



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 575 OF 2008

IN THE MATTER OF THE ESTATE OF THE LATE ELIJAH KILONZO KITHUMA
(DECEASED)

FRANCIS OYURU SEME.....1ST INTERESTED PARTY

SELAH MUTHIKE MAINGI.....2ND INTERESTED PARTY

ASHA KAMENE SALIM.....3RD INTERESTED PARTY

PADDY KAMAU NG'ANG'A.....4TH INTERESTED PARTY

ONESMUS KIOKO MWEU.....5TH INTERESTED PARTY

VERSUS

REGINAH MUTONO ELIJAH.....1ST ADMINISTRATOR

PAULINE MUMBUA KITHUMA.....2ND ADMINISTRATOR

WINFRED MUENI MUASYA.....3RD ADMINISTRATOR

RULING

Introduction

Elijah Kilonzo Kithuma (hereinafter referred to as “the Deceased”), died on 15th July 2007. His wife Reginah Mutono Elijah who is the 1st Administrator herein, and his son, Ambrose Kithuma Nzioki consequently petitioned for a grant of letters of administration intestate on 17th September 2008. However, before the said grant could be issued, Ambrose Kithuma Nzioki died.

Subsequently, on 8th June 2010 a consent was filed in Court in which it was agreed that the 1st, 2nd and 3rd Administrators herein be administrators of the estate of the Deceased, and a grant of letters administration intestate was duly issued to the said three administrators on 12th October 2010. The 2nd Administrator is the sister of Ambrose Kithuma Nzioki and a daughter of the deceased, while the 3rd Administrator is the wife of Ambrose Kithuma Nzioki and daughter-in-law of the Deceased.

The 3rd Administrator thereafter filed a summons for confirmation of grant dated 18th May 2015 to which the other beneficiaries consented and which was confirmed by this Court on 17TH June 2015 and a

Certificate of confirmation duly issued. The 1st, 2nd and 3rd Interested Parties and 5th Interested Party have now filed applications in this Court *inter alia* seeking for the revocation of the grant of probate and certificate of confirmation issued by this Court.

The said interested parties are contesting the distribution of one of the properties listed as an asset of the Deceased, namely, Mavoko Town Block 3/1994, which was in the certificate of confirmation of grant shown to devolve to Winfred Mueni Muasya, the 3rd Administrator herein, to be registered in her name and to hold in trust for N N N (a minor). The 4th Interested Party also asked to be joined in these proceedings to oppose the applications by the 1st to 3rd and 5th Interested Parties. This Court on 30th March 2016 and 8th June 2016 directed that the applications by the 1st, 2nd and 3rd Interested Parties and 5th Interested Party be heard and determined together.

The Applications

The 1st, 2nd and 3rd Interested Parties filed two applications both dated 11th March 2016. The first application is a summons for revocation of grant in which the following orders are sought:

- 1). That this Court do revoke the grant of probate confirmed by this Court on 17th June 2015, together with the Certificate of Confirmation
- 2). That consequential to (1) above and in the wider interest of justice and the expeditious settlement of the estate of Elijah Kilonzo Kithuma (Deceased) as well as the estate of the Ambrose Kithuma Nzioki (Deceased):-
 - a) This Honourable Court do find that the true legal beneficiary of the parcel of land originally identified as MAVOKO TOWN BLOCK 3/1994 as presently, is Ambrose Kithuma Nzioki (deceased son), such that the said title and any sub-divisions resulting therefrom shall with effect from 17th June 2015, be deemed to be held by the joint administrators of his estate under a continuing trust for and on behalf of the Estate Of The Late Ambrose Kithuma Nzioki (deceased),
 - b) This Honourable Court do exclude the 7 acre parcel of land presently known and identified as MAVOKO TOWN BLOCK 3/49030; 3/ 49031, and 3/49032 and portion of MAVOKO TOWN BLOCK 3/4386, being a subdivision excised from the parcel of land originally identified as MAVOKO TOWN BLOCK 3/1994, from the beneficial share of the Late Ambrose Kithuma Nzioki (deceased) in the parcel of land originally identified as MAVOKO TOWN BLOCK 3/1994, and:-
 - i. The Court do revoke, annul, nullify and/ or cancel, any and all sales, transfers, dispositions, charges, leases or transactions made by Winfred Mueni Muasya in respect of MAVOKO TOWN BLOCK 3/49030, 3/49031, 3/49032 and portion of MAVOKO TOWN BLOCK 3/4386, if at all any, as well as any dispositive transactions in relation to any further subdivisions identifiable from the aforesaid title and the office of the Land Registrar Machakos be directed to immediately give effect the Court's nullification orders as aforesaid .
 - ii. The said Winfred Mueni Muasya as administrator, beneficiary and trustee, for and on behalf of the administrators of the estates of the Late Ambrose Kithuma Nzioki (deceased) be granted leave to and directed to immediately transfer legal ownership of the aforesaid 7 acre parcel of land presently known as MAVOKO TOWN BLOCK 3/49030, 3/49031, 3/49032 and portion of MAVOKO TOWN BLOCK 3/4386, to Asha Kamene Salim, as the last beneficial owner in lawful possession thereof;
 - iii. The remaining share of the Late Ambrose Kithuma Nzioki (deceased) in the parcel of land originally identified as MAVOKO TOWN BLOCK 3/1994, comprised in. and presently identified as MAVOKO TOWN BLOCK 3/49030, MAVOKO TOWN BLOCK 3/49031, MAVOKO TOWN BLOCK 3/49032, MAVOKO TOWN BLOCK 3/49033, MAVOKO TOWN BLOCK 3/49034,

MAVOKO TOWN BLOCK 3/49035, MAVOKO TOWN BLOCK 3/49036, MAVOKO TOWN BLOCK 3/49037, MAVOKO TOWN BLOCK 3/49038, MAVOKO TOWN BLOCK 3/49039, MAVOKO TOWN BLOCK 3/49040, MAVOKO TOWN BLOCK 3/49041, MAVOKO TOWN BLOCK 3/49043, and MAVOKO TOWN BLOCK 3/4386, be transmitted to the estate of Ambrose Kithuma Nzioki (deceased), and to continue to be held by the said Winfred Mueni Muasya, for her own benefit and for the benefit of the other beneficiaries of the estate.

3. THAT also consequential to (1) above and in the wider interest of justice and the expeditious settlement of the estate of Elijah Kilonzo Kithuma (deceased) as well as the estate of the Ambrose Kithuma Nzioki (deceased), this Court do issue and confirm a fresh grant of probate in terms of the annexed draft Certificate of Confirmation of Grant, such that: -

a) The description of the parcel of land originally identified as MAVOKO TOWN BLOCK 3/1994, in which the interested parties have an interest in, but which is presently subdivided and no longer legally exists/operative for purposes of this Court's jurisdiction now identified as MAVOKO TOWN BLOCK 3/49030, MAVOKO TOWN BLOCK 3/49031, MAVOKO TOWN BLOCK 3/49032, MAVOKO TOWN BLOCK 3/49033, MAVOKO TOWN BLOCK 3/49034, MAVOKO TOWN BLOCK 3/49035, MAVOKO TOWN BLOCK 3/49036, MAVOKO TOWN BLOCK 3/49037, MAVOKO TOWN BLOCK 3/49038, MAVOKO TOWN BLOCK 3/49039, MAVOKO TOWN BLOCK 3/49040, MAVOKO TOWN BLOCK 3/49041, MAVOKO TOWN BLOCK 3/49042, MAVOKO TOWN BLOCK 3/49043 and MAVOKO TOWN BLOCK 3/4386;

b) The true legal beneficiary of the parcel of land originally identified as MAVOKO TOWN BLOCK 3/1994 as presently, is Ambrose Kithuma Nzioki-(deceased son) such that the said titles and any further subdivisions resulting therefrom shall, with effect from 17th June 2015, be deemed to be held by the joint administrators of his estate under a continuing trust for and on behalf of the Estate Of The Late Ambrose Kithuma Nzioki (deceased), and his residual share therein be included in the schedule of assets of the estate of Ambrose Kithuma Nzioki in Machakos Succession Cause No. 280 of 2010- Estate Of The Late Ambrose Kithuma Nzioki (deceased).

4. THAT the this Court be pleased to make any further or alternative orders, as the Court may deem proper and just in the circumstances.

The second application was a Notice of Motion seeking the following outstanding orders as rephrased by this Court:

1) That for sufficient reasons disclosed by the Interested Parties herein, pending the hearing and determination of the Summons for Revocation of the Grant dated 11th March 2016 filed by the 1st, 2nd & 3rd Interested Parties and/ or until expressly ordered otherwise by the Court, this court-be pleased to grant protective orders on the following terms

a) Winfred Mueni Muasya, as one of the administrators of the estates and the stated sole beneficiary of the property known as MAVOKO TOWN BLOCK 3/1994 pursuant to the grant confirmed in this cause on 17th June 2015, be restrained from selling, transferring, charging, leasing, disposing off or in any manner interfering with the ownership of the following subdivisions of the parcel of land originally registered as MAVOKO TOWN BLOCK 3/1994, which are presently registered as MAVOKO TOWN BLOCK 3/49030, MAVOKO TOWN BLOCK 3/49031, MAVOKO TOWN BLOCK 3/49032, MAVOKO TOWN BLOCK 3/49033, MAVOKO TOWN BLOCK 3/49034, MAVOKO TOWN BLOCK 3/49035, MAVOKO TOWN BLOCK 3/49036, MAVOKO TOWN BLOCK 3/49037, MAVOKO TOWN BLOCK 3/49038, MAVOKO TOWN BLOCK 3/49039, MAVOKO TOWN BLOCK 3/49040, MAVOKO TOWN BLOCK 3/49041, MAVOKO TOWN BLOCK 3/49042, MAVOKO TOWN BLOCK 3/49043 and MAVOKO TOWN BLOCK 3/4386, as well as any and all further subdivisions resulting and identifiable from the aforesaid titles.

b) The office of District Land Registrar Machakos, at the penalty of contempt in default, do

immediately suspend any past, pending or future transactions and forthwith register an inhibition against the registration, finalization of any and/ or all transactions or the making of any entries (other than entry of this order) on the parcel of land original known and registered as MAVOKO TOWN BLOCK 3/1994, which are presently registered as MAVOKO TOWN BLOCK 3/49030, MAVOKO TOWN BLOCK 3/49031, MAVOKO TOWN BLOCK 3/49032, MAVOKO TOWN BLOCK 3/49033, MAVOKO TOWN BLOCK 3/49034, MAVOKO TOWN BLOCK 3/49035, MAVOKO TOWN BLOCK 3/49036, MAVOKO TOWN BLOCK 3/49037, MAVOKO TOWN BLOCK 3/49038, MAVOKO TOWN BLOCK 3/49039, MAVOKO TOWN BLOCK 3/49040, MAVOKO TOWN BLOCK 3/49041, MAVOKO TOWN BLOCK 3/49042, MAVOKO TOWN BLOCK 3/49043 and MAVOKO TOWN BLOCK 3/4386, as well as any and all further subdivisions resulting and identifiable from the aforesaid titles, and submit written confirmation of the same in this cause within 7 days.

c) Winfred Mueni Muasya, as the stated beneficiary of as MAVOKO TOWN BLOCK 3/1994 (presently sub-divided) , be restrained from trespassing, selling, leasing, and/or in any other way interfering with the possession by Asha Kamene Salim on the 7-acre portion of the parcel of land presently registered as MAVOKO TOWN BLOCK 3/49030; 3/ 49031, and 3/49032 and portion of MAVOKO TOWN BLOCK 3/4386.

d) The aforesaid prohibitory orders do similarly bind the administrators of the estate of Elijah Kilonzo Kithuma (deceased), specifically, Regina Mutono Elijah, Pauline Mumbua Kithuma and Winfred Mueni Muasya, in respect of the aforesaid titles ,and no prior or pending disposition of the aforesaid parcels shall be done or authorized or concluded by them except by the order of the court.

2) That the Court be at liberty to grant any further or alternative orders as it deems proper and just in the circumstances.

The grounds for the two applications were stated in the body of the applications and in supporting affidavits both sworn by the 1st Interested Party on 11th March 2016 and in a further affidavit he swore on 18th April 2016.

In summary the 1st to 3rd Interested Parties' case is that the deceased, who died on 15th July, 2007 , had in accordance with Kamba Customary practices, and at a meeting held on 28th May 2005, made a gift *inter vivos* to his son, the late Ambrose Kithuma Nzioki and gave him beneficial ownership of his 8-acre share in MAVOKO TOWN BLOCK 3/1994. Further, that by the time of his demise in 2009, Ambrose Kithuma Nzioki as the true and beneficial owner of the 8-acre portion in MAVOKO TOWN BLOCK 3/1994, and to the knowledge of the family, had by 27th August 2008 sold his beneficial interest in the 7-acres of his portion to the 1st and 2nd Interested Parties and therefore the same was to be properly excluded from, and would not vest in or for the benefit of his estate upon his death intestate.

The Interested Parties' contention is that only the residue of MAVOKO TOWN BLOCK 3/1994 after excluding their portions was to devolve to the said Ambrose Kithuma Nzioki, and distributed to his estate through **Machakos Succession Cause NO. 280 of 2010 - Estate of The Late Ambrose Kithuma Nzioki**. They detailed out the various sale agreements that they entered with, and annexed copies of the same. The said Interested Parties also averred that the Court and parties herein, were duly notified that they were interested in the proceedings through the Caveat filed in this cause in 2013 pursuant to rule 15 of the Probate & Administration Rules, and therefore, the Court registrar should not have allowed the grant to be confirmed or disposed of without notice to them.

Further, that said Winfred Mueni Muasya unlawfully removed a caution that the 1st Interested Party had lodged on 25th February, 2010 against the title to the entire MAVOKO TOWN BLOCK 3/1994 upon learning of the death of Ambrose Kithuma Nzioki (deceased), pending the hearing and determination of his estate, and proceeded to subdivide the said land and is now in the process of disposing of the said sub-divisions.

According to the 1st to 3rd Interested Parties, the parcel of land known as MAVOKO TOWN BLOCK

3/1994 measuring 14.94 Hectares was originally identified as LUKENYA PLOT No. 194, and was purchased by Kithuma Ndunda (deceased), who was the father to Elijah Kilonzo Kithuma, Muya Kithuma, Muthama Kithuma, Mutua Kithuma and Soo Kithume. Further, that the said Kithuma Ndunda died intestate on 18th March 1988, and a grant of letters of administration in respect of his estate was issued to Esther Munyi Kithuma and Elijah Kilonzo Kithuma, as the widow and son respectively, through **Machakos P & A Cause No. 128**.

In addition, that once the property originally known as LUKENYA PLOT No. 194 was formally registered, the title thereof was registered in the name of Elijah Kilonzo Kithuma, (the deceased) to hold on his own behalf and on behalf of his 4 other brothers. Ultimately, that the said property was to be distributed according to a sub-division plan made in 2001 but not yet implemented, which the 1st to 3rd Interested Parties attached, and from which Elijah Kilonzo's share was to be 8 acres together with additional land that he bought from Soo Kithuma. The deceased was consequently on 6th July, 2005 registered as absolute owner of the said land, which was registered as MAVOKO TOWN BLOCK 3/1994

The 1st to 3rd Interested Parties alleged that the administrators and family members were aware of the fact that MAVOKO TOWN BLOCK 3/1994 (as it then was), though registered in the name of the deceased, was not his free property, as he in fact held the same on his own behalf and in trust for his brothers, and that the deceased's share of the said property had been given to Ambrose Nzioki Kithuma, but deliberately chose to conceal the same. Further that any allegation that the administrators or family were not aware of the same is controverted by extracts of the family resolutions following a family meeting held on 28th May 2008 at their Kyanguli home, and another family meeting held on 9th November 2009, after the death of Ambrose Nzioki Kithuma, copies of which were attached .

The 1st to 3rd Interested Parties therefore contend that they have a demonstrable interest in the land originally identified as MAVOKO TOWN BLOCK 3/1994, and that that the proceedings through which the Grant was obtained and confirmed in **Machakos High Court P & A No. 575 Of 2008- Estate Of The Late Elijah Kilonzo Kithuma**, and resulting in Winfred Mueni Muasya being registered as sole and absolute beneficiary of the parcel of land originally known as MAVOKO TOWN BLOCK 3/1994, were tainted with material non-disclosure of vital information, and should therefore be annulled.

The 5th Interested Party on his part filed a summons dated 18th April 2016 seeking orders that the grant of letter of administration issued to Winfred Mueni Muasya and confirmed on the 17th June 2015 be revoked and or annulled on the grounds that the said grant was obtained by making of false statement or by concealment from the court of material facts ,and that the proceedings to obtain the grant were defective in substance. The 5th Interested Party in his supporting affidavit averred that he is a beneficiary of the estate of the deceased having bought a portion of land parcel MAVOKO TOWN BLOCK 3/1994 from the sons of Kithuma Ndunda (Deceased), and the wife of Soo Kithuma also deceased, and he attached copies of the sale agreements. Further, that 2nd respondent herein was all along aware of the foregoing sales but deliberately failed to inform the court of his interest in the said land, and that he has since developed the land and constructed permanent home thereon. He attached photographs of the same.

The 5th Interested Party also filed a replying affidavit he swore on 6th May 2016 in support of the 1st to 3rd Interested Parties applications, wherein he concurred with the prayer for the revocation of the grant of probate confirmed by this Court on 17th June 2015, together with the certificate of confirmation thereof as the same were sought fraudulently and through the concealment of crucial information.

He further stated that the suit before this court will fully be resolved by determining the true beneficiaries of the estate of Kithuma Ndunda (Deceased) who wholly owned the land parcel MAVOKO TOWN BLOCK 3/1994. He reiterated that in 2001 the sons of the late Kithuma Ndunda subdivided the said land parcel, MAVOKO TOWN BLOCK 3/1994 amongst themselves, each getting 8 acres, and that by the time of the subdivision , Soo Kithuma was deceased and was survived by a wife , one Maria Soo Kithuma, and a son , one Joseph Mulei Soo. Further, that Maria Soo Kithuma sold to him 5 acres out of her share of 8 acres.

The Responses

The 1st, 2nd, and 3rd Administrators opposed the 1st to 3rd and 5th Interested Parties in replying affidavits they swore on 5th April 2016, 14th April 2016 and 29th March 2016 respectively, and in a supplementary affidavit sworn by the 3rd Administrator on 8th June 2016. The 1st Administrator in addition filed Grounds of Opposition dated 8th June 2016 to the 5th Interested Party's application.

The gist of the Administrators' responses were that the late Ambrose Kithuma Nzioki (deceased) never legally secured the alleged gift before the death of his father by moving to get Land Control Board Consent thereof or excising the same before his father's death, neither did he obtain a confirmed grant in this cause so as to entitle him to enter into transactions. Further, that he did not as a petitioner include the alleged interest in the form P&A 5 he signed on 16/9/2008 as a liability to the estate, if at all he had a legitimate and separate interest as a gift to him separate from the other beneficiaries.

In addition, that the said Ambrose Kithuma Nzioki was not the holder of a confirmed grant in this cause, and the Plot No. Mavoko Town Block 3/1994, which was registered to the deceased since 1/7/2005, and that all the land sales or transactions over the deceased's said plot No. Mavoko Town Block 3/1994 to the 3 interested parties or other persons and the subsequent re-sales or disposal thereof by the purported purchasers, assumption of possession and any developments thereof are completely illegal, null and void.

Further, that the same could not confer any title or interest as claimed as the said Ambrose Kithuma Nzioki had no legal or lawful power to sale, and that the transactions amounted to intermeddling with the deceased's estate. Accordingly that there is no valid, legal or enforceable interest which the interested parties can pursue against the estate of the deceased in this cause, as they purchased the land from a person without legal or any authority to dispose of immovable property of the deceased.

It was also contended that the 1st, 2nd & 3rd interested parties are not family members of the late Elijah Kilonzo Kithuma and his late son, Ambrose Kithuma Nzioki (deceased); they never attended the purported family meetings; are not the authors or signatories to the alleged minutes of the alleged family meetings and have not disclosed the sources of the purported family documents annexed to the further affidavit, and cannot therefore validly rely upon the said documents which are foreign to the administrators who have never signed any such documents.

Lastly, the Administrators stated that only a restriction and not a caution had been placed on 25/2/2010 over parcel of land MAVOKO TOWN BLOCK 3/1994 till this succession cause was finalized and upon issuance of a confirmed grant herein, the restriction was lawfully removed. It was also stated that the 1st – 3rd Interested Parties have already commenced parallel proceedings in the Environment and Land Court in Nairobi seeking reliefs similar in legal character to the prayers sought in their instant Summons.

The 4th Interested Party also filed a replying affidavit he swore on 30th March 2016 in opposition to the Interested Parties' applications, wherein he stated that he is registered as the absolute proprietor of all that land comprised in Title Number MAVOKO TOWN BLOCK 3 / 49034 which he purchased legally, and which although mentioned by the 1st to 3rd Interested Parties in their applications, does not form part of the deceased's estate. He urged the Court to vacate the order made against his property to enable him freely enjoy the same.

The Submissions

The Interested Parties' applications were canvassed by way of written submissions. Wetang'ula Adan Makokha & Co Advocates for the for the 1st, 2nd and 3rd Interested Parties filed submissions dated 24th June 2016, while Ojienda & Company Advocates, the Advocates for the 5th Interested Party, filed submissions dated 6th July 2016. The Advocates for the 1st Administrator, Mwanja Mbithi & Company Advocates, filed submissions dated 22nd July 2016, while B.M Kituku & Company, the Advocates for the 2nd Administrator, filed submissions dated 26th July 2016, and L.N. Ngolya & Company Advocates for

the 3rd Administrator and 4th Interested Party filed submissions dated 14th June 2016.

The 1st to 3rd Interested parties submitted that their application for revocation of summons brought under Sections 47 & 76 of the Law of Succession Act, as well as Rule 44 and 73 of the Probate and Administration rules, and urged that there are several broad principles of law that ought to guide this Court in its decision-making. Firstly, that it is settled law that under Section 76 of the Law of Succession Act, the court is empowered to revoke or annul a grant "on the application of any interested party or of its own motion" and the expression "any interested party", as used in that provision, in its plain and ordinary meaning, is wide enough to cover a person who invokes the aid of the Court on any good faith claim of having a demonstrable interest in an asset of the estate.

Secondly, that a grant of representation, whether or not confirmed, may at any time be revoked under Section 76 of the Law of Succession Act, and therefore, confirmation thereof does not afford any absolute Defence to a summons for revocation. Thirdly, that when faced with an application brought by way of a summons for revocation under Section 76 of the Law of Succession Act, the Court must identify and evaluate the nature and extent of the fraudulent conduct, to ascertain the scope of the relief which may be granted. Fourthly, that the standard of review to be applied in considering a summons taken out under Section 76 of the Law of Succession Act, is judicially similar to the principles that are generally applied to assessment of non-disclosure and the consequences which will follow as a result of such non-disclosure, as enunciated in the case of **Brink's-Mat Ltd V Elcombe And Others, [1988] 3 All ER 188** and in which it was held that there must be full and frank disclosure of facts which are material for the judge to know in making a decision.

Fifthly, that where a court finds that a grant was obtained by means of a fraudulent misstatement or concealment of material facts, specifically under Sections 76(a),(b) or (c) of the Law of Succession Act, the Court has an imperative obligation to return the estate to the status quo ante the grant, and jurisdiction for this is found under Section 47 of the Law of Succession Act which gives this Court unfettered original jurisdiction to make such pronouncements and orders as the Court deems fit, just and proper in the circumstances. Reliance in this regard was placed on the decision by Madan J. (as he then was) in the case of **Mawji -Vs- U.S. International University And Another, (1976) KLR 185**. Lastly, that where a court finds that a grant was obtained by means of a fraudulent misstatement or concealment of material facts, specifically under Sections 76(a),(b) or (c) of the Law of Succession Act, it is settled law that an affected party cannot have recourse to or enjoy any protection under Section 93(1) of the Law of Succession Act because fraud unravels everything under section 52 of the Law of Succession Act. Reliance was also placed on **Re Estate of Christopher Jude Adela (Deceased), [2009] e KLR** for this position.

The counsel for the 5th Interested Party in his submissions reiterated the averments made in their pleadings, as did the counsel for the 1st Administrator.

The counsel for the 2nd Administrator on his part argued that no ground for the revocation and/or annulment of grant as contemplated under section 76 of the Law of Succession Act has been disclosed by the applicants, who on the contrary were confessing and admitting to being intermeddlers in contravention of sections 45(1) , 55(1) and 82(b) (ii) of the Law of Succession Act. Further, that disposition of the capital assets of a deceased person is expressly prohibited by law with penalties prescribed including imprisonment. Reliance was placed on the decision by this Court in **Rosaita Mbithe Kyale vs Jackson Kiilu Mutisya, Machakos High Court Succession Cause No. 539 of 2014** in his regard. It was submitted that the applicants' claims in the circumstances can only lie against the estate of Ambrose Kithumo Nzioki- deceased , for recovery of any monies paid to him and not the estate herein.

The 2nd Respondent in addition submitted that the 3rd Administrator was to hold the said parcel of land in trust for herself and N N N who was then a minor but now of age, who ought to be equally provided for from the said parcel of land , and they are hence astonished that the 3rd Administrator managed to secure the said land to be registered solely in her name without declaring the said trust and has even managed to sell part of the land held in trust to the 4th interested party who now has a title thereto. The 2nd

administrator stated in this regard that she shall be making the appropriate application in the interest of justice for the provision of the said "minor" now an adult, and urged the court to invoke its unfettered jurisdiction to preserve this part of the estate forthwith. Further, that Rule 73 of the probate and administration rules provides that nothing in the 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.

The counsel for the 3rd Administrator on his part reiterated that the Applicants' agreements of sale exhibited in their respective affidavits are not only illegal but also null and *void ab initio*, as it is evident from those agreements that the Applicants were dealing with a stranger who had no capacity to sell any asset forming part of the estate hereof. In fact, that the Applicants are intermeddlers who should face penal consequences. It was also submitted that upon the confirmation of the grant, the 3rd Administrator has never dealt with the estate otherwise than provided by Section 82 of the Law of Succession Act. Further, that in so far as title number MAVOKO TOWN BLOCK 3/ 49034 is concerned, the same is exclusively owned by the 4th Interested Party, and is not part of the deceased's estate as alleged by the Applicants. In any case, that title number MAVOKO TOWN BLOCK 3 /1994 does not exist .

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the parties herein. The issue raised is whether the confirmed grant herein should be revoked and whether sufficient grounds have been established for the injunctions sought by the 1st to 3rd Interested Parties to be granted.

As regards revocation of the confirmed grant, the Court in this regard at the outset notes that there is a distinction to be made between revocation of the grant of representation and revocation of the confirmation of the said grant. As regards the former, section 66 of the Law of Succession Act which provides a general guide as to those who will be preferred to administer the estate of a deceased as follows-

“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 ranking of beneficiaries of an intestate is provided under Part V of the Act, and section 36 of this part specifically provides that where an intestate has left a surviving child or children but no spouse as in this application, the net intestate estate shall be equally divided among the surviving children. It is only where an intestate has left no surviving spouse or children, that the net intestate estate shall devolve upon the kindred of the intestate in order of priority, with creditors coming last in priority.

In the present application the 1st to 3rd and 5th Interested Parties are purchasers of parcels of land registered in the deceased name and therefore qualify as creditors, and cannot therefore rank in priority to the Administrators. They were therefore not required to be given notice or to give consent to the succession proceedings. The requirements as to such notice and consent are in this regard provided in Rule 26 of the Probate and Administration Rules as follows:

“(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.”

The Court in the circumstances finds that the grant of representation made to the 1st, 2nd and 3rd Administrators was legally and properly made, and will not revoke the same.

However, as regards the revocation of the confirmation of the said grant, it is noted that the 1st to 3rd Interested Parties allege that 8 acres of land parcel no MAVOKO BLOCK 3/1994 was gifted to Ambrose Kithumu Nzioki by the deceased, and is not available for distribution. Further, that the said parcel of land was held by the deceased in trust for his brothers who each have a share in the same. They claim to have purchased land from the beneficiaries entitled to the land as a result of the said gift and trust. These allegations are denied by the 1st 2nd and 3rd Administrators.

The law provides for gifts *inter vivos* of land as one of the ways of transmission of interests in land, and the requirements of law for such gifts *inter vivos* to be valid are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts.

In addition, the concept of a customary trust in relation to land held by a family member is recognized in law, and the fact that a person is registered as proprietor of land as absolute owner does not negate the possibility that he or she holds the land under a customary trust. In *Kanyi vs. Muthiora, (1984) KLR, 712* this Court held that registration of land in the name of a proprietor under the Registered Land Act did not extinguish rights under Kikuyu customary law and neither did it relieve the proprietor of his duties or obligations as trustee. The Court further stated that the trustee referred to in *section 28 of the Act* included a trustee under customary law.

Likewise in *Njuguna vs. Njuguna, (2008) 1 KLR 889* the Court of Appeal had occasion to consider the concept of *muramati* in Kikuyu customary law and his obligations and responsibilities. The respondent in that appeal, the eldest son in a family, was registered as owner of a parcel of land which he held under customary law trust for himself and his six brothers. The land was divided into eight pieces. The other brothers were given one piece each, but the respondent took two pieces ostensibly because he was a *muramati*.

Coming to the present applications, the 1st to 3rd and 5th Interested Parties have provided evidence of sale agreements entered into with beneficiaries they claim were gifted the subject parcel of land, or in whose benefit it was held by the deceased as trustee. They also produced extracts of minutes of meetings of the deceased family in which it is alleged the said gift and trust is shown to exist, and in which the said family members including some of the Administrators are said to have participated.

This Court at this stage cannot interrogate the veracity of the said evidence, save to state that the evidence presented raises the possibility of non-disclosure, and the 1st to 3rd and 5th Interested Parties have a right to present and canvass the said evidence in challenging the confirmation of and distribution of the land parcel no MAVOKO BLOCK 3/1994, and should also be given the opportunity to do so in support of their claims. The Administrators will equally upon this eventuality, also have the opportunity to challenge the admissibility and veracity of the said evidence.

Section 76 of the Law of Succession Act in this regard provides that any interested party can bring an application for revocation of a confirmed grant and provides as follows:

“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 circumstances it is my finding that sufficient ground has been raised for the revocation of the confirmation of grant.

On the second issue as to whether the injunctions sought can issue, the provisions of section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules give wide discretion to the Court as to the orders it can make, including orders of injunction if the interests of justice so require. The principles that are applicable for the grant of a temporary injunction are stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, which are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

For the grant of mandatory injunctions, the principles were set out by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** wherein it was held that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

The question I must therefore answer is whether the Applicants have met the criteria for the grant of an injunction. The Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others**[2003] eKLR stated as follows as to what constitutes a *prima facie* case:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Applying these principles to the instant application, this Court has already found that the 1st to 3rd and 5th Interested Parties have a right to present their evidence to challenge the confirmation of the grant issued to the Administrators in relation to land parcel no MAVOKO BLOCK 3/1994, and to this extent there is need to preserve the *status quo* until the Interested Parties establish their case or otherwise. This finding notwithstanding, I note that some of the orders sought by the 1st -3rd Interested Parties are final in nature in terms of determination of the rights of the respective parties herein, and can only be issued in the event that the Interested Parties are successful in establishing their case.

I have also noted and taken into account the submissions made that the 2nd Administrator was to hold the land known as MAVOKO TOWN BLOCK 3 /1994 in trust for another beneficiary, and appears to have registered it absolutely in her sole name and proceeded to dispose of the same. The said parcel of the land also requires to be preserved for this reason.

In the premises the Summons for Revocation of Grant and Notice of Motion by the 1st 2nd ,and 3rd Interested Parties dated 11th March 2016, and the Summons by the 5th Interested Party dated 18th April 2016 only succeed to the extent of the following orders:

1. The confirmation of grant of letters administration intestate and Certificate of Confirmation issued herein to the 1st, 2nd and 3rd Administrators by this Court on 17th June 2015 be and is hereby revoked.

2. The 1st, 2nd and 3rd Administrators, and Winfred Mueni Muasya, as sole beneficiary of the property known as MAVOKO TOWN BLOCK 3/1994 pursuant to the revoked confirmed grant, be and are hereby restrained from selling, transferring, charging, leasing, disposing off or in any manner interfering with the ownership of the following subdivisions of the parcel of land originally registered as MAVOKO TOWN BLOCK 3/1994, which are presently registered as MAVOKO TOWN BLOCK 3/49030, MAVOKO TOWN BLOCK 3/49031, MAVOKO TOWN BLOCK 3/49032, MAVOKO TOWN BLOCK 3/49033, MAVOKO TOWN BLOCK 3/49034, MAVOKO TOWN BLOCK 3/49035, MAVOKO TOWN BLOCK 3/49036, MAVOKO TOWN BLOCK3/49037, MAVOKO TOWN BLOCK 3/49038, MAVOKO TOWN BLOCK 3/49039, MAVOKO TOWN BLOCK 3/49040, MAVOKO TOWN BLOCK 3/49041, MAVOKO TOWN BLOCK 3/49042, MAVOKO TOWN BLOCK 3/49043 and MAVOKO TOWN BLOCK 3/4386; as well as any and all further subdivisions resulting and identifiable from the aforesaid titles.

3. The District Land Registrar Machakos, be and is hereby restrained from registering any further transactions, and shall also forthwith register an inhibition against the further registration, finalization of any and/ or further transactions, or the making of any further entries (other than entry of this order), on the parcel of land original known and registered as MAVOKO TOWN BLOCK 3/1994, which are presently registered as MAVOKO TOWN BLOCK 3/49030, MAVOKO TOWN BLOCK 3/49031, MAVOKO TOWN BLOCK 3/49032, MAVOKO TOWN BLOCK 3/49033, MAVOKO TOWN BLOCK 3/49034, MAVOKO TOWN BLOCK 3/49035, MAVOKO TOWN BLOCK 3/49036, MAVOKO TOWN BLOCK 3/49037, MAVOKO TOWN BLOCK 3/49038, MAVOKO TOWN BLOCK 3/49039, MAVOKO TOWN BLOCK 3/49040, MAVOKO TOWN BLOCK 3/49041, MAVOKO TOWN BLOCK 3/49042, MAVOKO TOWN BLOCK 3/49043 and MAVOKO TOWN BLOCK 3/4386; as well as any and all further subdivisions resulting and identifiable from the aforesaid titles.

4. The 1st, 2nd, 3rd and 5th Interested Parties shall file and serve their affidavits of protests to the summons for confirmation dated 25th May 2015 and filed herein on 19th May 2015 within 60 days.

5. Each party shall meet their respective costs of the Summons for Revocation of Grant and Notice of Motion by the 1st 2nd ,and 3rd Interested Parties dated 11th March 2016, and the Summons by the 5th Interested Party dated 18th April 2016 .

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 21st day of December 2016.

P. NYAMWEYA

JUDGE