, its inclusion was not wrong. Fraud on the part of the Respondent was not proved. None of the Applicants have interest in becoming administrators of the Estate of the Deceased therefore the grant should not be revoked.

21. I have taken into consideration rival submissions of both counsels for the Applicants and Respondent. Circumstances in which a grant of representation may be revoked or annulled are provided for in **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.”***

22. I have perused the lower court file, when the Respondent petitioned for a grant of Letters of Administration Intestate she filed an introduction letter from the Chief which disclosed all survivors of the Deceased. A person making such an application is required to file some forms that are duly filled. This would include the Petition (Form P&A 80), the affidavit in support (Form P&A 5), the affidavit of means (Form P&A 12) and a consent form by adult beneficiaries (Form 38). The consent by beneficiaries was omitted. It is argued by the Respondent that the Applicants and their other siblings were unco-operative as they deliberately refused to take out letters of administration. There is nothing on record to suggest that the Respondent attempted to ensure they signed the consent but they declined. The Applicants herein just like the Respondent were entitled to apply for the grant. Having failed to do so, the Respondent was required to draw a citation to enable the Registrar cite the Applicants to appear in court to declare whether or not they were interested in applying for the grant.

23. **Section 67(1)** of the **Law of Succession Act** provides thus:

***“(1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.”***

Following the application (Petition) filed by the Respondent in the lower court all documents were

compiled. They were forwarded to the Principal Registrar, High Court of Kenya, Nairobi for purposes of advertisement in the Kenya Gazette. The documents sent, the letter forwarding details inclusive, are dated **30<sup>th</sup> day of November, 2011**. This was the date reflected in the Kenya Gazette. The Gazette Notice was **No. 121** of the **6<sup>th</sup> day of January, 2012**. After the cause was advertised in the Kenya Gazette and no objections were lodged as required by law, the grant was issued by the court. In the court file the Grant of Letters of Administration Intestate appearing (P&A 41) is dated the **17<sup>th</sup> day of February, 2015 (Annexure EJM 4(a))**. I have perused annexure **EJM 4(b)** which is another grant issued in the same matter by the same Judicial Officer dated **10<sup>th</sup> September, 2014** but does not form part of the record. Circumstances in which the two (2) grants were issued remain questionable. What is however evident was the fact that the grant was not issued on the same date it was published in the gazette.

24. The Respondent has been faulted for failure to disclose material facts in the matter. It is a requirement for a person petitioning for a grant to disclose administrative assets and liabilities. Where practicable, copies of title documents should be attached. The Petitioner disclosed only two (2) assets namely:

- **Nzambani/Malima/838**
- **Miambani/Nzaaya/271**

She deposed that the Deceased left no liabilities.

Annexure “**EJM 3**” is a copy of title deed – for **Nzambani/Malima/838** which measures **12.6 Ha** in the name of **Dater Enterprises Limited**.

25. The title deed was issued on **29<sup>th</sup> June, 2010** some five (5) months prior to the demise of the Deceased. The Applicant has claimed possessionary ownership of the plot alleging that it was bequeathed to her by the Deceased in **1989** and that invasion of the parcel of land by the 1<sup>st</sup> Applicant and his two (2) brothers has resulted into their arrest and subsequent prosecution, a matter that is pending in court. It was admitted by the Respondent that the Deceased had many assets which she excluded as she awaited her siblings to come up with an inventory of all of them. This means that it was well within her knowledge that some assets were not disclosed.

In the case of **Samuel Wafula Wasike vs. Hudson Simiyu Wafula CA Case No. 253 of 1993** the Court of Appeal held that a grant obtained on the strength of false claims, without obtaining the consents of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.

26. From the foregoing it is apparent that the grant was obtained following proceedings that were defective in substance and concealment of some material facts. This calls for revocation of the grant, which I hereby do.

27. In this matter, the Applicants sought revocation of the grant but expressed no interest in becoming administrators of the Estate. The Respondent on the other hand prayed to be allowed to administer the Estate of the Deceased jointly with any of the siblings who may be willing to take up the task. The law protects free property owned by the Deceased (**Vide Section 45 and 46 of the Law of Succession Act**).

28. **Section 66** of the **Law of Succession Act** 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.”***

The question I should therefore pose in what was the main purpose of the Applicants in making the application for revocation of the grant if they are not interested in administering the Estate? This question remains unanswered. In the premises invoking powers bestowed upon me by **Section 66** of the **Law of Succession Act**, I direct all beneficiaries to the Estate to come up with names of persons who will administer the Estate within two (2) weeks, in default, I will exercise my discretion and proceed to appoint persons(s) to whom the grant will issue.

29. Being a Succession matter each party will bear their own costs.

30. It is so ordered.

**Dated, Signed and Delivered at Kitui this 27<sup>th</sup> day of September, 2016.**

**L. N. MUTENDE**

**JUDGE**