



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION MISC. CAUSE NO 249 OF 2014

IN THE MATTER OF THE ESTATE OF KAVILI MUSYOKA (DECEASED)

PAULINA KITHUE MUSYOKA.....APPLICANT

VERSUS

MONICA KITHUE MUSYOKA.....1ST RESPONDENT

BENJAMIN KALI MUTUNGA.....2ND RESPONDENT

LENA WAMBUA.....3RD RESPONDENT

ITAMBYA GROUP DIP.....4TH RESPONDENT

JOHN WAMBUA MUSYOKA.....5TH RESPONDENT

R U L I N G

1. **PAULINA KITHUE MUSYOKA** filed an application seeking to have the grant of letters of administration (grant) made in respect of the Estate of **Kavili Munyoki** revoked on the grounds that:

1. **The grant was obtained fraudulently and through forgery by making of false documents, false statements and/or concealment from court of some material facts relevant to obtaining the grant and in particular the signature of the late Musyoka Musyoki.**
2. **The grant was obtained by means of untrue allegations, non disclosure of material facts necessary and relevant to the grant and/or that facts contained in the affidavit in support were untrue and omitted material essential in point of law to justify the grant notwithstanding that the allegations were deliberately made to obtain the grant, especially that some members of the family were left out and crucial consents were not obtained from the family members.**
3. **In the interest of justice to have the grant revoked and/or annulled and all title deeds obtained be nullified because the process of obtaining them was not done by the deceased Musyoka Musyoki and due process of transferring title was done without involvement of the then administrator.**

2. The application is supported by an affidavit deposed by the applicant who deposed that she was the first wife of **Musyoka Munyoki** and a co-wife to **Monica Kithue Musyoka**, the 1st respondent and mother-in-law of the 3rd respondent, **Lena Wambua**. **Musyoka Munyoki** was the administrator of the common estate of his two (2) brothers who pre-deceased him, namely, **Mwanzia Munyoki** and **Kavili Munyoki**. The three (3) owned two (2) parcels of land – **Matinyani/Kalindilo/416** and **508** as

proprietors in common with equal shares. After the demise of **Mwanzia Munyoki** who died first, **Kavili Munyoki** who became his representative also passed on. **Musyoka Munyoki** was subsequently confirmed as the administrator of his estate. **Musyoka Munyoki** also petitioned for grant of letters of administration of the Estate of **Kavili Munyoki**. However, he suffered memory lapse due to advanced age.

3. In the process **John Wambua Musyoka**, the 5th respondent, his second son, in collusion with **Benjamin Kali Mutunga**, the 2nd respondent forged forms **P & A 108 and 9, P & A 12, P & A 5, P & A 80**. Though aged 80 years old, **Musyoka Munyoki** used to append a signature on documents therefore, the purported thumbprints were a forgery. The forgery in issue was intended to benefit the 5th respondent who was the only son of the deceased who got a part of the land despite the fact that the deceased had several children.

4. The 5th respondent and his mother the 1st respondent got **4.6 hectares** whereas the applicant got nothing. However, her daughter-in-law was given **4.19 hectares**. In perpetration of fraud the 5th and 2nd respondents obtained a letter from an assistant chief which did not disclose the existence of other family members. Only the 3rd and 5th respondents signed the consent.

4. Further, she stated that if the 2nd respondent purchased any part of the estate of the deceased it was not within the knowledge of family members.

6. Having been appointed as the administratrix of the Estate of **Musyoka Munyoki** the applicant applied to substitute him in **Succession Cause No.117 of 2005 (Estate of Kavili Munyoki)** where the mode of distribution had not been identified as **Musyoka Munyoki** had not signed transfer forms to transmit the land to the respondents.

7. The respondents fraudulently and by collusion with unknown people at the lands office obtained title deeds to parcels of land forming the Estate of Kavili Munyoki without following due process which was not only in breach of the law but a criminal act. The fraud committed cannot pave way for distribution of the Estate.

8. The two (2) brothers having died without families the estate devolved upon the applicant's husband and is subject to equitable distribution among his family members.

9. The respondents through **Benjamin Kali Mutunga**, the 2nd respondent deponed a replying affidavit in response of the application. He deponed that the applicant made a similar application in **Succession Cause No.915 of 2011-Machakos** and applied to withdraw it. The application is an abuse of the court process.

10. That the three(3) brothers held two (2) parcels of land in common namely **Matinyani/Kalindilo/416 and 508**. The three had initially agreed that **Mwanzia** would remain on **Parcel No 508** while **Musyoka** and **Kavili** would remain on **Parcel No.416** as their respective inheritance. **Mwanzia** and **Kavili** did not have wives and/or children but Musyoka had two (2) wives, the applicant and 1st respondent.

11. The 1st respondent having taken care of Mwanzia during his lifetime inherited **Land Parcel No.508** as a gift from him. The 3rd respondent on the other hand took care of Kavili Munyoki who surrendered to her **Parcel No 416** as a gift. Monica divided her land and gave his son, the 2nd respondent.

12. The (2nd respondent) purchased a portion of land **Parcel No.508** from Musyoka Munyoki during his lifetime which portion had been sold by the three (3) brothers to one Peter Wangi who failed to pay the full purchase price. The 4th respondent purchased a portion of land from Mwanzia Munyoki which was recognized at the time of confirmation. Further, he stated that the applicant or 1st respondent could not have been indicated as beneficiaries as their inheritance lay with their deceased husband. The estate of

Kavili Munyoki has been fully administered. The 2nd, 3rd and 4th respondents have no claim over the Estate of Musyoka Munyoki, an Estate that the applicant should proceed to administer and circumstances in which the applicant was substituted as the administrator in place of Musyoka Munyoki were dubious.

13. The application was canvassed by way of written submissions that I have taken into consideration.

14. It is submitted that the applicant unilaterally withdrew an application for revocation of grant but later filed the instant application which is viewed as an abuse of the court process. It has not been stated that the application was heard and determined at the point of withdrawal. I am also persuaded by the decision of GBM Kariuki J. (As he then was) **In the Matter of the Estate of Kibata Wamukuu Gichuki – Lucy Wanjiru Kibaba –vs- Lucy Wanjiru Mucheke (2013) e KLR** where he stated that:

“...technicalities of procedure in Succession Matters are treated less seriously than Civil Matters because the nature of Succession proceedings and the great need to focus on subsistence with a view to do justice for the parties”.

15. With this decision in mind and noting the fact that the application was not heard and determined, the applicant retained her right to reinstate the application.

16. Section 76 of the Law of Succession Act provides thus:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- a. **That the proceedings to obtain the grant were defective in substance;**
- b. **That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**
- c. **That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**
- d. **That the person to whom the grant was made has failed, after due notice and without reasonable cause either-**
 1. **To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or**
 2. **To proceed diligently with the administration of the estate; or**
 3. **To produce to the court, within the time prescribed, any such inventory or account or 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”.**

17. It is apparent that the jurisdiction seized by the court to revoke or annul a grant can be exercised by the court following an application made by a party or the court’s own motion. It therefore behooves me to consider what is just in the circumstances.

Issues to be determined are therefore:

1. **Whether the grant was obtained fraudulently.**
2. **Whether the grant was obtained by means of untrue allegations and disclosure of material fact.**

18. The deceased was survived by only one person. His brother Musyoka Munyoki and administrator of his estate.

19. At the time of his demise the assets he had were **Matinyani/Kalindilo/416** and **Matinyani/Kalindilo/508** and he had no liabilities.

20. A certificate of search of the aforesaid parcels of land indicate that as at **28th October, 2008**, **Mwanzia Munyoki**, **Kavili Munyoki** and **Musyoka Munyoki** were proprietors in common and had equal shares.

21. At the point of petitioning for the grant – According to the affidavit deposed by **Musyoka Munyoki**, the deceased died leaving no dependants. He was the sole person who survived the deceased.

22. Section 39(1) of the Law of Succession Act provides thus:

“Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

- a. **father, or if dead**
- b. **mother, or if dead**
- c. **brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares, or if none**
- d. **half-brothers and half-sisters and any child or children of deceased half- brothers and half-sisters, in equal shares; or if none**
- e. **the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares”.**

23. The deceased died intestate. His only surviving relative having been his brother and administrator of his estate, he was the only person entitled to benefit from his estate.

24. The affidavit sworn by **Musyoka Munyoki** in support of the petition for letters of administration alluded to has a thumbprint as the signatory’s identification mark. This was an indication that the deponent was not able to append a signature on the document. This document is dated **15th June, 2005**.

25. On the **9th October, 2008** an affidavit for confirmation of grant was filed at the court registry. The application is dated **12th August, 2008** while the affidavit is dated **12th August, 2006**.

What is intriguing about this document is the fact that it has an image of a signature written in hand depicting the deponent’s proof of identity or intent. These indeed arouses curiosity as a person who could not write in the year 2005 such that he appended a thumbprint on the document could now sign by hand.

26. At that latter time, it was deposed that the deceased had dependants namely:

- **Lena Wambua**
- Itambia Dip (Group)**
- Benjamin Kali Mutunga**
- John Mbugua Musyoka**
- Lena Musyoka**

Their relationship with the deceased was not stated.

27. The deponent did identify how shares of the Estate would be distributed among the persons entitled to benefit from the Estate at paragraph 5. These were as follows:

Matinyani/Kalindilo/508

- John Wambua Musyoka
- Monica Kithue Musyoka 9.2 Ha
- Benjamin Kali Mutunga – 3.6 Ha

Matinyani Kalindilo/416

- Musyoka Munyoki 9.35 Ha
- Lena Wambua – 4.19 Ha
- Itambya Group Dip – 0.26 Ha

28. The certificate of search adduced in evidence indicate that **Matinyani/Kalindilo/416** measures **13.8 Hectares** while **Matinyani/Kalindilo/508** measures **12.8 Hectares**.

The deceased having been entitled to half the area of each Title as it was stated that by then Mwanzia was dead, the administrator as a co-owner ought to have benefited from what was owned by the deceased and also retained his entitlement.

29. When the matter came up for confirmation of the grant, although no medical evidence was provided, when the **Petitioner/Administrator (Musyoka Munyoki)** appeared before court on **12th November, 2008** he was unwell. John Wambua Musyoka who was with him notified the court that he had suffered a stroke. He also stated per what is recorded that Mwanzia Munyoki one of the proprietors in common of the assets indicated as belonging to the estate of the deceased was deceased.

30. The court observed and recorded that the administrator had a memory problem. He was incoherent in speech. He was not able to prosecute the application due to infirmity of mind.

The learned trial magistrate directed that parties do regularize the position in respect of **Mwanzia Munyoki**.

31. Thereafter, an advocate was retained. He made the first appearance on the **1st April, 2009**. No document was filed to indicate who in particular gave him instructions to act for the petitioner considering the fact that the petitioner was indisposed at the time.

32. On the 25th November, 2004 the learned magistrate **M.O. Kizito (RM)** declined to confirm the grant following non-compliance of directions given by the court previously.

33. On the **8th February, 2005**, the grant was confirmed by **E.K. Makori (SRM)**. The estate of the deceased was distributed in accordance with the mode of distribution proposed in the application.

34. The administrator died on the 16th December, 2010. The administrator of his estate is the applicant herein.

35. Looking at events that unfolded, it is obvious that the signature that was appended on the affidavit in support of the summons for confirmation of the grant was not a thumbprint appended on the initial affidavit. The signature was appended at a time when the administrator was stated to have suffered a stroke therefore it cannot be said with certainty whether or not it was his signature.

Further, a consideration of how the grant was eventually confirmed clearly show that it was obtained following deliberate deception. This in the circumstances was fraudulent.

36. The only important beneficiary to the estate was the administrator, but since it is not known if he deponed the affidavit relied upon due to the deception aforesated. The grant though confirmed must be revoked.

37. In the premises I do revoke the grant of administration intestate issued herein.

All orders consequent upon and based on the said grant of matters of administration are declared null and void.

38. Each party shall bear its own costs.

39. It is so ordered.

SIGNED, DATED and DELIVERED at KITUI this 28th day of OCTOBER, 2015

L.N. MUTENDE

JUDGE