



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**SUCCESSION CAUSE NO. 637 OF 2009**

**IN THE MATTER OF THE ESTATE OF ZABETH WANZA MUTUA - DECEASED**

**ANNA SYOKAU MUTUA ..... APPLICANT**

**VERSUS**

**MBULA MUTUA ..... RESPONDENT**

**RULING**

Before me is a Summons for Revocation and Annulment of grant filed by Anna Syokau Mutua dated 27<sup>th</sup> January 2011. The application was filed under Section 76 of the Law of Succession Act (Cap 160) and Rule 44 of the Probate & Administration Rules. It seeks orders that the grant of letters of administration issued to Mbula Mutua and Anna Syokau on 19<sup>th</sup> November 2009 and confirmed on 15<sup>th</sup> October 2010 be revoked and or annulled. The Respondent is named as MBULA MUTUA.

The grounds of the application are that:-

- 1. The confirmation of the grant was obtained fraudulently by the making of false statements and by the concealment from the court of matters material to the case.**
- 2. The proceedings to obtain grant were defective in substance.**
- 3. The grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant.**
- 4. If the grant is not revoked, the Respondent is likely to dispose of transfer or in any other way alienate the property in issue to the detriment of the estate of the deceased.**
- 5. Orders for preservation of the estate be issued and served upon the Land Registrar to prohibit any dealing with MASII/MITHINI/384 until further orders of this honourable court.**

It was deponed in the said affidavit, *inter alia*, that the Applicant was a (woman to woman) Kamba customary wife of the deceased, and that Mbula Mutua was a daughter of the deceased. That since the deceased's death, the Applicant and Mbula Mutua have had running disputes on the deceased's land MASII/MITHINI/384 and that as a consequence, the Applicant filed Land Disputes Tribunal Case No. 105 of 2001 at Mwala. That on 07/04/2009 an award from the said Tribunal Case was read in CMCC

Misc. Application No.97 of 2002 Machakos, which decreed that 4 acres of the land would be inherited by Mbula Mutua and the rest of the land would go to the Applicant. That the Applicant however, later learnt in 2009 that Mbula Mutua had filed this present Succession Cause. That when the Applicant was subsequently availed copies of the documents filed in this Succession Cause, she noticed that her signature had been forged and used in documents in the court file. That when her advocates were taking action to protect her interests by bringing into these proceedings the decision of the Land Disputes Tribunal, they learnt that the grant herein had already been confirmed and collected. That it was not true that the Applicant was daughter of the deceased as alleged by Mbula Mutua. That Ngewa Mutua should not get any share of the estate. That the Applicant and Mbula Mutua were satisfied with the decision of a court of competent jurisdiction (that is the Tribunal's award read in Misc. App No. 97 of 2002 Machakos). That the Applicant deserved to be heard regarding the distribution of the estate. That therefore the confirmed grant herein should be revoked and she be afforded an opportunity to prosecute her application dated 29/06/2010.

The application is opposed. A replying affidavit sworn on 9<sup>th</sup> March 2011 by Mbula Mutua was filed. It was deponed that there was no running battle between the Applicant and the Respondent. It was also denied that the signature of the Applicant was forged in documents in the succession cause herein. It was deponed that the present opposition to the confirmed grant was brought too late in the day that is, 3 years after the confirmation. It was also deponed that the Respondent was not opposed to subdividing the land which was granted to her and the Applicant in the confirmed grant.

On the hearing date, Ms Mbone, learned counsel for the Applicant submitted in support of the application. Counsel submitted that the correct way forward was to apply the decision of the Land Disputes Tribunal, since the Tribunal divided the property.

The Respondent in person opposed the application. She submitted that she was not party of the Land Disputes Tribunal proceedings. She did not attend the Tribunal proceedings because the land was hers.

Having considered the different positions taken, my decision is in the following terms.

Under section 76 of the Law of Succession Act (Cap 160), this court has wide discretion to revoke or annul a grant issued by the court, even when the said grant has been confirmed. It appears that there is no statutory limitation of time for the filing of an application for revocation or nullification of grant. Under Section 76 of the Act it specifically provided as follows:-

**76.A grant of presentation, 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:-**
  - (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 any material particular; or**

**(e) that the grant has become useless and inoperative through subsequent circumstances .**

There are therefore several statutory grounds on which a grant may be revoked or annulled. The Applicant has relied on fraud, false statements, and concealment of material facts. She has also contended that the proceedings were defective. She also relies on the ground of untrue allegations.

I observe that the Applicant and the Respondent were jointly appointed joint administrators of the estate by the court of 19<sup>th</sup> November 2009. It was therefore their legal responsibility to apply for confirmation of grant after the lapse of six (6) months. Ordinarily this they should have done jointly. However, in this case the Applicant singly filed an application for confirmation of grant dated 29/06/2010 on the same date. The proposed mode of distribution was as follows:-

**MASII/MITHINI/384 – MBULA MUTUA be given 4 acres and ANNA SYOKAU MUTUA be given the rest of the land per the decree in Chief Magistrate’s Court Misc. Civil Application No. 97 of 2002, Machakos (annexed hereto and marked “ASM1”).**

On the 22<sup>nd</sup> September 2010 the Respondent singly filed her separate summons dated 02/07/2010 for confirmation of grant. The proposed mode of distribution was as follows:-

**MASII/MITHINI/384 – TO BE DIVIDED AS FOLLOWS:**

**MARY NGEWA MUTUA – 4 ACRES AND THE BALANCE TO BE SUBDIVIDED IN COMMON EQUAL SHARES BETWEEN MBULA MUTUA AND SYOKAU MUTUA.**

From the court record, on 15/10/2010 Waweru J in chambers, and in the absence of the parties dealt with and allowed the summons of the Respondent for confirmation dated 02/07/2010 and filed on 22/9/2010 and confirmed the grant and the distribution proposed therein. It is not clear from the file, who moved the court for that confirmation to be done. It is also not clear why the summons for confirmation by the Applicant filed on 29/6/2010 was not considered. On 15/11/2010 the Respondent collected the certificate of confirmed grant.

The Applicant claims that her signature was forged in documents in this succession cause. I see no basis for that because if it were so she would not have filed her own application for confirmation of grant. She would have instead filed objection proceedings. Several forms were indicated to contain her inscription before the filing of her application for confirmation of grant. She also states that she is a wife (“*Iweto*”). That is also doubtful, as in her own application for confirmation of grant dated 29/6/2009, she describes herself as daughter.

The Applicant states that she wants the grant to be revoked so that she can pursue her summons for confirmation of grant dated 29/6/2009 on the basis of the Land Disputes Tribunal Decision which was adopted by the Chief Magistrate Machakos. This court cannot enforce that decision. The enforcement of that decision rests with the Chief Magistrate’s Court. If the Applicant wanted to enforce that decision she should have done so through the Chief Magistrate’s Court.

In any event, that decision of the Land Disputes Tribunal is contrary to specific provisions of the enabling Act. The provisions regarding the Tribunal under section 3 of the Land Disputes Tribunal Act (Cap 303 A) do not confer powers to deal with land registered under the Registered Land Act (Cap 300), or to determine rights of ownership to land. A perusal of the award shows that the Tribunal purported to determine ownership to land and also dealt with land which was registered under the Registered Land Act. The Tribunal went beyond the powers conferred on it by the law. This court cannot be used as a

conduit for enforcing illegal or unlawful orders.

The subject land was under a title issued under the Registered Land Act (Cap 300) on 21/03/1977. The registered owners are ISAVETHI WANZA w/o MUTUA and MARY NGEWA w/o MUTUA. ISAVETHI is deceased, and is subject to these succession proceedings. MARY NGEWA is still alive, and appears to be the person whom the Applicant wants to disinherit. That cannot happen legally, because MARY NGEWA is the survivor of the two registered owners of the land. It is just by sheer good luck that MARY NGEWA has not so far complained, otherwise even the share in the confirmed grant of the Applicant may be in jeopardy.

Considering the totality of this matter, I am of the view that in the absence of MARY NGEWA complaining, the decision of the court in the confirmation of grant herein tried to balance the interests of the survivors as much as the facts disclosed could sustain. I find no justifiable reason to revoke or annul the confirmed grant or to change the mode of distribution approved by the court.

In the result this application will not succeed. I find no merits in the application and dismiss the same.

This being a family matter, I order that parties bear their respective costs.

Dated and delivered at Machakos this **20<sup>th</sup>** day of **February** 2012.

**George Dulu**

**Judge**

**In presence of:-**

Anna Syokau Mutua – Applicant

Mbula Mutua – Respondent

Nyalo – Court clerk.