



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 27 OF 2004

**IN THE MATTER OF THE ESTATE OF THE LATE SAMWEL K. MANGUSHO
DECEASED**

A N D

TERESIA C. THOMASADMINISTRATOR

ESTHER CHEPKEMOI KITIYO RESPONDENT

VERSUS

STANLEY MANGUSHO

DAVID MANGUSHO APPLICANT

R U L I N G

1. The summons for revocation of the grant issued on the **29th July 2004** and confirmed on **1st December 2005**, was taken out on the **31st January 2011** by the objector / Applicant **Fred Juma Mangusho**, on grounds that the grant was obtained fraudulently and without disclosure of material facts and that the applicant and other beneficiaries who are children of the deceased were left out.

The applicant also alleges that there was no disclosure that the deceased had four (4) wives and that the first petitioner/respondent being the fourth wife re-married after the death of the deceased.

Apart from the order for revocation of grant, the applicant also seeks an order that all title documents issued to the respondents be cancelled.

2. However, the prayer for cancellation of title documents is wrongly made before this court and may have to await the outcome of this application before the applicant decides whether or not to move the Environment and Land Court in that regard.

Be that as it may, the grounds for the application are supported by the supporting affidavit deposed by the applicant dated **31st January, 2011** and are opposed on the basis of the facts contained in the respondents replying affidavit dated **21st October 2011**.

It may be noted that the original application dated **31st January 2011**, was substituted for a similar application dated **27th February 2014**, following the demise of the original applicant **Fred Juma Mangusho**.

3. The new applicants, **Stanley Mangusho** and **David Mangusho**, are brothers of the late **Fred Juma Mangusho** and their grounds for the application are similar to those relied upon by their late brother. However a fresh supporting affidavit was deponed by Stanley Mangusho on **27th February 2014**. There was no response to this new affidavit from the respondents thereby applying that they were relying on their original replying affidavit to oppose the application which was argued on the basis of the averments contained in the affidavits by the applicants and the respondents. Oral evidence was also received from the late Fred Juma Mangusho (PW1) and his witnesses, **Jonathan Barasa Naibei** (PW2) and **Bernard Matuyu Mangusho** (PW3).

The first respondent, **Teresia Chemalasi Thomas** (DW1), also testified at the hearing of the application. Thereafter written submissions were filed by both the applicants and the respondents through their respective advocates i.e **Messrs Millimo Muthomi & Co. Advocates** and **Messrs Katama Ngeywa & co. Advocates**.

4. From the pleadings and the evidence, the main issue arising for determination is whether the applicants have established in terms of S.76 of the Succession Act, that the subject grant or the certificate of confirmation thereof or both ought to be revoked and / or annulled, In her submissions, the first respondent indicates that the objectors have not established a case against them because the deceased had shared out his estate to his family and settled the respective households on their respective shares. Therefore, this application is intended to disinherit the first respondent and her daughters.

It is the contention of the first respondent that the objectors' evidence is contradictory and quite clearly they omitted to mention other property bequeathed to them by the deceased .

5. As for the objectors, it was submitted that the respondents failed to disclose all the beneficiaries and to reveal all the assets of the deceased together with the fact that the deceased had contracted a polygamous marriage with four (4) wives, the first wife having pre- deceased him. That , the respondents did not follow the due process of the law to be able to have titles registered in their names as they failed to disclose all material facts when obtaining the letters of administration. That, by not stating each and every other dependants including all the deceaseds wives and not obtaining any consent as per Rule 26(1) of the Probate / Administration rules, the proceedings to obtain the grant was defective in substance as form 38 was not even signed by all the beneficiaries. That, the respondents also failed to state all the properties of the deceased and that some of the beneficiaries left out actually reside at Sukwo farm.

The objector relied on s.39(1) (b) of the Registration of Titles Act (Cap 281), s.26(i) of the Land Registration Act, Sections 29,40,42,66 and 71(3) of the Succession Act together with the decisions in **Lucia Adeya Anjelina vs Patrick Odhiambo Akongo (2014) e KLR** and **Mary Wangari Kihika vs John Gichuhi Kinuthia & Others (2015) e KLR** and prayed that the confirmed grant be revoked for material non-disclosure on the part of the respondents and for the titles with respect to **Saboti/Saboti Block 6/Sukwo/106** registered in the names of the first and second respondents be rectified by deleting the names of he respondents and reverting the same to the name of the deceased.

6. Basically, the provisions of the succession Act cited herein by the objectors to wit S.29, S.40, S.42, S.66 and S.71(3) were applicable in the present circumstances given that there was no dispute from the respondents that the deceased was a polygamous man having married four (4) wives of which one preceded him in death and that he died intestate leaving behind his surviving widows and a number of children and / or dependants all of whom were entitled to benefits from his estate and thus be involved in the petition by the respondents for grant of letters of administration respecting the estate.

The evidence by **Fred Juma Mangusho** (PW1), was essentially to show that not all beneficiaries were involved or consulted by the petitioner / respondent when applying for the grant and that they (Petitioners) concealed material facts by not disclosing the existence of additional property owned by the deceased and in particular the land at Sukwo.

7. The evidence by **Jonathan Barasa Naibei** (PW2) and **Bernard Matuyu Mangusho** (PW3) was to show that the land at Sukwo belonged to the deceased and that it is or was occupied by members of his

family including the first respondent as well as the children of the deceased's late first wife (i.e. the Objectors). However, in her evidence, the first respondent (DW1) indicated that the deceased allocated his portions of land among his wives such that the late first wife lived at the land at Kaptama, the second wife lived at the farm at Kaptalio while the third wife had separated from the deceased but came to live at Kaptama after his death. She (the first respondent) was the fourth wife and she was allocated the land at sukwo for her exclusive use together with her own family consisting of female children.

8. It was admitted by the first respondent that no documents existed to show that the deceased prior to his death shared out or allocated his property among his wives. She also admitted that in her application for the grant she did not mention the names of the other wives of the deceased nor did she include all the property belonging to the deceased nor did she inform other beneficiaries of her application for the grant.

Indeed, the letter from the D.O Saboti division dated **9th February, 2004**, merely mentioned that the deceased had four (4) wives without indicating the names of the wives save the first respondent.

The affidavit in support of the application for the grant dated **4th February 2004**, did not also mention all the widows of the deceased and their respective children. Neither did it mention that the deceased had property other than the Sukwo land.

The summons for confirmation of grant dated **24th October 2005**, only mentioned the first respondent and her daughters yet the deceased left behind other surviving widows and their children. The consent of all the other beneficiaries including the objector herein was clearly missing in the summons for confirmation of grant.

9. All the factors afore-mentioned coupled with the respondents admissions clearly prove that the grant obtained by her and the second respondent (her daughter) was so obtained by concealment of material facts and through proceedings which were defective in substance.

Consequently, this application / objection is well merited and is allowed to the extent that the grant issued to the respondent on **29th July 2004** and confirmed on **1st December 2005**, be and is hereby revoked to pave way for a fresh application encompassing all the beneficiaries and / or defendants of the estate of the deceased.

The applicants / objectors may move the appropriate court for cancellation of titles issued to the respondents or anyone of them on the strength of the hitherto, revoked grant.

Each party shall bear own costs of the application.

J. R. KARANJA

JUDGE

Read / signed this 30th of June 2015.

In the presence of M/s Bett and M/s Arunga holding brief for Ngeywa for Objector.