



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**SUCCESSION CAUSE NO. 6 OF 2003**

**IN THE MATTER OF THE ESTATE OF AUGUSTINO KHAGONI – DECEASED**

**JUVENALIS LUBUKA KHAGONI ..... PETITIONER**

**VERSUS**

**NANCY M SAWENJA ..... APPLICANT**

**R U L I N G**

1. The grant respecting the estate of the late **Augustino Shigunga Khagoni**, was issued on the **26th June 2003**, to **Juvenalis Lubuka Khagoni** (Petitioner / applicant) after he petitioned for the same on the **13th January 2003**. The only asset listed in the petition was a portion of land described as Land Parcel No. **61 Bungoma** within **Kabuyefwe Settlement Scheme No.13** measuring 27.4 hectares.

The listed beneficiaries included the widow of the deceased and her four (4) sons including the applicant. The daughters of the deceased were not listed as beneficiaries. Nonetheless, the grant remains unconfirmed to date. Summons for its revocation dated **23rd June 2009** were filed on 15th September 2009 by the daughters namely **Nancy Sawenja, Harriet Khagoni, Isabella Obedo and Beatrice Khagoni**. They complained of being excluded as beneficiaries of the estate. The summons however, remain pending to this day.

2. On **24th February 2012**, an unsigned summons for confirmation of the grant was filed by **Isabella** with the consent of all the daughters of the deceased and one son (**Maurice**). The petitioner / applicant and two other sons of the deceased (**Peter** and **Alex**) did not consent to the summons for confirmation which included a third party as a beneficiary i.e. **Margaret Lusike Kituyi**, who also consented to the summons.

In response to the confirmation summons, the petitioner filed a protest dated **2nd January 2013** supported by his own affidavit together with those of **Peter** and **Alex** dated **2nd January 2013, 5th March 2014** and **2nd September 2014**, respectively.

Replying affidavits dated **24th march 2014**, were in that regard filed by **Isabellah** and **Margaret Lusike Kituyi**.

3. The protest was heard by way of “**viva voce**” evidence,

The petitioner **Juvenalis (PW1)** testified in support of his protest and was supported by his brothers **Peter (PW2)** and **Alex (PW3)**. **Isabella (DW1)** testified in opposition to the protest. All the witnesses apparently based their respective testimonies on the averments contained in the

supporting and replying affidavits.

The bone of contention seems to be whether the grant should be confirmed as applied by **Isabella** yet there is a clear disagreement on the actual beneficiaries and the distribution of the estate.

4. Under S.71 of the Law of Succession Act, the petitioner was required to apply for confirmation of the grant after the expiry of six months from the date of the grant but he did not do so. The distribution of the estate was therefore stalled and perhaps this explains why it was a beneficiary (**Isabella**) who made the necessary application rather than the petitioner. It was obviously out of frustration that the beneficiary applied for the confirmation of the grant although it was not within her right to do so. Her application is therefore incompetent as she is not the legally appointed administrator of the estate of the deceased.

The application is not only incompetent but also defective in as much as the necessary consent was not sought from all the rightful beneficiaries. The consent given by **Margaret Lusike Kituyi** was immaterial but she has a right to sue the estate in the event that her alleged interest in part of the estate property is disregarded by the administrator.

5. As per the evidence adduced herein it is apparent that the delay in having the grant confirmed was occasioned by the disagreements of the beneficiaries with regard to the distribution of the estate and the omission of the daughters of the deceased as beneficiaries as well as the inclusion of a "stranger" (i.e **Margaret Lusike Kituyi**) as a beneficiary of the estate. Indeed, the petitioner alluded to an Appeal Case No.44 of 2004 relating to the stranger's alleged interest in a part of the estate property.

The petitioner indicated that, that case remains pending in court and has contributed to the delay in having the grant confirmed.

6. This protest is therefore well merited. The beneficiary **Isabella** is not the administrator of the estate. She cannot therefore purport to apply for confirmation of the grant issued to the petitioner whereas all the beneficiaries are yet to agree on the mode of distribution of the estate and the inclusion of all the unlisted beneficiaries without any discrimination based on gender or marital status. The summons for confirmation of grant filed on **24th February 2012** by **Isabella** is therefore null and void and is hereby struck out. It would be appropriate for **Isabella** and all other aggrieved beneficiaries to pursue their application for revocation of the grant dated 23rd June 2009 if they cannot agree with the rest of the beneficiaries on the mode of distribution or if they feel that the petitioner is not administrating the estate in a proper and lawful manner.

**J. R. KARANJA**

**JUDGE**

Read and signed this 19th day of August 2015 in the presence of the applicant and M/s Munialo for Respondent