



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 2395 OF 2003

IN THE MATTER OF : THE ESTATE OF SIAMETO ole MUNGUTI (DECEASED)

RULING

1. There are three (3) applications that are for simultaneous determination. These are dated 22nd January 2013, 15th March 2013 and 7th June 2014, respectively. Directions for their simultaneous determination and canvassing by way of written submissions were given on 7th October 2014.
2. The application dated 22nd January 2013 seeks, in principal, the revocation of the grant made in the matter on 21st July 2004, temporary orders to restrain dealing with certain assets and stay of proceedings with relation to the orders of 17th February 2012 and 16th March 2012.
3. The grounds upon which the application is premised are set out on the face of the application, as well as in the affidavit sworn by the applicant on 16th January 2013. The 1st and 2nd administrators are accused of not complying with court orders, failing to involve one side of the family in administration, failing to provide a criteria in the distribution of the assets, failing to follow the provisions of the Law of Succession Act in distribution and distributing property to strangers. It is also pleaded that there are in force three (3) separate grants of letters of administration intestate issued in the matter.
4. The application was brought at the instance of Simon ole Munguti, along with his siblings, and the 3rd administrator of the estate. The deceased was said to have had died in 1974, and representation to his estate was sought and obtained in 1980 by Nepruko Siameto, a widow of the deceased, the grant was confirmed and the estate distributed. Seventeen (17) years later a group of persons came to court seeking revocation of the grant made in **HCSC No. 227 of 1980** on the grounds that they too were widows and children of the deceased. Their plea was allowed, the grant was revoked and it was ordered that a fresh one be issued to the three widows of the deceased in a fresh cause. Subsequent orders were made on the distribution of the estate. It is these subsequent orders that he applicant complains have not been complied with. He also complains that the grant was obtained in the matter without fully complying with the provisions of the Law of Succession Act, specifically without according his mother an opportunity to file a cross-petition or to make an objection.
5. The 3rd administrator has attached to his affidavit a copy of authority to plead on behalf of his siblings, Elizabeth Sialo Munguti and Fredrick Longisa Munguti. There is also copy of certificate of death dated 11th June 1976 indicating that the deceased passed away on 29th October 1974. He has also attached a copy of the grant of letters of administration intestate made in this matter on 21st July 2004 to the widows- Resiato Munguti and Noongipa Munguti; and the certificate of confirmation in respect of the said grant dated 26th September 2005. There is also a document

mapping out the various sub-divisions from the title Ngong/Ngong/27. Finally, he has attached copies of the rulings and judgments in the matter from both the High Court and the Court of Appeal.

6. The respondents, the 1st and 2nd administrators of the estate, Resiato Munguti and Noongipo Munguti, upon being served, swore a joint affidavit on 15th March 2003, filed in court on even date. They assert that they are the administrators of the estate of the deceased, adding that the applicant is also an administrator of the estate having substituted his late mother, Nepruko on 19th November 2008. They deny that the applicant administers the estate jointly with his sister, Elizabeth Sialo, and brother, Longisa Munguti. It is averred that the issues raised by the applicant about the non-involvement of his mother in distribution, among others, were raised previously by his mother and were dealt with by the court. She did not object to the proposed distribution and the estate was shared out equally among the three widows. They state that it is actually the applicant who is guilty of failing to comply with court orders. They aver that the orders of 17th February 2012 and 7th August 2009 were neither on making a grant nor distribution of the estate but orders to facilitate settlement of the subject property by the beneficiaries. They state that the Land Registrar has since cancelled all the subdivisions and reverted the land back to Ngong/Ngong/27 in compliance with the order of 17th February 2012.
7. Attached to the affidavit of the 1st and 2nd administrators are copies of the various applications filed in the matter by the 3rd administrator's mother, which in their view were designed to frustrate the distribution of the estate. There is a copy of the grant of letters of administration intestate dated 21st July 2004, indicating that the 3rd administrator's mother was one of the administrators of the estate, jointly with the respondents. There is also the certificate of confirmation of grant dated 26th September 2005 indicating how the estate was shared out amongst the survivors of the deceased. There is also the order by Nambuye, J. cancelling the subdivision of Ngon/Ngong/27 and restoring the original title.
8. The application dated 15th March 2013 is by 1st and 3rd administrators. They seek orders that the Deputy Registrar be directed to sign forms on behalf of the 3rd administrator in the application of 22nd January 2013 to facilitate the subdivision and distribution of Ngong/Ngong/27 and the transfer of Ngong Town plot No. 32 (LR No. 4480/32). They also seek that the Officer Commanding (OCS) the Ngong Police Station be ordered to provide security during the survey and settlement of Ngong/Ngong/27.
9. The 1st and 2nd administrators swore a joint affidavit on 15th March 2013 in support thereof. They refer to the order of Nambuye J. of 17th February 2012 which had commanded the cancellation of the subdivision of Ngong/Ngong/27 and its reversal to the original state. They aver that the reversal has been completed and pray that distribution ought to proceed as per the confirmed grant. They accuse the 3rd administrator of failing to cooperate with them. They would also want to complete the disposal of Ngong Town Plot No. 32, given that an injunction application filed over the said property had been dismissed.
10. To the said affidavit, the 1st and 2nd administrators have attached a copy of the order of Nambuye J. of 17th February 2012, and the other by Gacheche J. of 7th August 2009. There is also a certificate of official search dated 12th September 2012 indicating that Ngong/Ngong/27 is still in the name of the deceased.
11. The 3rd administrator swore an affidavit on 17th March 2013 in reply to the application. His opposition to the application was founded principally on three grounds. One, that there was a pending application for revocation of the grant, which ought to be determined first. Two, that the applicants had benefitted from property elsewhere, which has not been disclosed. And finally, that the orders of 12th February 2012 had been stayed in **HC Petition No. 154 of 2013**.

12. The application of 7th June 2014 is a summons in chambers filed on 9th June 2014 by persons who describe themselves as interested parties. It names the estate of the deceased as respondent. It is premised on various provisions of the law. It seeks joinder of the applicants and of other persons to the suit as interested parties, leave for the said interested parties, after being so joined to participate in the proceedings in such way as may be deemed proper by the court, interim stay of the orders of 17th February 2012 and 16th March 2012, injunctive orders to restrain the estate from dealing with Ngong/Ngong/27, joinder of the OCS Ngong Police Station to effect the orders sought and review of the orders of 17th February 2012 and 16th March 2012.
13. The application is predicated on the grounds set out on the face of the application, as well as on the facts set out in the affidavit sworn on 8th June 2014 by Athman Salim Mohamed.
14. The interested parties' case is that they had during the period when the estate was under the sole administration of Nepruko Munguti Siameto, bought portions of the estate property, Ngong/Ngong/27, the said portions were excised from the mother title and subsequently registered in their names. These transactions were carried out in the 1990's and early 2000 after the grant had been confirmed and the estate devolved to the then administrator and known widow of the deceased, Nepruko Munguti Siameto. On 21st December 2001, the grant made to Nepruko Munguti Siameto was revoked. Subsequently, a fresh grant was made to three individuals representing the three houses of the deceased. On 17th February 2012 it was ordered that all the parcels of land resulting from the subdivision of Ngong/Ngong/27 be collapsed and reverted back to Ngong/Ngong/27 originally registered in the name of the deceased. The interested parties contend that the order of 17th February 2012 was adverse to their interests and was made before they were accorded a hearing. It is averred that the order to collapse the titles into one was an error apparent on the face of the record in view of the provision in Section 93 of the Law of Succession Act.
15. Several documents have been annexed to the affidavit in support to buttress the applicant's case. There is a letter of authority indicating that the applicant, Athman Salim Mohamed, was acting with the authority of the other purchasers of portions of the subject property. There is also copy of the grant of letters of administration intestate in respect of the estate of the deceased made on 9th December 1980. There are several copies of documents of title in respect of the subdivided portions from the original title. There is also the order of 21st December 2001 revoking the grant of 9th December 1980 and directing that a fresh petition be filed by the widows of the deceased. The grant made on 21st July 2004 to the three widows is also attached together with a certificate dated 26th September 2005 of the confirmation of the grant of 21st July 2004. Copies of the impugned ruling and order of 17th February 2012 is also attached.
16. The application dated 7th June 2014 was served on all the persons named in it as parties. There is an affidavit of the said service sworn on 23rd June 2014 by George Onyango and filed in this cause on 24th June 2014.
17. I do not have in the record before me any papers filed by the 3rd administrator in reply to the application. There is however a further affidavit on record sworn on 21st July 2014 by a Wilfred Ouru Obutu, one of the applicants, in purported reply to a replying affidavit sworn by Resiatio Munguti and Noongipa Munguti on 30th June 2014. I have scrupulously gone through the record but it seems that the said affidavit did not reach the court file.
18. I directed on 7th October 2014 that all the three applications – dated 22nd January 2013, 15th March 2013 and 7th June 2014 - be disposed of simultaneously by way of written submissions. Further directions were granted on 17th November 2014 that the written submissions be highlighted.

19. In compliance with the said directions, the parties hereto filed their written submissions. The 1st and 2nd administrators' submissions are dated 3rd November 2014, and were filed in court on the same date. The 3rd administrator's written submissions are dated 13th November 2014, and were filed in court on 19th November 2014. While those by the interested parties are dated 19th November 2014 and were lodged in court on even date.
20. The application dated 22nd January 2013 is by the 3rd administrator, I will start therefore by examining the submissions of the said administrator. He submits that the court has discretion to revoke a grant, whether or not confirmed. He argues that the confirmation process did not deal with total estate of the deceased, especially so far as the same touched on property that was in the hands of the 1st and 2nd administrators. He emphasizes that administration requires good faith and absence of good faith would be good ground for revoking a grant. He pleads that the confirmation was founded on concealment of matter from the court. He argues that the application dated 15th March 2013 is premature, for it is meant to pre-empt the application dated 22nd January 2013. The 3rd administrator supports the application by the interested parties dated 7th June 2014.
21. The first and second administrators argue that the application dated 22nd January 2013 is *res judicata* as there was a similar application filed by the 3rd administrator's mother dated 6th March 2005, which was resolved by the 3rd administrator's mother being appointed administrator. They state that the 3rd administrator is raising the same issues as those that were raised in the applications dated 8th and 22nd March 2006. They argue that there was equal distribution between all the three houses. On the application dated 15th March 2013, the 1st and 2nd administrators state that theirs seek only to comply with orders of Nambuye J. of 17th February 2012. On the application dated 7th June 2004, they submit that the interested parties have not demonstrated that their application falls within the parameters set for review of court orders – error on the face of the record and discovery of new evidence. In any case, they further submit, the applicants, being not heirs of the deceased, were at the wrong forum.
22. The interested parties in their written submissions ...
23. The written submissions were highlighted on 11th February 2015. Mr. Wati stated the case for the 1st and 2nd administrators, while Mr. Ndege represented the 3rd administrator and Mr. Awele the interested parties.
24. Mr. Awele went first. He submitted that when the issue of the reversal of the transactions for Ngong/Ngong/27 was placed before Gacheche J. she ordered that details thereof be furnished by the Land Registrar responsible for Kajiado. Those details were placed before Nambuye J. who ordered the reversal of the subdivision in respect of Ngong/Ngong/27. It was submitted that the third interested parties ought to have been taken into account, and that Gacheche J. no doubt intended to do that when she called for details of the transactions. It was urged that Section 93 of the Law of Succession Act applied for the transactions were carried out before the grant was revoked and after the interested parties had already taken possession. The land registration was under the repealed Registered Land Act, Cap 300, Laws of Kenya, under which, it was submitted, a cancellation of a title could only be on grounds that the registration was obtained fraudulently and the registered proprietor participated in the fraud. It was emphasized that a registration under the Registered Land Act was indefeasible, and that that was still the legal position under the current law. Consequently, going by the above position, the order of Nambuye J. demonstrated a manifest error on the face of the record. It was submitted that the order by Nambuye J. has far reaching ramifications for the third parties were in possession and the order had the effect of depriving them of shelter. Mr. Awele submitted that Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules require that review be sought where there is manifest error on the face of the record and the applicant ought to have been party to the proceedings where the order was made. It was submitted that the interested parties fell within the criteria set out in

Section 80 of the Civil Procedure Act, and sought to have been given a chance to participate in the proceedings. He then cited decisions made in ***Kennedy Opiche Olela –vs- William Oginda Ochuodho***, where it was held that Section 13 of the Law of Succession Act protects the interested party title in property which cannot be revoked through an application for revocation of the grant. Similarly in ***Philip Wambaa Karanja and Others –vs- Josephine Muthoni***, it was held that the rights of *bona fide* purchasers for value cannot be interfered with by virtue of Section 93 of the Law of Succession Act. It was submitted that the court ought to have allowed the third parties to place material before the court on the transactions.

25. Mr. Wati followed. He submitted, on the review application, that there was no error apparent on the record, as Nambuye J. did not commit any error. He argued that it was not proved that Nambuye J's order offended Section 93 of the Law of Succession Act. He stated that the transactions that are protected by Section 93, are those done before revocation. In his estimation only transactions relating to Ngong/Ngong/20323, 23747 and 23748 were done before revocation, and therefore the rest of the transactions should not enjoy protection under Section 93. He argued that the order of Nambuye J. had not invalidated the said transactions, the interests of the third parties were to be charged against the share of the third house, for the said house had sold 34% of the estate; which is equal to their one third share in the estate. He stated that Nambuye J. recognized the third parties, especially Mr. Salim Mohamed and Mr. Wilfred Mulwa. Her Ladyship had given reasons why everything needed to be done so that redistribution could be done afresh. Mr. Wati submitted that the third party interests were to be actualized at the distribution stage. On Section 93 of the Law of Succession Act, he submitted that the provision does not give a platform to third parties in revocation proceedings. He stated that where there is revocation of a grant everything collapses, but valid transfers are saved, which is not the same as saying that the purchasers should then participate in the proceedings. He sought to distinguish the decision in ***Kennedy Olela –vs- Ochuodho***, saying that it was not a proper reading of Section 93 of the Law of Succession Act for it mixed titles with transfer, yet Nambuye J. never questioned the validity of the transfers. On ***Philip Wambaa Karanja –vs- Josephine Muthoni***, he argued that Nambuye J. did not order that anyone be removed from the land, as was the case in the authority cited by Mr. Awele. He submitted that what the third parties were crying for had already been provided in Nambuye J's judgment. In his view the problem was on the ground rather than with the documents. He further submitted that interested parties have no audience in succession proceedings, and cited authority in that respect, arguing that rule 73 of the Probate and Administration Rules did not come to their aid. On the revocation application, Mr. Wati submitted that there was no evidence of fraud. He urged the dismissal of the interested parties application as well as that of the 3rd administrator.

26. Mr. Ndege for the 3rd administrator urged me to rely entirely on his written submissions, adding that the 3rd administrator supported the application by the interested parties and for fairness, urging a redistribution of the estate.

27. Mr. Awele replied to the highlights by Mr. Wati. He conceded that only a few of the transfers in question were done before revocation, but submitted that even the ones done thereafter were valid, stating that most of the interested parties were unaware of the dispute in court. The joinder sought of these parties is so that they can place some evidence before the court to prove their interest. He argued that the inherent powers of the court as saved in Rule 73 of the Probate and Administration Rules cannot be invoked to overrule the clear provisions of the Registered Land Act, under which the transactions were done which make titles indefeasible except in cases of fraud, emphasizing that cancellation can only be in terms of the provisions of the Registered Land Act. He stated that the collapse of the titles did not mean that the interests of the third parties were secure. On Section 93 of the Law of Succession Act not conferring audience to purchases in probate proceedings, he stated that the argument is defeated by Article 159 of the Constitution. He added that when the interested parties approached the Environment and Land Court, they were referred to the probate court. On transfer and title, he submitted that there cannot be any distinction between them for the logical effect of a transfer is conferment of title.

28. I will deal with the three applications in the order in which they were filed, starting with one dated 22nd January 2013. The application in the main seeks revocation of the grant made on 21st July 2004, the setting aside of the orders confirming the said grant and cancellation of the certificate issued subsequent to that confirmation. The other orders are consequential – a temporary injunction with respect to the property the subject of the application dated 7th June 2004 and stay of execution of the orders made on 17th February 2012 and 16th March 2012.

29. The law on revocation of grants of representation is set out in Section 76 of the Law of Succession Act. For avoidance of doubt, the said provision states 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 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 satisfy 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 material particular; or**
 - iv. **That the grant has become useless and inoperative through subsequent circumstances.”**

30. The grant sought to be revoked was made in this cause on 21st July 2004. The grant of 2004 was made after the initial representation to the estate made in **HCSC No. 227 of 1980** to Nepruko Munguti Siameto on 9th December 1980 was revoked on 20th December 2001 by Rawal J. The court in that cause directed that a fresh petition be made in the names of the three wives of the deceased under the Law of Succession Act. The decision of Rawal J. was challenged at the Court of Appeal in **CA No. 272 of 2002**, but was upheld. The fresh petition ordered on 20th December 2001 in **HCSC No. 227 of 1980** was filed on 27th August 2003 in a new cause being **HCSC No. 2395 of 2003**, by Resiato Munguti and Noongipa Munguti. They simultaneously filed on the same day an affidavit of verification of proposed citation to accept or refuse letters of administration intestate asking for Citations to issue upon their co-widow, Nepruko Siameto Munguti, on the grounds that she had refused to take out letters of administration jointly with them. A citation in those terms was issued on 27th August 2003 by the Deputy Registrar for service on Nepruko Siameto Munguti. Similar Citations were issued thereafter on diverse dates addressed to several other members of the Siameto ole Munguti household. The grant was then made on 21st July 2004 to Resiato Munguti and Noongipa Munguti, who then filed a summons on 7th June 2005 for the confirmation of the said grant. The grant was confirmed in the terms of the said application on 26th September 2005, and a certificate of confirmation of grant of even date issued duly signed by Koome J.

31. The administrators thereafter, by a Summons for Rectification of Grant dated 28th November 2005, moved the court for the rectification of the certificate of confirmation of grant dated 26th September 2005 to effect several minor corrections to the names of the beneficiaries. The application was allowed and the certificate of confirmation of grant was rectified on 24th January

2006.

32. On 6th March 2006, the 3rd administrator's mother, Nepruko Munguti, filed a summons under the Civil Procedure Act and Rules for enlargement of time to file an application for revocation of the grant made to the 1st and 2nd administrators. When the application dated 8th March 2006 came up for hearing before Rawal J, the court made an order, after discussing the matter with the parties, that the mother of the 3rd administrator be made co-administrator with Resiato Munguti and Noongipa Munguti. The court noted that the said Nepruko Munguti appeared to have had issues or complaints on the distribution made on 26th September 2005.
33. An application dated 9th March 2006 was then filed, seeking to have the grant made in the matter on the orders of Rawal J. on 8th March 2006 revoked on the grounds of fraud and concealment of material facts. On 1st July 2009, Gacheche J. dismissed the application dated 9th March 2006 on grounds that the grant of 8th March 2006 was made on the strength of a valid order made by Rawal J. It was not made on a petition or application for appointment of administrators made by any of the parties, but rather after the court considered other applications made by the parties. Gacheche J. was of the view that the question of fraud and concealment of matter from the court could not therefore arise. In any event, the court noted no appeal had been lodged against the order of Rawal J. of 8th March 2006.
34. I have set out the history of the appointment of administrators in the foregoing paragraphs in an effort to lay out the background within which the grant of 21st July 2004 was made and subsequently amended on 6th March 2006 to accommodate the third house of the deceased. From the material before me I can declare with no doubt at all in my mind that it has not been demonstrated that there was fraud or concealment of matter in the process of obtaining the grant. When Rawal J. on 20th December 2001 revoked the grant of 9th December 1980 in **HCSC No. 227 of 1980**, she directed that a petition in a fresh cause be filed in the names of the three widows for their appointment as administrators of the estate of the deceased. That fresh petition was filed in this cause, **HCSC No. 2395 of 2003**, by two of the widows, the other widow having failed to cooperate despite being cited. The grant of 21st July 2004 was made in those circumstances. No fraud has been demonstrated at all, neither has it been shown that any matter was concealed from the court that to justify nullification of the proceedings that culminated in the making of said grant.
35. The grant of 21st July 2004 was made on 8th March 2006 on the orders of Rawal J. when the court appointed the 3rd administrator. The orders of 8th March 2006 dealt with the concerns of the third house regarding their representation in the administration of the estate. The said order effectively and finally validated the proceedings that had culminated in the making of the grant of 21st July 2004. There cannot therefore be any basis for faulting the process of the making of the grant of 21st July 2004. Neither can there be any basis for challenging the orders of 8th March 2006 appointing the 3rd administrator.
36. The 3rd administrator alleges that there are three grants in force in this cause. It is not clear from the papers that he has lodged in court about what he means by saying so. I can only assume that he is referring to the orders of 21st July 2004, 8th March 2006 and 1st July 2009, and saying that each order resulted in the making of a grant of letters of administration intestate. In my view there is only one grant in force. It was made on 21st July 2004, and its character changed with the making of the orders of 8th March 2006 and 1st July 2009. The subsequent orders did not result in other grants being made in addition to that of 21st July 2004, rather they only had the effect of either amending the grant or revoking it and replacing it with the fresh appointments of the two persons who have so far acted as the successively 3rd administrator.

37. Therefore, with respect to the integrity of the process of the making of the grant on record, it is my conclusion that the same was above board and a case has not been made for its revocation.
38. From my reading of the material placed before me by the 3rd administrator, it is plain that the third house has concerns about the distribution of the estate effected by the certificate of confirmation of grant dated 26th September 2005. These concerns were noted by Rawal J. when making the order of 8th March 2006. I have carefully gone through the record and noted that the said concerns have not been addressed.
39. One concern is that at the time the grant was confirmed on 26th September 2005, only the first and second houses were represented in the administration of the estate for at that time the grant holders were the first and second widows of the deceased. The third widow joined the administration on 8th March 2006; months after the grant had been confirmed. Arising from these circumstances, the 3rd administrator argues that the confirmation process did not involve the third house as the said house was not party to the administration of the estate at the material time. He complains that the third house was not consulted nor involved in arriving at the mode of distribution proposed in the application for confirmation which was subsequently approved by the court. In short his case is that the process of distribution was not inclusive.
40. The other concern, which is not properly and coherently articulated, is that this cause relates to the estate of the deceased situated at Ngong, yet the deceased had two residences, at Ngong and at Narok. The first and second houses resided at Narok during the deceased's lifetime, while the second house resided at Ngong. The implicit argument is that the third house should be entitled to inherit the whole of the deceased's estate at Ngong where it resided with him during his lifetime, while the other two houses inherit the estate situated at Narok where the members of the two houses resided during the deceased's lifetime. It would appear to me that that was the understanding by the third house which informed the initiation of **HCSC No. 227 of 1980**, which was limited to the Ngong property, without involving the other two houses.
41. From the record in **HCSC No. 227 of 1980**, and specifically the proceedings relating to the revocation application, it is clear that the deceased's original home was Narok. He was born and raised there, and it was while there that he married the 1st and 2nd administrators. He apparently set up another house at Ngong, not with the 1st and 2nd administrators, but with the mother of the 3rd administrator. From the record it emerges that the 1st and 2nd administrators lived at Narok on what must have been the deceased's ancestral land, while the third wife lived at Ngong. Clearly, the deceased had two residences, one at Ngong and the other at Narok. One family lived at Ngong, while the other lived at Narok.
42. The existence of these two distinct residences was dramatized by the fact that when the deceased passed on at Ngong in 1974, none of the members of the two Narok sides of his family attended his burial. Secondly, when representation was sought to his estate six years later, in 1980, none of the members of the Narok families came forward to object to grant being made to the third widow, and it was seventeen years after the grant was made in that cause that the members of the other two houses showed interest in the matter.
43. The two Narok families are large, one eleven (11) members while the other comprises of six (6) members. The third house was made up of four (4) persons. The large Narok family must have been resident on the ancestral land. I find it curious that members of the said two houses did not at all in **HCSC No. 227 of 1980**, nor in this cause, disclose to the court the property that the deceased died possessed of at Narok.
44. When the grant made in **HCSC No. 227 of 1980** was revoked, and it was ordered that representation to the estate be sought by the three widows in a fresh cause, one would have expected that there would be a full disclosure of all the estate of the deceased. That is to say, a full disclosure of the property that the deceased owned at Ngong where he lived with his third wife

and at Narok, the ancestral home where his first two wives lived. It would be unreasonable, in my view, to expect that a large family of seventeen (17) persons would have been squatters on property belonging to another.

45. I find it curious too that when the 1st and 2nd administrators applied for letters of administration intestate in their petition filed in this cause on 27th August 2003, they only disclosed the Ngong property occupied by the third house, but not the Narok property occupied by themselves. Their joint affidavit in support of the petition, sworn on 14th August 2002, states that the deceased died possessed of two parcels of land both situated at Ngong, being Kajiado/Ngong/27 and 32. The affidavit is silent on the Narok property. Similarly, the confirmation application dated 7th June 2005 sought to distribute only the two assets at Ngong. There are no averments in the affidavit in support of the said application on the status of the Narok property.
46. This cause concerns the estate of the deceased. He owned land at Ngong, which was registered under the Registered Land Act, Cap 160, Laws of Kenya. He had a large family residing at Narok. He must have had or owned property there where that family was settled whether the land was held under statute or customary law. There was an obligation to place facts before court concerning the said land, for at the point of distribution the fate of such land was material.
47. The probate court is a court of equity. In distributing an estate of a dead person, equitable principles apply. There are notions in customary laws which are akin to equitable principles. Equality in distribution is a factor in all systems of law. Fairness in distribution cannot be attained where certain assets are not placed on the table.
48. I have carefully perused through the record before me in an effort establish whether the 1st and 2nd administrators were ever called upon to account for the Narok estate; in terms of disclosing whether the deceased owned any land at Narok, and if so, the nature of the property and its status both now and at the time of his demise. I have not come across any such record.
49. I appreciate the third house's grievance that it was the estate that they resided on with the deceased that is being subjected to distribution without an account being sought of the estate where the other two families resided and surfaced from in 1997 to stake a claim in the Ngong estate. There would be a sense of injustice in distributing the Ngong estate as if the deceased did not own any other estate or property elsewhere, particularly where disclosure of the possible existence of such property has not been sought.
50. In view of the above, it is my considered opinion that the Ngong property ought not have been distributed before the fate of the Narok property had been determined. The existence or otherwise of the Narok property had a critical bearing on how the Ngong property should have been distributed.
51. It is for the purpose of achieving equity or fairness that the law requires that during intestate distribution all the assets be brought to the table. It is called bringing property to the hotchpotch or hotchpot. There must be a full disclosure of the deceased's estate – of his free property, encumbered property and property distributed *intervivos*. This legal position is stated in Section 42 of the Law of Succession Act, which states that:-

“Where-

- a. **an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**
- b. **property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35;**

That property shall be taken into account in determining the share of the net

intestate estate finally accruing to the child, grandchild or house.”

52. Section 42 of the Law of Succession Act falls under Part V of the Act. The deceased died before the Act came into force and for that reason the provision may not be of application to his estate. However, the principle stated therein is one of equity, and by dint of the provisions of the Constitution, 2010, the court can still be guided by the said principle.

53. My conclusion is that the concerns raised about the distribution of 26th September 2005 are legitimate. There is therefore merit in the application dated 22nd January 2013 so far as the distribution is concerned. The 3rd administrator asks me to revoke the certificate of confirmation of 26th September 2005 and to stay the execution of the scheme set out in the orders made on 17th February 2012 and 16th March 2012 for the implementation of the said distribution.

54. I am persuaded that there was no fairness in distributing the estate before there was full disclosure of the entire estate. I am moved to review the orders of confirmation of the grant made on 26th September 2005 and to set aside or vacate the said orders and cancel the certificate of confirmation of grant founded on the said orders. This should pave way for a full disclosure of the estate, especially of the Narok property, and a fresh distribution thereof. The setting aside of the order of 26th September 2005 would have the effect of stopping the distribution of Ngong/Ngong/27 in the terms of Order 5 of the ruling delivered by Nambuye J. on 17th February 2012.

55. The determination of the application dated 22nd January 2013, in the terms proposed in paragraphs 54 above effectively disposes of the applications dated 15th March 2013 and 7th June 2014 for there is now no certificate of confirmation of grant for implementation on the terms of the scheme set out in the orders of Nambuye J. of 17th February 2012 and 16th March 2012; save of course for the issue of joinder. The aggrieved persons have sufficient interest in the estate which ought to be protected.

56. In the end, I am disposed to and hereby make the following orders;-

- a. **That the orders made on 26th September 2005 confirming the grant made to Resiatio Munguti and Noongipa Munguti are hereby set aside;**
- b. **That the certificate of confirmation of grant dated the 26th day of September 2005, as amended on diverse dates, is hereby cancelled;**
- c. **That the 1st and 2nd administrators shall render an account in respect of the property situated at Narok that the deceased died possessed of in the terms mentioned at paragraph 48 of this ruling;**
- d. **That the account in (c) above shall be in affidavit form, and shall be filed in court within 45 days of the date of this ruling;**
- e. **That the administrators are to maintain *status quo* on Ngong/Ngong/27 pending fresh distribution of the estate;**
- f. **That the application dated 7th June 2014 is allowed to the extent of joining the applicants to this case as interested parties.**
- g. **That the matter shall be mentioned after 45 days for compliance; and**
- h. **That this being a family matter there shall be no order as to costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 31ST DAY OF JULY, 2015.

W. MUSYOKA

JUDGE

In the presence of Mr. Wachenga for Mr. Wati advocate for the 1st and 2nd Administrators.

In the presence of Mr. Awele advocate for the Interested Party.