



**In re Estate of Mwanza Mbatha Mwanza alias Mwanza Mbatha (Deceased)
(Succession Cause 603 of 2014) [2024] KEHC 5144 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 603 OF 2014**

**MW MUIGAI, J
MAY 16, 2024**

BETWEEN

PAUL MWANZA MULI PETITIONER

AND

MBATHA KAVUVI MWANZA PROTESTOR

RULING

1. *Vide* a petition received on 29th September, 2014 in which the petitioner Paul Mwanza Muli petitioned this Honorable Court for a grant of Letters of Administration intestate of the estate of Mwanza Mbatha Mwanza Alias Mwanza Mbatha (deceased) who died on 27th July, 1992 as per death certificate and domiciled in Kenya.
2. Pursuant to the Affidavit in support of the said Petition for Letters of Administration Intestate, the deceased died intestate and left the following surviving him; -
 - a. Paul Mwanza Muli- Son 1274064
 - b. Richard Kavuvi Mwanza- Son 1472850
 - c. Josphat Matata Mwanza- Son 9364123
 - d. Dominic Mutinda Mueli-Nephew- 10275885
3. The Affidavit in Support of Petition for Letters of Administration Intestate mentioned properties and/or assets left by the deceased at the date of his death as follows:
 1. Mbiuni/Makiliva/453
4. The total estimated value of the estate of deceased was Kshs. 1,000,000.00/=.



5. *Vide* the Chief's letter dated 1st September,2014 confirmed that Mwanza Mbatha Mwanza (Deceased) hailed from his location being Makiliva sub-location, Mbiuni Location in Mwala sub-county. The chief's letter further confirmed the heirs left as named in the affidavit in support of petition for Letters of Administration Intestate.
6. *Vide* the Gazette notice dated 28th November, 2014, Paul Mwanza Muli of P.O Box 80, Mwala in Kenya the deceased's son was gazetted for grant of Letters of Administration intestate.
7. Grant for Letters of Administration granted and issued by this Honorable Court on 18th March,2016 to Paul Mwanza Muli as personal representative of the deceased's estate .

Summons for Confirmation of Grant

8. Pursuant to Summons for Confirmation of Grant dated 17th October,2017, the Applicant sought orders for the grant of letters of administration granted on 18th March,2016 made to Paul Mwanza Muli be confirmed.
9. Pursuant to Affidavit in Support of the said Summons sworn by Paul Mwanza Muli the Administrator of the estate of Mwanza Mbatha Mwanza Alias Mwanza Mbatha(deceased), deposed that deceased left the following beneficiaries:
 - a. Paul Mwanza Muli- Son
 - b. Richard Kavuvi Mwanza- Son
 - c. Josphat Matata Mwanza-Son
 - d. Dominic Mutinda Mueli- Nephew
10. He deposed that the parcel of land Mbiuni/Makiliva/453 whole be registered in the name of Dominic Mutinda Mueli.
11. Consent to Confirmation of grant was signed by Josphat Matata Mwanza and Dominic Mutinda Mueli.

Affidavit of Protest against Confirmation of Grant and on distribution.
12. By the Affidavit of Protest against Confirmation of Grant and on distribution dated 18th January,2018 and filed in court on 19th January,2018, sworn by Mbatha Kavuvi Mwanza, the Protestor herein, wherein, she deposed that she is one of the beneficiaries of the estate of the deceased and that the estate of the deceased is comprised of the asset, Mbiuni/Makiliva/453. She contends that the deceased was survived by the following:Paul Mwanza Muli-sonRichard Kavuvi Mwanza Son-deceasedJosphat Matata Mwanza-sonAgnes Suva-daughter
13. Depositing That One Dominic Mutinda Mueli is a nephew to the deceased and is not supposed to be listed as a beneficiary. She deposed that she is the wife of the late Richard Kavuvi Mwanza who is a son of the deceased but is now deceased. She said that her husband left four children surviving him namely;
 - i. Mary Mumbua-Adult
 - ii. Patrick Mwanza-Adult
 - iii. Jackson Mutuku-Adult
 - iv. Petronella Mbithe-Minor



14. She deposed further that the Petitioner did not involve her and her children and she came to know the existence of this succession cause when the Petitioner came to her house and summoned her to the area chief demanding that she gives them the death certificate of her late husband, one Richard Kavuvi Mwanza. It was her case that the deceased had also a daughter one Agnes Suva who resides at Mutitu wa ndei and the Petitioner has not listed her as a survivor to the deceased.
15. She deposed further that she is not included to get anything from the estate and one Dominic Mutinda Mueli who is indicated at paragraph 3 of the affidavit in support of the application to be registered as the owner of the Mbiuni/Makiliva/453 is a stranger to the estate and wants to disinherit them. She urged this Honorable Court that the land herein be subdivided among all the beneficiaries and she be given the share of the late Richard Kavuvi Mwanza and the said Dominic Mutinda Mueli should be excluded from the estate as a beneficiary.

Affidavit in Reply to Affidavit of Protest of Confirmation of Grant

16. In the Affidavit in reply to the Affidavit of Protest dated 10th September, 2018, sworn by Paul Mwanza Muli, the Petitioner herein who deposed that the deceased herein was his brother and was registered as the proprietor of the whole of that parcel of land known as Mbiuni/Makiliva/453
17. He Deposed that the land initially belonged to their father but he did not possess a title deed and prior to his death sub-divided the said parcel of land between his two sons being Mwanza Mbatha Mwanza and one Pius Ngui Mbatha and they were to share the said land in equal portions. He stated that as at the time of the sub-division, the said Pius Ngui Mbatha was not around and it was only Mwanza Mbatha who was present and subsequently the said parcel of land surveyed and the aforementioned parcel of land registered in the names of the deceased herein being Mwanza Mbatha Mwanza alias Mwanza Mbatha. He deposed that when Pius Ngui Mbatha returned to the suit land being Mbiuni/Makiliva/453, he became aware that the suit land had been solely registered in the names of his brother known as Mwanza Mbatha Mwanza who is the deceased herein.
18. Further that on or about 21st January, 2014 the said Pius Ngui Mbatha willingly agreed to sell his portion of the said land to one Dominic Mutinda Mulei who was the nephew of the deceased herein for a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/=). He opined that they did enter into an agreement of sale which was witnessed by several elders of the family. It was his deposition that sub division and survey was conducted and the aforementioned Dominic Mutinda Mulei retained the original title number for his property being Mbuini/Makiliva/453 while the other half was issued the number known Mbiuni/Makiliva/261.
19. He contended that the deceased herein had another parcel of known as Mbiuni/Makiliva/372. Further that they as the children of the deceased had already decided that they would share the aforementioned parcel of land known as Mbiuni/Makiliva/372 equally and live thereon since the other parcel of land known as Mbuini/Makiliva/453 had already been sold by their deceased father to the said Dominic Mutinda Mulei. Further that Richard Kavuvi Mwanza, who is a son of the deceased was part of the agreement entered and dated 18th October, 2014 in which they agreed that they would share their father's parcel of land equally and that each one of them would approximately get 10,444m².
20. It was deposed that the protestor herein has been living on her husband's portion of the land known as Mbiuni/Makiliva/372 measuring the agreed 10,444m² since the said date of 18th October, 2014 and without any interruptions from any of them or from the said Dominic Mutinda Mulei and it is quite surprising that the proprietor herein now states that she wants a portion of that property known as Mbuini/Makiliva/453 which she is well aware that their deceased father sold the same to the said Dominic Mutinda Mulei.



Supplementary Affidavit

21. In the Supplementary Affidavit dated 19th November, 2018 and filed in court on 20th November, 2018, the Protestor deposed that the Petitioner Paul Mwanza Muli was not a brother to the deceased as alleged or at all. In fact the Petitioner is a son to the deceased and it is true that the deceased was the registered owner/proprietor of that parcel known as Mbuini/Makiliva/453. and he never subdivided the parcel to anyone including PIUS Ngui Mbatha who was not his son but brother and that the said Pius Ngui Mbatha never possessed parcel number Mbuini/Makiliva/453 and he has no interest in that parcel or at all, further Pius Ngui Mbatha is deceased.
22. She contends that as at 21st January, 2024 the parcel Mbuini/Makiliva/453 was registered in the name of the deceased and the said Pius Ngui Mbatha had no interest in the parcel and he had no right or capacity to sell the parcel belonging to the deceased to Dominic Mutinda Mulei. She deposed that the late Pius Ngui Mbatha had no capacity to enter into a Sale Agreement with the Dominic Mutinda Mulei while the said Pius Ngui Mbatha had not yet obtained the Grant of Letters of Administration and the said Pius Ngui Mbatha had no capacity to enter into a sale agreement in respect of parcel number Mbuini/Makiliva/453 which is still registered in the name of their late father Mwanza Mbatha Mwanza.
23. She admitted that it is true that the deceased had another parcel of land known as Mbiuni/Makiliva/372 and they never subdivided the land as alleged and it her prayer that both parcels Mbuini/Makiliva/453 and Mbiuni/Makiliva/372 be subdivided equally to the beneficiaries of the estate namely Paul Mwanza Muli, Mbatha Kavuvi Mwanza and Josphat Matata Mwanza.
24. She contends that the said Dominic Mutinda Mulei has no interest in the estate of their late father he should not be given any parcel and she disagrees with schedule attached in the replying affidavit. She deposed further that she lives in parcel number Mbiuni/Makiliva/372 but the parcel has never been subdivided by the deceased or at all and she prayed that Honorable Court to subdivide the properties equally. Opining that the deceased father never sold any parcel to the said Dominic Mutinda Mulei or at all.

Hearing

Protestor's hearing

25. Protestor PW1 was Mbatha Kavuvi Mwanza. She testified that the deceased herein was his father-in-law and she got married in 1996 under Kamba Customary Laws to the son of the deceased known as Richard Kavuvi Mwanza. She told court that the Petitioner herein is her brother-in-law. She sought to rely on her affidavits of protest dated 18/11/2018 and filed on 19/11/2018.
26. She testified that the Petitioner filed this case without her knowledge as he did not engage all the family members and her husband died leaving behind four children. It was testimony that the land they reside on had been purchased by the deceased. Further she testified that a third party namely Dominic Mutinda interfered with the family land as he had been made a beneficiary yet he is not a close member or child of the deceased. She wanted that stranger be removed and the properties he be shared equally among the children of the deceased.
27. In cross-examination, it was her testimony that deceased had several parcels such as Mbiuni/Makiliva/453, Mbiuni/Makiliva/372 and that Dominic Mutinda is in occupation of parcel Mbiuni/Makiliva/453 since the year 2012. Testifying that she used to know Pius Ngui Mbatha who is a brother to the deceased. She told court that she is not aware that Pius Ngui used to reside on parcel 453 and she heard that Pius Ngui sold part of parcel 453 to Dominic Mutinda. Testifying further that Anthony



Musau Sila is her brother-in-law and Peter Kilovya Mulei is brother to Dominic Mutinda. It was her testimony that Muindi Thati is a village elder while Ngumbi Mutiso is a neighbour. Further that she is not aware that the above persons witnessed the sale between Pius Ngui and Dominic Mutinda and that her grudge is with Dominic Mutinda's presence on their family land. She maintained that the witnesses to sale are not their family members. According her, she did not know when survey was concluded on the lands and three members namely Paul Muli Mwanza, Josephat Matata Mwanza and Mbatha Kavuvi reside on parcel Mbiuni/Makiliva/372. She told court that Agnes Suva is her sister-in-law married in mtito Andei and she has no objection if parcel 372 is shared among the four family members. That her problem is with parcel 453 as she does not know how it was sold to Dominic Mutinda and that none of the family members have been indicated on parcel 453.

Petitioner's hearing

28. Petitioner PW1 was Paul Mwanza Muli. He testified that the deceased herein was his father. He wished to rely on his witness statement dated 26/10/2015. He told court that the deceased had only one land parcel Mbiuni/Makiliva/453 which according to him initially belonged to their grandfather Mbatha Mwanza. Testifying that there was no title deed at the time and his grandfather died before he was born. Further that parcel 453 was to be shared by his father and Pius Ngui Mbatha who were both brothers.
29. According to the Petitioner, during the survey exercise the land was registered in names of his father as his brother was away at the time, this was in 1970. It was his testimony that Pius Ngui Mbatha came back in 2014, that his father had already bought another parcel and parcel 453 was to be shared equally between the two. Testifying that his father later moved into parcel 372 where they currently reside. He told court that the deceased exchanged plot 372 which belonged to his brother Mbatha Mutua which in exchange took half of parcel 453. Testifying that later Pius Ngui Mbatha sold his portion to Dominic Mutinda Mulei at Kshs. 100,000/= as per the sale agreement. He told court that he did not witness the agreement and that Pius Ngui Mbatha since died. It was his testimony further that parcel 453 has already been subdivided into Mbiuni/Makiliva/261 and 453. That his father exchanged 261 with 372 by swapping it with his brother Mutua Mbatha. That 453 was sold to Dominic Mutinda.
30. In cross-examination, he testified that he had seen the sale agreement between Ngui and Dominic Mutinda. Testifying that his father bought parcel 372. Further that all three sons reside on plot 372 and the family has no claim on parcels 453 and 261. Testifying that Dominic Mutinda to have parcel 453 as he legally bought it.
31. In cross-examination by Mbatha Kavuvi Mwanza, it was his testimony that his father and his brother Ngui trusted each other and the deceased and Ngui did not enter into an agreement. Testifying that the husband of the Protestor was aware of the sale of land to Dominic Mutinda. He told court that the deceased did not enter into an agreement and they did not want to interfere with their agreement. He said that his father sold the portion he exchanged with his brother Mutua and as he had already bought parcel 372. He said that his father sold the swapped portion to a school board nearby.
32. According to him, Dominic Mutinda Mulei is a family member and that during the survey in 1970 his father was the only one present at home. Petitioner maintained that Dominic Mutinda Mulei is entitled to the parcel 453. He testified that he needed the documents from the Protestor so as to process the land matter since the Protestor's husband had died. He claimed that he has no intention of harassing or disinherit the Protestor.
33. PW 2 was Dominic Mutinda Mulei. He testified that he recorded his statement on 26/10/2018 and filed on 25/10/2018 and he wanted to adopt the said statement. According to him he is related to the Mwanza Mbatha deceased herein. It was his testimony that he bought Mbiuni/Makiliva/453 sold



- by Pius Ngui Mbatha. He testified further that in the Affidavit in Reply to Affidavit of Protest of Confirmation of Grant of 1/9/2018 annexed are Search Document and Agreement of Sale in Kamba. It was his testimony that the land was sold to him at Kshs. 100,000/-.
34. He said that Pius Ngui and Mwanza Mbatha (deceased) were brothers and that the land Pius Ngui sold to him belonged to Mbatha Kilonzo their father. That their father owned 453. Mwanza Mbatha obtained title in his name as Pius Ngui was not available. Testifying further that Mbiuni/Makiliva/453 belonged to the deceased's father and Pius Ngui who were brothers and that he bought from Pius Ngui and Mbiuni/Makiliva/261 remained with their mother. He lamented therefore that Mbiuni/Makiliva/453 is his property and it is not available for distribution as the deceased estate. That the search of Mbiuni/Makiliva/453 shows the deceased as owner/registered owner and Pius Ngui was not included as he was not near. He testified further that the title deed came with the deceased name as Pius Ngui was not around.
 35. According to PW2 Mwanza Mbatha held property in his name for his brother Pius Ngui who sold to him. Therefore, the title deed was issued in 453 into 453 & 261. He testified that later, Mbatha exchanged 261 Mwanza Mbatha and 191 with his brother Mutua Mbatha and Pius Ngui remained with 453. He produced the Petitioner's Exhibit 5 and referred to list of exhibit certificate of official search of Mbiuni/Makiliva/191. He told court that to date he has not received title deed 453 Sale Agreement was witnessed by village elders. Mutua Kindyo, Muindi Musyoka and Muasya Nzioki and Ngumbi Mutiso they witnessed the sale of this property.
 36. He testified that Mwanza Mbatha has Mbiuni/Makiliva/372 and that he lives on 453 and it his home and he bought the property since 2014. Testifying that Pius Ngui died and he is buried in 453. Pius Ngui had no family and when he died he buried him there. Pius Ngui is his uncle a brother to his father. He asked the court to allow property 453 to be registered in his name.
 37. On cross- examination by Mbatha Kavuvi Mwanza, it was his testimony that the land was sold to him by Pius Ngui and he paid Kshs. 100,000/- and that the children of Mwanza Mbatha were aware of the sale of 453. That the father of the Protestor was there and agreed to the sale. Further that the children of Mwanza Mbatha Mwanza are; Paul Mwanza Muli, Richard Kavuvi Mwanza, Josphat Matata Mwanza and Agnes. That the property was for Pius Ngui, the brother of Mwanza Mbatha Mwanza.
 38. He said that the search on the property 453 & 372 are in the name of the deceased. He claimed that he is a nephew of the deceased and not son of the deceased. He told court that when the exchange and property sale took place and bought the land from his uncle, the Protestor was not there. further he testified that the property was registered in the deceased name and the mother and others were away. Testifying that the Protestor is the wife/widow of the late Richard Kavuvi Mwanza and that wife of Mutua was there when the exchange was done and nothing was written. The Protestor was not there at the time. It was his testimony that 372 Mwanza bought the land a long time ago and the Protestor was not there. PW2 claimed that he has witnesses to confirm that the property was sold to him by Pius Ngui.
 39. He testified that official search 453 is in the name of the deceased and that he has an Agreement of Sale and exchange of the land. Further he told court that there is agreement of exchange; 453 and 372 belongs to the deceased and that he bought the shamba in 2014 and the property was registered in 2014.
 40. In re-examination, he told court that Paul is son of Mwanza Mbatha and the Protestor is the wife of Richard Kavuvi brother of Josphat.
 41. The matter was canvassed by written submissions.



Submissions

Protestor's submissions

42. Protester in her submissions dated 30th November, 2023 and filed in court on 1st December, 2023, wherein, she raised the following issue for determination.

1. Whether parcel number Mbiuni/Makiliva/453 was not sold by the deceased and whether it should be distributed equally amongst all the beneficiaries.

43. On the first issue she submitted the issue of the estate of deceased person was dealt with by Justice Odunga J in the case of *Mbaluto v Kasalu* (Succession Cause 744 of 2015) [2022] KEHC 12778 (KLR). Submitting that the purchaser may successfully stake his claim to the deceased's estate in his capacity as a creditor of the estate. To bolster this position, she placed reliance on the case of *Re Estate of Mukhobi Namonya (deceased)* [2020] eKLR, and submitted that where subsequent to the death of the deceased but before the estate is distributed, some beneficiaries enter into an agreement with third parties for the disposal of the estate or part thereof. She further relied on Section 45 and 79 of the *Law of Succession Act* and further quoted the cases of *Muruiki Musa Hassan v Rose Kanyua Musa & 4 Others* [2014] eKLR and *Re Estate of John Gakunya Njoroge (deceased)* [2015] eKLR.
44. It was her case that the deceased did not sell the land to Dominic Mutinda Mulei and whoever sold the land did not have confirmed grant. Contending that Mbiuni/Makiliva/453 is under the name of the deceased who was survived by Paul Mwanza, Richard Kavuvi Mwanza (deceased), Josphat Matata Mwanza and Agnes Suva. She averred further that Dominic Mutinda Mulei is a nephew to the deceased and is not supposed to be listed as a beneficiary. She opined that the Protester is the wife of the late Richard Kavuvi Mwanza who is a son of the deceased but is now deceased and that the protestors husband left four children surviving him namely Mary Mumbua, Patrick Mwanza, Jackson Mutuku and Petronila Mbithe all adults except Petronila Mbithe who is a minor.
45. It was submitted that the Petitioner did not involve the Protester and her children and they came to know the existence of this succession cause when the Petitioner went to the Protestors house and summoned her to the area chief demanding that she gives them the death certificate of her late husband one Richard Kavuvi Mwanza. Averring that the Protestor was not included to get anything from the estate and one Dominic Mutinda Mulei who is indicated at paragraph 3 of the affidavit in support of the application to be registered as the owner of the Mbiuni/Makiliva/453 is a stranger to the estate and wants to disinherit them.
46. It was the Protestor's case that the said Dominic Mutinda Mulei, the purchaser cannot successfully claim to be the creditor of the estate but he only becomes a creditor of the beneficiary who purported to have sold to him part of the estate. Averring that accordingly, he has to wait until the estate is distributed and then lay his claim against the part of the estate that is confirmed to the said beneficiary as he alleges. The protester denied that Pius Ngui used to reside on Parcel No. Mbiuni/Makiliva/453 and there is no evidence to prove that the said Pius Ngui had interest in the parcel. Submitting that the Petitioner Paul Mwanza Muli confirmed parcel No. Mbiuni/Makiliva/453 belongs to the deceased and he did not produce any evidence to prove that parcel No. Mbiuni/Makiliva/453 was to be shared by the deceased and Pius Ngui Mbatha. He was not a witness in the purported sale by the stranger and he confirmed in the cross-examination that the deceased did not enter any agreement with the said Dominic Mutinda and that Dominic Mutinda confirmed that he did not purchase any land from the deceased Mwanza Mbatha and the land is registered under the name of the deceased.



47. It was her case that purported buyer is not entitled to this land and it should be distributed. To buttress her this, she placed credence in the cases *Mbaluto v Kasalu* (Succession Cause 744 of 2015) [2022] KEHC 12778 (KLR, *Paul Gituma Kiogora v Doris Mukiri Magari & Another* [2017] eKLR and *Re Estate of Stone Kathuli Muinde* [2016] eKLR.
48. She prayed that the court finds that parcel number Mbiuni/Makiliva/453 was not sold by the deceased and is subject to sub-division and she urged this Honorable Court to find that the land herein Mbiuni/Makiliva/453 be sub-divided among all beneficiaries and the Protestor be given the share of the late husband Richard Kavuvi Mwanza and the said Dominic Mutinda Mulei should be excluded from the estate as a beneficiary Mbiuni/Makiliva/453.
49. On whether Mbiuni/Makiliva/372 should be distributed equally to all the beneficiaries, she submitted that there is no dispute that parcel number Mbiuni/Makiliva/372 is registered under the name of the deceased and all the parties have agreed the same should be distributed equally to all beneficiaries and prayed that court should order as such in the scheduled of distribution by the Protestor he has suggested that the land be registered under the joint names of Paul Mwanza Muli, Mbatha Kavuvi Mwanza, Josphat Matata Mwanza and Agnes Suva but the Protestor opposes this mode of distribution and requested that the land be shared equally amongst the beneficiaries as follows: Mbiuni/Makiliva/372 be shared equally amongst Paul Mwanza Muli, Mbatha Kavuvi Mwanza, Josphat Matata Mwanza and Agnes Suva.
50. In conclusion she prayed that Mbiuni/Makiliva/372 and Mbiuni/Makiliva/453 be shared equally amongst all the beneficiaries namely Paul Mwanza Muli, Mbatha Kavuvi Mwanza, Josphat Matata Mwanza and Agnes Suva.

Determination/analysis

51. I have considered the Summons for confirmation of grant, the affidavit of protest and the corresponding affidavits as well as the submissions that have been filed by the parties. I find that the issues for determination are;
- a. Whether the grant of letters of administration should be revoked.
 - b. What constitutes the estate property.
52. I note that it is not in dispute that the deceased herein left the following heirs;
- a. Paul Mwanza Muli- Son
 - b. Richard Kavuvi Mwanza- Son
 - c. Josphat Matata Mwanza-Son
 - d. Agnes Suva-Daughter
53. It is also not in dispute that Dominic Mutinda Mueli is the nephew of the deceased and not a son of the deceased.
54. Section 76 of the *Law of Succession Act* is a proviso on the grounds upon which a grant can be revoked or annulled. It 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-
 - (i) 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
 - (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.”

55. This section was discussed *in re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR where it was stated that:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

56. In this case, the protest is based on the fact that the Petitioner did not include all the beneficiaries, in particular Agnes Suva, a daughter of the deceased. I note that the Petitioner did not include her and has



not denied this fact in his responses. It is a requirement that all the beneficiaries of an estate be listed when filing a matter in court for a grant.

57. Section 51 (2) of the [Law of Succession Act](#) provides that

“An application shall include information as to—

- (a) the full names of the deceased;
- (b) the date and place of his death;
- (c) his last known place of residence;
- (d) the relationship (if any) of the applicant to the deceased;
- (e) whether or not the deceased left a valid will;
- (f) the present addresses of any executors appointed by any such valid will;
- (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
- (h) a full inventory of all the assets and liabilities of the deceased; and
- (i) such other matters as may be prescribed.

58. The importance of disclosing all material facts was discussed [In Re Estate of Moses Wachira Kimotho \(Deceased\)](#) Succession Cause 122 of 2002 [2009] eKLR, where the court stated that;

“I am certain that had the Applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the Respondent been forthright and candid and included the Applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The Respondent knew of the Applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant.

59. The Petitioner ought to have included all the children of the deceased in the Petition. No one can purport to speak on her behalf including the protestor. Perhaps the Petitioner assumes that because the said Agnes Suvais married then she should not inherit from her father’s estate. Before the law, everyone is equal, man or woman, daughter or son and therefore she has a right to be included in these proceedings and to fully participate in the same. Equality before the law is provided for in the [Constitution](#) of Kenya under Article 27 (1) (2) &(3) [CoK](#) which states that;

- “(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.



(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”

60. I find that the protestor has fulfilled one of the grounds of section 76 of *Law of Succession Act*, that is; 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.

61. The second issue that is in contest is what constitutes the estate property. According to the Petitioner, the only property that was owned by the deceased is Mbiuni/Makiliva/453. The protestor on the other hand contends that the deceased had two properties, Mbiuni/Makiliva/453 and Mbiuni/Makiliva/372. The Petitioner who was PW1 told the court that Mbiuni/Makiliva/453 was sold to Dominic Mutinda Mueli who was PW2 and also contends that he owns the said piece of land having bought it from Pius Nguu Mbatha. Why then didn't the Petitioner include both properties in the application.

62. The deceased in this case died on 27th July 1992, the agreement that has been attached is dated 21st January 2014. The grant had not yet been confirmed at this time therefore there could not have been any authority to sell, the land had also not been distributed among the beneficiaries. So where did the said Pius Nguu Mbatha get the authority to sell? He could only have been intermeddling for the sale can only be null and void.

63. *In re Estate of Jamin Inyanda Kadambi (Deceased)* [2021] eKLR where it was stated that;

“A valid sale of estate property can only be by those to whom the assets vest by virtue of section 79, and who have the power to sell the property by virtue of section 82. Even then, immovable assets, like land, such as Kakamega/Kegoye/30, cannot be disposed of by administrators before their grant has been confirmed, and if land has to be sold before confirmation, then leave or permission of the court must be obtained. That is the purport of section 82(b)(ii) of the *Law of Succession Act*. Clearly, the sale transaction that was carried out by the administrators was contrary to sections 45 and 82(b) (ii) of the *Law of Succession Act*, and was invalid for all purposes. It cannot be asserted at all, and am surprised that persons to whom administration of the estate herein can purport to support a sale transaction that was carried out contrary to the very clear provisions of the law.

a. For avoidance of doubt, sections 45, 79 and 82 of the *Law of Succession Act* provide as follows:

b.

45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of



imprisonment not exceeding one year or to both such fine and imprisonment; and be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that —

no immovable property shall be sold before confirmation of the grant...”

64. At this juncture, It is therefore not in dispute that Mbiuni/Makiliva/453 is registered in the 1name of the deceased herein. This is reflected in the certificate of official search dated 4th August 2014, 18th January 2018.
65. there is a sale agreement in Kamba Language then translated to English that has been attached to the Reply to the Affidavit of protest but only Dominic Mutinda Mulee testified. None of the other witnesses to this alleged transaction testified on this issue.
66. According to the certificate of official search dated 23rd July 2018 Mbiuni/Makiliva/372 belongs to Mwanza Mbatha. The Petitioner did not include this property in the initial application for confirmation of grant but has attached a schedule for distribution in the Reply to the Affidavit of protest. That is admission on his part that one of the property of the estate was left out. That is also a ground for revocation or annulment of a grant.
67. The issue of the father of the deceased subdividing the property has not been supported by any evidence. Neither has there been any evidence to indicate that the sale agreement was fulfilled. There is no evidence of payment of the alleged Kshs 100,000.

Disposition

68. In the end, I order find as follows;
 - a. The grant of letters dated 18th March 2016 is hereby revoked



- b. A fresh Summons for confirmation of grant to be taken out.
- c. The beneficiaries of the estate are ;
 - i. Paul Mwanza Muli
 - ii. The estate of Richard Kavuvi Mwanza
 - iii. Josphat Matata Mwanza
 - iv. Agnes Suva
- d. The estate properties are;
 - i. Mbiuni/Makiliva/453
 - ii. Mbiuni/Makiliva/372
- e. The properties shall be divided equally/equitably between the beneficiaries of the estate upon filing of Summons for Confirmation of grant either with written consents of beneficiaries or protests to be heard first before confirmation of grant.

**RULING DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 16/5/2024.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

In the presence of:

Mr. Munyao for the Petitioner – Online

Mr. Mbatah Kavuvi Mwanza – Present In Court

Jackson Mutuku – Present in court

Patrick - Court Assistant

