



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**PROBATE AND ADMINISTRATION CAUSE NO.233 'A' OF 2010**

**IN THE ESTATE OF THE ESTATE OF THE LATE MAURICE SIMIYU MWENDUTI a.k.a  
MAURICE LEO IMIYU ..... DECEASED**

**AND**

**POLYCARP W. WENDUTI ..... PETITIONER/RESPONDENT**

**DANIEL WEKESA WASIKE ..... RESPONDENT**

**VRS**

**EDWARD MWENDU SIMIYU ..... OBJECTOR/APPLICANT**

**RULING**

1. The late Maurice Simiyu Mwenduti (hereinafter “the deceased”) died intestate on 14<sup>th</sup> April, 2005 at Masaba Hospital due to what the Death Certificate No.[particulars withheld] dated 27/09/05 stated to be cardiorespiratory arrest due to bronchogenic carcinoma. A letter by the Chief, Matunda Location dated 22/07/13 shows that the deceased was interred at his farm in Sabata, Matunda. The record shows that he left behind 19 dependents being his own sons and daughters.
2. On 13<sup>th</sup> July, 2010, one Wanjala, an Assistant Chief for Milo Sub-location wrote a letter to the Deputy Registrar of this court confirming that the deceased had been a resident of his Milo Sub-location and that the deceased's surviving family members were Policap Wafula Mwenduti and Daniel Wekesa Wasike.
3. Armed with that letter, Policap Wafula Mwenduti, petitioned this Court on 19<sup>th</sup> July, 2010 for letters of Administration for the estate of the late Maurice Simiyu Mwenduti. He set out his name and that of Daniel Wekesa Wasike as the only beneficiaries of the estate of the deceased and Parcel No.Nidivisi/Muchi/4336 as the only asset of the estate.
4. Pursuant thereto, on 29<sup>th</sup> September, 2010 the grant was issued in favour of Policap Wafula Mwenduti who thereafter applied under a Certificate of urgency for the confirmation of the grant. He urged that the grant be confirmed before the statutory six (6) months period on the ground that he was sick and required to complete the administration of the estate. He produced a copy of General Out-Patient Record in respect of the deceased from Webuye District Hospital for the period 05/02/2009 and 26/06/2010 to back his claim. The grant was confirmed on 9<sup>th</sup> February, 2011. In the Certificate of Confirmation, the only property of the deceased Parcel No. Ndivisi/Muchi/4336 was divided into two, Policap Wafula Mwenduti (0.13 Ha) and Daniel Wekesa Wasike (0.11 Ha) (“the 2<sup>nd</sup> Respondent”).

5. On 8<sup>th</sup> October, 2013, Edward Mwenduti Simiyu (“the Objector”) acting for and on behalf of the other 18 beneficiaries of the Estate of the deceased commenced proceedings for the revocation and annulment of the said grant issued to Policap Wafula Mwenduti who thereafter (“*the Petitioner*”). The grounds upon which the application was grounded was that the Objector was a son of the deceased and ranks higher in priority to any other person in the taking out of letters of administration of the deceased, that the suit property had been fraudulently transferred to the Petitioner and other 3<sup>rd</sup> parties including the 2<sup>nd</sup> Respondent, that the Petitioner was not a son of the deceased and had not sought the consent of the deceased's family members before Petitioning for the administration of the estate of the deceased; that the documents relied on to petition for the grant herein were false; that the Petitioner had fenced off the suit property for construction by 3<sup>rd</sup> parties.

6. The Objector further contended that the grant was obtained by means of untrue allegations of fact essential in law and concealment of material facts; that the Objector only realized about the grant only recently, that the petitioner had disinherited the rightful heirs of the deceased and that if the orders sought were not granted people numbering about 50 will be greatly prejudiced. The Objector swore that the deceased died on 14<sup>th</sup> April, 2005 in terms of the Death Certificate B NO.[particulars withheld] dated 27<sup>th</sup> September, 2005 at age 76 years and not on 05/11/00 at age as per Birth Certificate B NO. **[particulars withheld]** dated 05/07/10 relied on by the Petitioner.

7. The 2<sup>nd</sup> Respondent filed Grounds of Opposition and Replying Affidavit. He contended that the estate of the deceased had been distributed after due process, that 3<sup>rd</sup> parties had benefited from the Estate and were protected by law and that the application was an abuse of the court process. In his Replying Affidavit, he swore that; he purchased Plot No.Ndivisi/Muchi/4336 from the Petitioner vide an agreement dated 04<sup>th</sup> September, 2010, that the Petitioner had a good title and that he, the 2<sup>nd</sup> Respondent, had extremely developed the property. That he was an innocent purchaser and that the Objector had not stated where he was when the Petition was Gazetted on 06<sup>th</sup> August, 2010 vide Gazette Notice No.9267 dated 16<sup>th</sup> July, 2010. He urged that the application be dismissed.

8. When the matter came up for hearing on 11<sup>th</sup> March, 2014 neither the Petitioner nor the 2<sup>nd</sup> Respondent attended. Mrs Chunge, Learned Counsel for the Objector argued that the Replying Affidavit having only been sworn by a purchaser the application should be allowed as prayed.

9. I have considered the Affidavits on record. I have also carefully perused the record. The averments by the Objector in his Supporting Affidavit sworn on 08<sup>th</sup> October, 2013 were not controverted. He has therein sworn that the Petitioner was not a son of the deceased and that therefore did not have a right to apply for the grant of letters of Administration of the Estate of the deceased; that none of the family members of the deceased's was ever consulted by the Petitioner before these Succession proceedings were commenced; that the deceased actually died on 14/04/2005 and not on 05/11/2000 as per the death certificate produced by the Petitioner. The factual matters having not been controverted, it is clear that the grant herein was issued fraudulently by making of false statement and/or concealment from court of material particulars. It was also obtained by means of an untrue allegation of fact essential in point of law to justify the grant. It is clear from the Petition Form NO. P&A 80 and Form NO. P&A 5, that the Petitioner told the court that he was petitioning the Court as son of the deceased and that the only beneficiaries surviving the deceased were himself and Daniel Wekesa Wasike of Id. No.[particulars withheld]

10. Other irregularities are that while the record shows that the Gazette used to have the grant issue on 29/09/10 was Gazette Notice NO.9267 of 6<sup>th</sup> August, 2010, the Petitioner applied for the confirmation on 02/12/10 claiming that he was sick. The grant was signed for on 09/02/12 but it seems to have been issued on 09/02/11/ Further, from the 2<sup>nd</sup> Respondents own Replying Affidavit, the agreement for the sale of the suit property or a portion thereof was entered into on 04<sup>th</sup> September, 2010 when the grant had not been confirmed and the Petitioner lacked capacity to dispose off an interest in the suit property.

11. I have seen the Grounds of Opposition and Replying Affidavit of the 2<sup>nd</sup> Respondent. I am not in

agreement with him that he was an innocent purchaser of the suit property. His name started featuring from the conception of the fraud perpetrated in this Cause. As early as on 13<sup>th</sup> July, 2010 when the Assistant Chief of Milo Sub-location wrote his letter to the Deputy Registrar, the 2<sup>nd</sup> Respondent was named therein as a surviving beneficiary of the deceased who “*who wished to do Succession*” of the property. He also signed Form NO.38 and P&A NO.5 as one of the beneficiaries of the estate. That being the case, the agreement dated 04<sup>th</sup> September, 2010 as fraudulent as it was, did not and could not in law pass any interest in the suit property.

12. In any event, the Succession Cause for which the Petitioner and Respondent obtained a grant and a purported interest in the suit property was of one Mourice Simiyu Mwenduti who died on 05<sup>th</sup> November, 2000 aged 79 years and not Maurice Simiyu Mwenduti who died on 18<sup>th</sup> April, 2005 aged 76 years.

13. For the foregoing reasons, I allow the application dated 08/10/2013 and make the following orders:-

a) The Certificate of Confirmation of grant of letters of administration issued to Policap Wafula Mwenduti on the 09<sup>th</sup> February, 2012, whichever date appears in that Certificate, in respect of the estate of the late Mourice Simiyu Mwenduti (deceased) and in respect of land Parcel No.Ndivisi/Muchi/4336 be and is hereby revoked and/or annulled and all or any subsequent orders made in pursuance thereof are hereby set aside.

b) The title documents and registration of Land Parcel Numbers Ndivisi/Muchi/8045, 8046, 8321 and 8322 registered in the names of the Petitioner and/or Respondent Daniel Wasike Wekesa and others be and are hereby cancelled and nullified so that the initial title comprised in the Land Parcel No.Ndivisi /Muchi/4336 in the name of Maurice Simiyu Mwenduti is restored pending proper administration of his estate.

c) In order to render substantive justice under Article 159 of the Constitution of Kenya, I direct the DCIO, Bungoma East to forthwith investigate Polycarp Wafula Mwenduti (Id. No. *[particulars withheld]*), Daniel Wekesa Wasike (Id. No. *[particulars withheld]*) and the Assistant Chief of Milo Sub-location Webuye, who signed the letter dated 13<sup>th</sup> July, 2010 in this Cause with a view of charging them with appropriate offences, including but not limited to fraud, impersonation, forgery and intermeddling with the estate of the late Maurice Simiyu Mwenduti.

d) The costs of these proceedings be paid to the Objector by the Respondents.

**DATED and Signed at Bungoma this 07<sup>th</sup> day of April, 2014**

**A. MABEYA**

**JUDGE**

**DATED and Delivered at Bungoma this 10<sup>th</sup> day of April, 2014.**

**A. OMOLLO**

**JUDGE**