



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**  
**SUCCESSION CAUSE NO. 1523 OF 1999**

**MARGARET NTHOKI MWOVI.....)**  
**.....APPLICANTS**

**TERESIA KANINI MBUSYA.....)**

**Versus**

**BEATRICE MUTAVE MWOVI)**  
**.....RESPONDENTS**

**MAINGI MWOVI MBUSYA )**

**RULING**

The applicants are daughters of the late Jackson Mwovi Mbusya (hereinafter referred to as the deceased). The deceased died on 11th August 1998 and the grant of Letter of Administration in respect of his estate were issued to Beatrice Mutave Mwovi, the widow and Maingi Mwavi Mbusya the son on 27th October 1999. According to a certificate of confirmation of a grant confirmed pursuant to the provisions of section 71 (1) and (3) of the Law of Succession Act, the deceased estate was distributed as follows:

Teresa Kanini Mbusya ) Plot No. 209/4844/27 (in equal shares)

Margaret Nthoki Mwovi) Machakos Ulu 395

Maingi Mwovi Mbusya ) Machakos Ulu/1

Beatrice Mutave Mwovi) Machakos Ulu/387

Machakos Ulu/31

Tractor KPN 282

Tractor KZA 856

Toyota DB

Saloon KQU 109

Plot Nos 5 & 8 Yoani

Plot No. 209/3600 Nairobi

In equal shares.

The applicants filed the above motion under certificate of urgency and seeking the following orders:

- a) That this application be certified as urgent and service hereof be dispensed with in the first instance.
- b) That BEATRICE MUTAVE MWOVI being the mother to the applicant and Maingi Mwovi Mbusya being the brother to the applicants or their agents be hereby restrained from evicting the applicants from their deceased father's premises known as Plot No. 209/300 situate within South B in Nairobi and or the same be opened for the applicant pending full and inter parties hearing of the application.
- c) That the full grant of Letter of Administration issued to the respondents on 22nd March 2000 be and is hereby reviewed to include the applicant who are daughters of the deceased.
- d) The apportionment of the title of one Jackson Mwovi Mbusya be reviewed to include the applicants
- e) The applicants be entitled to equal shares of the estate of the deceased.

The application is brought under order 39 rules 1 & 2 and 44 rules 1 & 2 and order 44 Rule 1 of the Civil Procedure Rules. It is noteworthy to state on the on set that the only Civil Procedure Rule applicable of the above quoted provisions under the Probate and Administration Rules (63 (11) it is only order 44 in regard to the review and the other provisions are not applicable.

The application is supported by the joint affidavit of the applicant as well as the grounds stipulated in the application which can be summarized as follows:

- That the applicants were excluded from the list of beneficiaries
- That the respondents have thrown out the applicants from South B plot No. 209/300
- The applicants only learnt of the certificate of the certificate of confirmed grant when their mother was chasing them that should be sometime in January 2004
- The applicants have been brought up in the suit premises it is only place that they call home and the attempt to throw them out is activated by discriminatory attitude based on the applicants gender. They claim that they have been thrown out of what they are taking matrimonial home and are being housed by members. Lastly and perhaps most importantly
- They did not sign a consent Form 37 which is mandatory.

The respondent's opposed this application and filed a replying affidavit sworn on 30th January 2004.

The respondent's deny that the applicants were excluded as beneficiaries of the estate. In this regard they referred to the certificate of confirmed grant whereby the applicants are the beneficiaries of two properties namely Plot No. 209/4844/27 and Machakos Ulu/395. The respondents have attached a copy of the Title deed in the names of the applicants and issued on 9th May 2000 and a letter by one of the applicant Margaret Nthoki Mwovi dated 23rd July 2003 addressed to Mutugi Kavoi a Tenant in the applicant's plot. According to the respondent's the applicants were involved in the process of application of the grant and even the confirmed grant was collected from the High Court Family Division Registry by the 1st applicant a copy of the confirmed grant indicates that she signed for it.

According to the respondent's there was a mistake initially whereby the applicants were not included in Form P & A 5 but another form was filed on 22nd March 2000 which reflected all the beneficiaries. The estate was distributed following a mutual agreement by family members and although the applicants did not sign a consent form, they have benefited from their father's estate and have not suffered any prejudice. It would also appear by the respondent's affidavit that the applicants were not thrown out of the suit premises but were summoned in the rural home by their mother on 16th January 2004 and were asked to vacate the rooms since under the Kamba customary law it is an abomination for a mother to share a bedroom with her daughter and son-in-law. The first applicant is said to have taken their mother's bedroom with her husband.

I have considered the above submissions and all the material placed before me from where I have formulated the following issues which shall guide me in my further evaluation of the matter before me.

- Is the Notice of Motion competent?
- Is the applicant guilty of material non disclosure of important and material facts?
- What is the legal status of the confirmed grant where all the dependants have not consented in writing Form 37 of the P & A rules

This motion as I pointed out earlier is brought under the wrong provisions of the Law save for Prayers Nos (c ) and (d) dealing with this issue of review. I have considered the provisions of Order 44 Rules (1) (1) "which provides

Any person considering himself aggrieved (c ) by a decree or order from which an appeal is allowed but from no appeal has been preferred, (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decision or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay"

The first applicant Margaret Nthoki is the one who collected the certificate of confirmed grant on 13th April 2000.

In my view it has taken her inordinately too long to discover some mistake and bring an application for review. Copies of Title Deed of a parcel of land is prima facie evidence that she has benefited and so is the letter demanding for rent from her tenant in Mbotela Estate. If the applicants were seized of this information they were under duty to disclose the same to this court when this application was argued ex parte and an ex parte interim order was granted. Are the applicants acrobating and reprobating? I am satisfied that the applicants withheld material information.

The applicants have not sought for the revocation of the grant, but for review and in tackling the last issue regarding lack of their consent I wish to refer to rule 40 (8) of the P & A rules

“Where no affidavit of protest has been filed the summons, and affidavit shall without delay be placed by the registrar before the court by which grant was issued which may, (emphasize is mine) on the light of consent in writing in form 37 of all the dependants or other persons who may be beneficially entitled, allow the application without the attendance in person: .....

My perusal of the court record would show that the petitioners’ application for confirmation first came to court on 15th March 2000 but was stood over to 22nd March 2000 so that they could include the full list of beneficiaries. The application for confirmation made a provision for all the beneficiaries. The petitioners were acting in persons and from my observations above, it would appear that the applicants are now dissatisfied with the mode of distribution, which in their view tends to favour their brother and mother. This therefore being the case, there was no material placed before this court to show, the inequity in distribution such as valuation, reports of the assets or new matters to warrant a review. The applicants were not forthright first of all refusing to acknowledge they have benefited from their father’s estate. My reading of rule 40(8) of the P & A rules, it is not mandatory for the dependant’s to sign a Form 37 consent form, especially if the confirmed grant has not resulted or occasioned the party complaining an injustice.

The applicants’ were provided for and I see no sufficient reason why I should invoke the inherent jurisdiction of this court and review the order and certificate of grant.

Finally the applicant when making an application for review failed to attach certified copy of the order to the application for review.

It is compulsory in an application for review, as held in several decisions from the Court of Appeal an application for review must be accompanied by the order sought to be reviewed.

The sum total of all the above is that the application by Notice of Motion dated 21st January 2004 fails in its entirety. The exparte order issued on 21st January 2004 is hereby set aside.

This being a family matter each party shall bear their own costs.

It is so ordered.

Ruling read and signed on 12th March 2004

**MARTHA KOOME**

**JUDGE**