



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Nzemi Musila (Deceased) (Succession Cause 798 & 1091 of 2008  
(Consolidated)) [2023] KEHC 21267 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21267 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 798 & 1091 OF 2008 (CONSOLIDATED)**

**MW MUIGAI, J**

**JULY 24, 2023**

**IN THE MATTER OF THE ESTATE OF NZEMBI MUSILA  
(DECEASED)**

**BETWEEN**

**THOMAS MUSILA MUTAVA ..... 1<sup>ST</sup> ADMINISTRATOR**

**AGNES MUTHINI MUSILA ..... 2<sup>ND</sup> ADMINISTRATOR**

**AND**

**MACHARIA CHEGE ..... 1<sup>ST</sup> PROTESTOR**

**SUSAN NDUNGE KIOKO ..... 2<sup>ND</sup> PROTESTOR**

**AND**

**JOHN MIGWI MWANGI ..... INTERESTED PARTY**

**RULING**

**Background**

1. Vide a Petition received on December 15, 2008 in which the petitioners Mutava Musila and John Migwi petitioned this Honorable Court for a grant of Letters of Administration intestate of the estate of Nzemi Musila (deceased) who died on March 1, 2007 as per death certificate annexed and domiciled in Kenya.
2. Pursuant to the Affidavit in support of Petition for Letters of Administration Intestate, the deceased died intestate and left the following surviving him; -
  - a. Nzuki Musila- Son
  - b. Thomas Musila- Son



- c. Muthini Musila- Son
  - d. Kalee Zakayo- Daughter In Law
  - e. Syombua Munyao- Daughter In Law
  - f. Kanini Mutuku- Daughter In Law
3. The Affidavit in support of Petition for Letters of Administration Intestate mentioned properties left by the deceased at the date of his death as follows.

**a.Donyo Sabuk/ Koma Rock Block 1/18554**

4. Vide the Tala Chief's letter dated December 5, 2008 confirmed that Nzembi Musila (Deceased) hailed from his Location, Koma Sub-Location. The chief's letter further confirmed the heirs left as named in the affidavit in support of petition for letters of administration intestate and the property left for distribution.
5. Vide the Gazette Notice dated December 24, 2008, Mutava Musila and John Migwi both of P.O Box 114 Tala in Kenya the deceased's sons were gazetted for grant of Letters of Administration intestate to the estate of, Nzembi Musila, late of Kangundo who died in Kangundo Hospital in March 1, 2007.
6. Grant for Letters of Administration granted on July 20, 2009 and issued by the Honorable Court Hon. I. Lenaola J on August 10, 2009 to Mutava Musila and John Migwi as personal representatives of the deceased's estate to render a just and true account thereof as required by law.
7. Application for Summons for Confirmation of Grant dated September 21, 2010, the Applicant sought orders for the grant of letters of administration granted on July 20, 2010 made to Mutava Musila, John Migwi to be confirmed.
8. Pursuant to Affidavit in Support of Summons sworn by Mutava Musila the Administrator of the estate of Nzembi Musila (deceased), deposed that deceased left the following beneficiaries:
  - a. Mutava Musila
  - b. John Migwi
  - c. Thomas Musila
  - d. Nzuki Musila
  - e. Kalee Zakayo
  - f. Syombua Munyao
  - g. Kanini mutuku
  - h. Muthini Musila
9. He deposed that the parcel of land measuring 15.77 Hectares had been divided as follows.
  - a. Kanini Mutuku- 0.672 Ha
  - b. Mutava Musila- 5.67 Ha
  - c. Thomas Musila- 0.81 Ha
  - d. John Migwi- 8.418 Ha



- e. Syombua Muyao- 0.2 Ha
10. Consent to confirmation of grant was signed by all the beneficiaries named in the Affidavit in Support of the Summons for Confirmation of Grant.

### **Protest**

11. The 1<sup>st</sup> Protestor herein had filed his affidavit of protest filed on February 8, 2021 on the ground that the cause was sub judice as there was another succession cause over the same estate filed by Thomas Musila in the High Court Nairobi Succession Cause 1091 OF 2008 pending hearing. The Protestor, Macharia Chege had an interest on the estate of the deceased by dint of the fact that he had entered with the Deceased into Sale Agreement of a portion of land measuring 3 Ha from Land parcel Donyo Sabuk/ Komarok Block 1/4189 at a consideration of Kshs 210,000/- and paid Kshs 190,000/- with a balance Kshs 20,000/- which was to be paid upon the Deceased obtaining consent to transfer from the Land Control Board.
12. Vide Ruling dated February 29, 2012, the protest was found to have merit and was allowed and as consequence the grant issued was revoked by Hon. Makhandia J ( as he then was)
13. On April 26, 2012 the petitioners filed an application seeking to be heard Exparte, praying to be set aside and /or varying the ruling dated February 29, 2012 and order maintaining the grant in order for the Application to be heard contemporaneously with the protest.
14. The Court vide Ruling dated April 28, 2015 by Hon.L.N. Mutende J dismissed the Application and observed that either they agree on whether to proceed with the case in Nairobi or have a consent taking into consideration the interest of the protestor.
15. The Protestor yet again filed another application, Summons of Revocation of Grant of letters of Administration dated December 14, 2021 to safeguard his interest on the estate of the Deceased by the virtue of his right over the 3 Ha of land which he had bought from the Deceased and therefore the proposed mode of distribution by the Administrators was disfavoring him.
16. The Protestor claimed that Sale Agreement creates rights and obligations between the parties and they survive a deceased party by creating a trust. The Petitioners opposed the application denying any agreement as the same was undated and unattested as required by law hence was merely executory and did not confer any interest in land.
17. Pursuant to the Ruling dated November 10, 2022 by Hon. G.V. Odunga J (as he then was) ruled in favor of the Protestor that there was an agreement between him and the Deceased and accordingly, in distributing the Deceased's Estate the protestor's interest ought to be considered.
18. In the result the learned Judge observed that the Summons for Confirmation of Grant herein cannot be granted in a manner proposed by the petitioners and directed the Petitioners to propose another mode of distribution of the Deceased estate taking into account the protestor's interest within 30 days and in default 3 Hectares land parcel No. Donyo Sabuk/ Komarock Block 1/4189 shall be carved out and transferred to the Protestor herein.

### **Revocation Of Grant**

19. In Summons for revocation of Letters of Administration dated December 14, 2022 by one Susan Ndunge Kioko sought orders inter alia that letters of administration intestate issued herein be annulled or revoked as well as all other orders and proceedings be set aside. She deposed in her affidavit that she is the daughter of the deceased herein hence on equal priority with the administrators herein. She opined



that the grant had been obtained fraudulently through a concealment of material facts as she was not informed when the letters of administration were taken.

20. In response to the application the protestor averred that the applicant is working in cohort with the petitioners to steal a match against him as she did not produce any evidence that indeed she was the daughter of the Deceased.
21. Pursuant to a ruling dated July 20, 2022 G.V. Odunga J ruled that the Applicant's interest will be sufficiently protected by directing that she be considered in the distribution of the estate of the Deceased hence revocation of the grant issued was declined but instead directed that both the interests of the Protestor as declared in the ruling dated November 10, 2021 and the Applicant's entitlement as a daughter of the Deceased herein be taken into account in distribution. In other words, the Protestor's portion arising from the sale agreement be exercised from the Deceased's parcel and the remainder be distributed amongst the beneficiaries.
22. Vide a Certificate of Confirmation of Grant dated July 20, 2022 and issued on July 28, 2022 the grant of Letters of Administration to the estate of the late Nzembi Musila (deceased) were confirmed to Thomas Musila Mutave and Agnes Musila.

### **Summons Dated 13<sup>th</sup> October, 2023**

23. Vide Summons dated October 13, 2022 and filed on October 14, 2022 brought under Rule 49 of the Probate and Administration Rules the Applicant/ Protestor, Macharia Chege herein sought Orders inter alia That:
  - a. The Administrators herein be ordered to execute all necessary transfer documents to effectuate the registration of 3 Hectares out of Land Parcel No. Donyo Sabuk/ Komarock block 1/18554 to the Applicant and in default the Deputy Registrar of this Honorable Court be empowered to do so.
  - b. Upon granting prayer (a) above this Honorable Court be pleased to issue KBC Police Station within Komarock Location within Matungulu Division to provide Security to the Applicant and his team, and to be appointed a Surveyor during the excising of 3 Hectares out of land parcel No. Donyo Sabuk/ Komarock Block 1/18554 and to further preserve the peace during such enforcement.
  - c. The Honorable Court be pleased to give such further or other orders and/or directions as may deem fit and just to grant.

### **Supporting Affidavit To Summons Dated October 13, 2022**

24. In supporting affidavit dated October 13, 2022 and filed on October 14, 2022, sworn by Macharia Chege, he deposed that: vide Certificate of confirmation of grant issued by this Honorable Court on July 20, 2022 the court directed that 3 Hectares out of land parcel No. Donyo Sabuk/ Komarock Block 1/18554 be registered in his name and that concerted efforts to prevail upon the Administrators to execute the necessary transfer documents in his favor have been fruitless; lamenting that ground area in which he is entitled has been built up by strangers with the blessings of the Administrators and any attempt to enter into the said land to exercise the 3 Hectares as directed by the court may be hostile; he deposed further that unless orders herein are granted the Certificate of Confirmation of Grant herein shall be rendered nugatory and a mere academic exercise and that he has reasonable apprehension that unless this Honorable court issues the order as prayed, the likelihood of a breach of peace is imminent as the busy bodies on the ground have already threatened him with unspecified consequences.



### **Summons For Revocation Dated 31st October,2022**

25. In yet another Summons for Revocation dated October 31, 2022 and filed on November 3, 2022 brought vide Section 76 of the Succession Act and Rule 44 of the Probate and Administration Rules the Applicant Interested Party (IP) John Migwi herein sought Orders That:
- a. Prohibits the Land Registrar and County Land Surveyor or any other Surveyor from registering any sub division, transfer, transmission and any other dealings with the Parcel of land known as Donyo Sabuk/ Komarock Block 1/18554 pending hearing and determination of this application.
  - b. The Certificate of Grant and Grant of Letters of Administration Intestate issued herein be revoked as well as all other orders and proceedings be set aside
  - c. A declaration be issued that the IP / Applicant is a lawful purchaser of land measuring 8.5 Hectares which parcel of land forms the estate of the deceased herein
  - d. A declaration that the IP/Applicant herein is entitled to a portion measuring 8.5 Hectares from land parcel number donyo sabuk/ Komarock Block 1/18554.

### **Supporting Affidavit To The Summons For Revocation Of Grant Dated 31st October,2022**

26. Vide the supporting affidavit dated October 31, 2022 and filed on November 3, 2022 sworn by John Migwi Mwangi, it was deposed that: he is the lawful purchaser for value from the Deceased of a portion of land parcel No. Donyo Sabuk/ Komarock Block 1/4184 measuring 8.5 Hectares (annexed and marked copy of sale agreement) and that the said parcel of land has undergone subdivision severally and the only remaining estate of the Deceased is land Parcel No. Donyo Sabuk/ Komarock Block 1/18554. He lamented that the Certificate of Confirmation of Grant issued by this Honorable Court on July 28, 2022 does not specifically allocate him the 8.5 Hectares he lawfully purchased from the Deceased leaving his lawful interest in the land unsecured and that the Administrators herein are fully aware that he purchased the said portion from their mother and as a matter of fact one of them was witness to the said agreement of sale; he lamented that grant should be revoked and or annulled and his interest as a purchaser for value of a portion of land measuring 8.5 Hectares, from the Deceased, specifically indicated and/ or catered for in the distribution of the Estate.

### **Replying Affidavit to the Summons for Revocation of Grant Dated 31<sup>st</sup> October, 2022**

27. Vide Replying affidavit Dated November 11, 2022 and filed on November 14, 2022 sworn by Macharia Chege, in which he deposed inter alia that: The Applicant has featured in two former Rulings in which he petitioned this court for grant of letters of Administration for the suit land i.e. Ruling by L.N. Mutende J on Succession Cause No.798 of 2008 Dated April 28, 2015 and Ruling by Asike Makhandia J on Succession Cause No.798 of 2008 Dated April 29, 2012; deposing that in the purported sale agreement, Thomas Musila Mutava and Nzioka Musila all sons of the deceased are referred to as the vendors the same appears in the last paragraph where they also sign as vendors instead of witnesses. There is no power of attorney attached to this agreement to prove that late Nzembi Musila donated her power of sale over land to her sons; further he lamented that this Court be pleased to find that the Applicant is entitled to a share of the Deceased estate and can be given a share of the Deceased estate from the net estate after his 3 hectares have been hived off from land parcel No. Donyo Sabuk/ Komarock Block 1/18554 as per orders of November 10, 2021 as the Applicant herein will not suffer any prejudice if the orders are executed; finally he opined that the Applicant has filed this Application



maliciously and in bad faith with the same meant to distract the court and delay the conclusion of this matter in a similar manner, style and fashion applied by the Petitioners and the 2<sup>nd</sup> Protestor.

### **Replying Affidavit by the Interested Party To The Application Dated 13th October,2022.**

28. Vide the IP's replying affidavit dated and filed on 14<sup>th</sup> November,2022 sworn by John Migwi Mwangi, he stated that: the grant issued by the court on 28/7/2022 did not specifically cater for his interest as a purchaser for value from the Deceased and as a result through his Advocates he has filed summons for revocation of the said grant; lamenting that the hearing and determination of this Application should be stayed pending the hearing and determination of his summons for revocation of grant application filed before this court and that in the event the hearing and determination of this application proceeds his summons for revocation of grant will be rendered nugatory; he deposed that his summons for revocation of grant has high chance of success; he prayed that the summons application herein be dismissed.

### **Replying Affidavit by the 1<sup>st</sup> Administrator to the Application Dated 13<sup>th</sup> October,2022**

29. In his replying affidavit dated 24<sup>th</sup> November,2022 and filed on 25<sup>th</sup> November,2022 sworn by Thomas Musila Mutava, he averred that: the said application is frivolous, vexatious and an abuse of the court process and that the grounds contained in the affidavit sworn by Macharia Chege on 13<sup>th</sup> October,2022 did not warrant the grant of orders sought; opining that it is not true the 1<sup>st</sup> Protestor bought 3 hectares from the Deceased herein and that the Deceased herein did not execute the alleged sale agreement that the 1<sup>st</sup> Protestor relied upon in obtaining the grant he wishes to now enforce; he stated that land registered Komarock Block 1/18554 had already been sold to different parties and at the time the 1<sup>st</sup> Protestor alleges to have bought 3 hectares there was none available for sale hence he ought to have done due diligence prior to the alleged purchase which is contested. He would have realized that the 3 hectares were not available for sale; he further averred that he will be moving the court to revoke the grant obtained by the 1<sup>st</sup> Protestor as the same has been through fraud; he deposed that it will not be in the interest of justice to allow the 1<sup>st</sup> protestor to get his share when there are other innocent purchasers who bought land from the Deceased long before the 1<sup>ST</sup> Protestor.

### **Replying Affidavit by the 2nd Administrator to the Application Dated 13<sup>th</sup> October,2022**

30. In her replying affidavit dated 1<sup>st</sup> February,2023 and filed on 2<sup>nd</sup> February,2023 sworn by Agnes Muthini Musila she regurgitated the contents of the 1<sup>st</sup> Administrator's replying affidavit hence defeats the purpose to repeat said contents here.

### **Further Affidavit by The 1<sup>st</sup> Protestor**

31. Vide the further affidavit dated 1<sup>st</sup> February, 2023 and filed on 7<sup>th</sup> February,2023, sworn by Macharia Chege, in which he replied to the replying affidavits sworn by the 1<sup>st</sup> administrator and the IP's. He deposed that he has never petitioned for any parcel of land in relation to deceased's estate and therefore he has never been issued with any grant and it is baffling when the 1<sup>st</sup> Administrator accuses him of having obtained a grant fraudulently yet he is the Administrator and the affiant is not; averring that the 1<sup>st</sup> Administrator is trying to engage this honorable court in a wild goose chase by trying to reintroduce issues that had already been determined by this honorable court. He referred to the two rulings one by Hon Asike Makhandia J and the other by Hon. G.V. Odunga J. The said rulings were in his favor (annexed and marked copies of the rulings); he lamented that he is aware of the precise location where his 3 Ha fall within the Deceased estate since at the time of purchase, a surveyor contracted by the deceased clearly demarcated his parcel of land and placed the beacons and that he contracted the 1<sup>st</sup>



Administrator to put up a perimeter fence; lamenting that when the deceased died the Administrators herein occupied his land, uprooted the fence and started subdividing the amongst themselves and reported the matter to the local chief who referred the matter to Land Tribunal at Matungulu and thereafter he registered a land restriction order (annexed and marked copy of the restriction order); he stated that the replying affidavit by the 1<sup>st</sup> Administrator is a perjury.

32. The Protestor, further opined that there was an error and the affidavit was actually signed on 24<sup>th</sup> November, 2022 the same day the 1<sup>st</sup> Administrator passed on after being admitted at Kangundo Level 4 Hospital in a critical condition begging the question whether the 1<sup>st</sup> Administrator really signed the replying affidavit to confirm the contents therein. (annexed and marked copies of a letter from the medical Superintendent at Kangundo level 4 Hospital); further that the nature of Thomas Musila illness as evidenced by the Medical Legal Report and further supported by the details of his Eulogy Booklet did not provide him with sufficient physical and mental rigor to read and understand and reply to his application; he deposed that the replying affidavit by the 1<sup>st</sup> Administrator was devoid of merit, is a perjury and was actually not executed by the deponent urging that it should be expunged from the record; as regarding the IP, he deposed that the IP has always been a participant in the suit and the court is not obligated to grant him orders that he had not prayed for.
33. The 1<sup>st</sup> Protestor deposed that during the Application of the revoked grant the IP herein misrepresented himself as a son of the Deceased, whereas he was an outsider and an alleged purchaser with the ulterior motive to inherit the estate of the Deceased; stating that the first grant which was revoked was issued to him and one Mutava Musila and that initially the IP wanted 8.41 HA and now he is seeking 8.5 HA and that the administrators herein offered him two plots size (40 by 60) ft and Kenya shillings one million instead of his 3 HA to withdraw his claims which he refused (annexed and marked copy of letter of offer); he finally deposed that his interest over the deceased estate which he has successfully litigated for a period of fifteen (15) years and received his award from this honorable court cannot be tied to that of the IP and that he should not be dragged into his indolence.

### **Replying Affidavit by the 1<sup>st</sup> Protestor**

34. Vide his replying affidavit dated 22<sup>nd</sup> February, 2023 and filed on 23<sup>rd</sup> February, 2023 sworn by Macharia Chege, the 1<sup>st</sup> protestor herein. He replied to the replying affidavit of the 2<sup>nd</sup> Administrator. He deposed that the affidavit is fatally defective in that the deponent has stated her personal legal particulars like age, gender, place of residence and whether she is of sound mind.; he averred that the estate of the Deceased comprises of land Reference Number Donyo Sabuk/ Komarock Block 1/18554 measuring 15.77 HA (annexed and marked copy of a current certificate of official search) and that the land is still registered in the name of the Deceased and the 1<sup>st</sup> Administrator cannot say that his 3 Hectares are not available.; deposing that during the process of purchase of his 3 HA he conducted a due diligence search at Machakos Lands office and found this Parcel Donyo Sabuk/ Komarock Block 1/4184 to be free from any encumbrances, inhibitions, cautions or restrictions it was therefore good land and free for sale (annexed and marked copy of land search dated 13<sup>st</sup> January, 2000);
35. The 1<sup>st</sup> Protestor stated that land registered parcel No. Donyo Sabuk/ Komarock Block 1/18554 is the subject suit land and the same the Administrators herein and the IP were seeking the permission of the court in this succession cause to share among themselves it is therefore a lie under oath to tell this honorable court that the land was already sold out after the Deceased died; further, he lamented that the allegation that Nzembi Musila (deceased) herein had sold all her land before she died is not true and that within court's file is a list of distribution filed by the administrators herein and the IP seeking authority of the court to share among themselves 15.77 HA which the Deceased left behind; he stated that this land is intact as evidenced by his search dated 22/12/2023 (annexed and marked copy of the



official search). He finally indicated that no prejudice will be suffered by any party if his application dated 13<sup>th</sup> October,2022 is allowed, beseeching this honorable court to allow his application and relieve him from this long protracted court battle.

36. The matter was canvassed vide written submissions.

## **Submissions**

### **1<sup>st</sup> Protestor's Submissions**

37. Vide the protestor's submissions dated 3<sup>rd</sup> April,2023 and filed on 18<sup>th</sup> April,2023, it was submitted that by the application dated 13/10/2022 the protestor moved the court for the effectuation of the said ruling on the ground that the Administrators have failed to execute the necessary transfer documents in conformity with court's orders.
38. Submitting that hardly had the protestor prosecuted his Application dated 13<sup>th</sup> October,2022 than John Migwi Mwangi emerged with another Summons for revocation of grant dated October 31, 2022 seeking prohibition orders and revocation of the grant ostensibly on the ground he discovered that the court issued a confirmed grant with regard to the deceased's estate. Urging that the IP herein have worked in cahoots with the Administrators herein to deny him the fruits of the judgment of this Court.
39. It was the position of the Protestor that IP has featured in former rulings to wit, the Rulings of Justice L.N Mutende dated 28<sup>th</sup> April,2015 and a Ruling by Justice Asike Makhandia dated 28<sup>th</sup> April,2012, opining that it is absurd for the Interested Party (IP) to come to this court feigning to be affected by the orders of this court.
40. He submits that the administrators are not candid and truthful and it is clear that they are working in cahoots with the parties who are bringing application after application this court having dealt with two applications for revocation should declare itself functus officio and close all the proceedings in this matter in relation to the protestors' entitlement.
41. It is submitted further that it is a well-established principle of law that he who approaches a court of equity, must approach with clean hands and in good faith hence the Administrators herein, 2<sup>nd</sup> Protestor and the IP have not approached this Honorable Court with clean hands and in good faith therefore not entitled to equity. He averred that filing two contemporaneous succession causes touching on the same estate at different jurisdiction with intention to conceal material fact from this honorable court was an act of bad faith and that the 1<sup>st</sup> Administrator filed Succession Cause 1091 in 2008 at Nairobi High Court, abandoned the same when the Protestor entered appearance, colluded with his brother Mutava Musila and John Migwi Mwangi and the interested party herein and filed Succession Cause 798 of 2008 at Machakos High Court.
42. It was submitted that the Administrators herein have made several allegations about the sale agreement being not well executed while they were witnesses to the same and that they have made allegations he obtained the grant fraudulently while the same was made issued in their names by this court. contending that the IP has lied to this Honorable Court under oath that he was not aware of these court's proceedings when he was the first Petitioner in this matter Succession Cause 798 of 2008 the grant which was later revoked was issued in his name and that the IP and Mutava Musila later moved this court albeit unsuccessfully to have the grant reinstated.
43. It was the Protestor's case that the IP's present Application is premised upon a Sale Agreement dated 4/2/1998 in which all the children of the deceased have signed as vendors instead of witnesses. The buyer (interested party herein) did not even sign the sale agreement the land reference numbers known



35 Oldonyo Sabuk/ Komarock 1/ 1484 referred to in paragraph 2 of the said sale agreement, is different from the suit land known as Donyo Sabuk/ Komarock Block 1/4184.

44. He opined that if any sale transaction took place either by the Administrators herein or by the IP it amounts to intermeddling with the estate of the deceased. Reliance was placed on the case of *Morris Mwiti Mburugu vs Dennis Kimani M'Mburugu* (2016) eKLR it was held as follows:

“where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of sections 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act but were not involved in the same.”

45. He contended that the Application dated 13<sup>th</sup> October, 2022 was premised on the Ground as enumerated on the face of the application and more specifically that efforts to prevail upon the Administrators to execute the necessary transfer documents have been fruitless and that the ground area in which the Protestor is entitled to has been built by strangers who purchased from the administrators or the Interested Party who are yet get proper title to the land and any effort to exercise the 3 Hectares as ordered by the court has been met with hostility.
46. It is the position of the Protestor that in the interest of justice this Honorable court do find that the Protestor continues to incur costs and the same should be condemned to the Administrators or his Advocates on record; he asked for costs since the date of filing this case, special damages for Psychological suffering occasioned by this long protracted and unnecessary litigation taking into consideration the 1<sup>st</sup> Protestor is a person living with hearing disability and incurred expenses to hire support.

#### **Administrators Submissions**

47. Vide the submissions dated and filed on 12<sup>th</sup> May, 2023, the Administrator herein submitted that it is not true that the 1<sup>st</sup> Protestor bought 3 Hectares from the Deceased and that the Purported agreement for purchase is a forgery. The Deceased did not sign it.
48. It is contended that the 1<sup>st</sup> Administrator is not aware of the position of the 3 HA the 1<sup>st</sup> Protestor is alleging to have bought and that if he bought the same genuinely why was the same not identified for him? Why has he never taken possession of the same and why would he be requesting the court to offer him security to go to survey land if the same belonged to him. Urging that land in question has already been subdivided to other purchasers who bought from the deceased hence no land left that is available for allocation to the 1<sup>st</sup> Protestor.
49. It was the case of the Administrator herein that the people who bought the land from the Deceased already took possession and have developed it and that allowing the Applicant to be transferred 3 Hectares would amount to evicting innocent purchasers.
50. It is submitted that if for example the Application is allowed where will the 1<sup>st</sup> Protestor be given the 3 Hectares within the vast Donyo Sabuk/ Komarock Block 1/18554? Will he be the one to choose where he wants or the Administrator will show him? If the land is no available where will he get the land?
51. It is averred that if the orders sought in the Application by the 1<sup>st</sup> Protestor are granted it will create chaos and anarchy as people will be evicted from their homes and rendered homeless.



52. Finally, court is urged that a survey be conducted to ascertain the 3 Hectares that the 1<sup>st</sup> Protestor is demanding if available.

### **Analysis/ Determination**

53. This Court considered the pleadings filed, Court proceedings, Rulings & Orders of the Court and the present applications presented for hearing and determination. The Court took the liberty to outline the procedural history of the matter upon perusal of the Court File to familiarize with its contents and inform the way forward.
54. At the Preliminary stage, this Court was presented with 3 Applications simultaneously;
- a. The Certificate of Urgency filed on 14/10/2022, by Macharia Chege 1<sup>st</sup> Protestor seeking Court orders to facilitate the enforcement of Certificate of Confirmation of Grant of 28/7/2022.
  - b. The summons for Revocation of Grant filed on 3/11/2022 by Interested Party John Migwi seeking as a lawful Purchaser 8.5 hectares from the estate of the deceased.
  - c. The Summons for Revocation filed on 15/12/2022 by Susan Ndunge Kioko, who claimed to be one of the beneficiaries of deceased's estate as a daughter of the deceased and was left out in the process of obtaining grant and confirming grant of letters of administration.
55. On 14/12/2022, this Court was informed of the demise of the 1<sup>st</sup> Administrator Thomas Musila Mutava and the need to substitute him and Counsel for the Administrator to obtain instructions from the family.
56. On 9/2/2023, the Court was informed by Counsel on record for the 1<sup>st</sup> Administrator that the 1<sup>st</sup> Administrator's family met and agreed that Peter Musila, son of Thomas Musila Mutava was to substitute the deceased 1<sup>st</sup> Administrator.
57. On 17/5/2023, this Court was informed by Counsel on record for the interested Party John Migwi was deceased and time was required to obtain instructions and thereafter substitute him before the matter proceeds.
58. The 1<sup>st</sup> Protestor/Objector objected to the application for adjournment and delay in conclusion of the matter. This court sought evidence of the claim by production of burial permit, Eulogy or death certificate etc and in the meantime the substituted party if at all could peruse the Court file and file written submissions through the Deputy Registrar MHC.
59. The Court agreed to hear all filed applications together with regard to revocation of grant issued on 14/1/2021 to Thomas Musila Mutava (deceased) replaced by Peter Musila & Agnes Musila and confirmed grant of 28/7/2022 and the application to effect and enforce Court orders the confirmation of grant of 28/7/2022.

### **Revocation Of Grant Applications**

60. The Summons are primarily premised on section 76 of the [Law of Succession Act](#), cap 160 Laws of Kenya. The said provision states as follows:

“76. Revocation or annulment of grant



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.”

61. The power to revoke and/or annul the grant is discretionary in the sense that the court has to be guided by the factors set out under section 76(supra). This was the position taken by Hon Mativo J (as he then was) in *Lucy Wakarima Ngabucha & Another vs. George Mwangi Ngabucha & another* [2016] eKLR where the Court held that;

“The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the grounds stipulated in section 76 of the act. The grounds laid down in section 76 can be divided into the following categories:- the propriety of the grant making process; mal-administration or where the grant has become inoperative due to subsequent circumstances.”

The provision under section 76 uses the phrase “may at any time be revoked or annulled if the court decides’ which connotes discretion. Under the provision the grant may be revoked and/annulled whether or not confirmed.

62. Hon Mwita J. in the *Albert Imbuga Kisigwa vs. Recho Kawai Kisigwa*, Succession Cause No.158 of 2000 stated:



- “[13] Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”
63. I am fortified by the decision of Hon. Khamoni, J. *in Re Estate of Gitau (Deceased)* [2002] 2 KLR 430 and stated;
- “Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong. While section 76 of the *Law of Succession Act* should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.” See also; *Mary Wangari Kihika vs. John Gichuhi Kinuthia & 2 Others* [2015] eKLR.
64. *In Re the Estate of the Late Suleman Kusundwa* [1965] EA 247, the court stated that:
- “The Court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased’s property as he was entitled to dispose of by will under the applicable law of inheritance.”
65. In light of the outlined relevant legal provision and case-law, the law shall be applied to the existing facts or allegations and the Court Rulings.

#### Court Rulings

1. Ruling by Hon. A. Makhandia J on 29/2/2012-  
The Protest filed by 1<sup>st</sup> Protestor, Macharia Chege, despite service Administrator(s) refused to attend Court or send representation or file any documents/pleadings. The Protest was upheld and grant revoked.
2. Ruling by Hon L. N. Mutende LJ on 28/4/2015-  
The Petitioners sought the orders of 29/2/2012 be set aside. The court found the application lacked merit and was dismissed.
3. Ruling by Hon G. V. Odunga J on 10/11/2021- held;



[31] The Summons for Confirmation of grant cannot be granted in the manner proposed by Petitioners. I Therefore direct the Petitioners to propose another mode of distribution of the deceased's estate taking into account the Protestor's interest within 30 days and in default, 3 hectares of Land Parcel No Donyo Sabuk/Komarock Block 1/4189 shall be carved out and transferred to the Protestor herein.'

4. Ruling by Hon G. V. Odunga J on 20/7/2022- held;

[34] In the premises, since Applicant's interests will be sufficiently protected by directing that she be considered in the distribution of the estate of the deceased; I decline to revoke the grant herein and instead direct that both the interests of the Protestor as declared in the Ruling of 10<sup>th</sup> November 2021 and Applicant's entitlement as a daughter of the deceased be taken into account in the distribution of the estate'.

66. The Summons for Revocation of Grant filed on 3/11/2022 is by Interested Party John Migwi seeking as a lawful Purchaser 8.5 hectares from the estate of the deceased. He deposed that he is a lawful purchaser for value of LR Donyo Sabuk/Komarock Block 1/4184 which has undergone several subdivisions and he claims 8.5 hectares and annexed the Agreement marked JMM-1 dated 4/2/1998.
67. He also stated that the Certificate of Confirmation of Grant of 23/7/2022 did not include his share and lawfully allocate him 8.5 hectares that he purchased from the estate of the deceased. Before the deceased's demise, the deceased had pointed out the portion of purchase and he consequently undertook development of the same, and he is/was currently settled on the purchased portion as evidenced by copies of photographs annexed as JMM2.
68. The applicant deposed that the that certificate of confirmation of grant left out his entitlement as a Purchaser for value and was therefore obtained through fraud and concealment of material facts that he purchased 8.5 hectares from the deceased. The Applicant sought revocation of the grant.
69. This court relies on section 66 & 71 of Law of Succession Act that provide for appointment of administrators of the deceased's intestate estate from the family of the deceased, Creditor or Public Trustee and mode of distribution of deceased's intestate estate.
70. In the petition for grant of letters of Administration intestate, John Migwi, the interested Party herein deposed that John Migwi and Mutava Musila were sons of the Deceased and proposed Administrators of the deceased's estate. The parties failed to obtain written consents from beneficiaries for appointment of Administrators. Consequently, on 10/8 2009, the interested Party was issued with grant of letters of Administration jointly with Mutava Musila as one of the Administrators.
71. In the Summons for Confirmation of Grant, filed on 21/9/2010 John Migwi ID No 8632940 was/is listed as one of the deceased's heirs/beneficiaries surviving him/her and proposed mode of distribution, he claimed /was to be allocated 8.418 Ha. This grant was later revoked.
72. The Certificate of Grant of 28/7/2022 is/was that Donyo Sabuk/KomaRock Block 1/18554 to be distributed as follows; 3 HA to be registered in the name Macharia Chege and remainder to be distributed amongst beneficiaries of the estate of the deceased. From the above listed documents, the Petition and grant, John Migwi is a son of the deceased and one of the beneficiaries according to the



Petition and Summons for Confirmation of Grant and Certificate of Grant of 28/07/2022. As son of the deceased he is a beneficiary and was not left out.

73. It is confusing to this Court that John Migwi is now a legal Purchaser for value for 8.5 ha purchased in 1998 as per the Agreement annexed a situation/document which never featured anywhere in the Court pleadings even as he instituted this Petition/matter until in the instant application. As a beneficiary he is one of the beneficiaries entitled to the remainder of Donyo Sabuk/KomaRock Block 1/18554, there is no need to revoke the grant. If he is now a Purchaser, the claim has to be established first; 'he who alleges must prove' or remain a beneficiary and obtain his share as per the Certificate of Confirmation of Grant.
74. As it is the interested party cannot benefit twice from the deceased's estate as a beneficiary and as a purchaser, his claim must be confirmed first whether as beneficiary or Purchaser but not both. The Application by the interested party does not warrant revocation of grant as he deposed to be a child/son of the deceased and all beneficiaries are catered for in the Certificate of Confirmation of Grant of 28/07/2021. If he is a Purchaser and the fact is contested, he ought to pursue his purchase of land claim before ELC Court.
75. The Summons for Revocation filed on 15/12/2022 by Susan Ndunge Kioko, who claimed to be one of the beneficiaries of deceased's estate as a daughter of the deceased and was left out in the process of obtaining grant and confirming grant of letters of administration.
76. This Court finds that the 2<sup>nd</sup> Protestor, Susan Ndunge Kioko made an identical/similar claim before Hon. G. V. Odunga J vide application dated 14/12/2021, where the Applicant deposed that she is daughter of the deceased herein and hence on equal priority with the administrators. The application was the subject of hearing and determination that culminated to the Court Ruling of 20/7/2022. The Applicant was/is considered 1 of the beneficiaries to the deceased's estate.
77. The Court Rulings outlined above are valid, legal and regular orders of Courts with similar, equal and competent jurisdiction as this Court. In the absence of an application for review before the Court, the orders remain in force until and unless set aside, varied successfully reviewed or appealed against. the claim by Susan Ndunge Kioko was upheld by the Court Ruling of 20/7/2022.

### **Summons Dated 13<sup>th</sup> October, 2023**

78. Summons dated October 13, 2022 October 13, 2022 and filed on 14th October,2022 , by the 1<sup>st</sup> Protestor/Objector seeks orders that the Administrators execute all necessary transfer documents to effectuate the registration of 3 Hectares out of Land Parcel No. Donyo Sabuk/ Komarock Block 1/18554 to the Applicant and in default the Deputy Registrar of this Court be empowered to do so.
79. This Honorable orders KBC Police Station within Komarock Location within Matungulu Division to provide Security to the Applicant and his team, and to be appointed a Surveyor during the excising of 3 Hectares out of land parcel No. Donyo Sabuk/ Komarock Block 1/18554 and to further preserve the peace during such enforcement or grant any other appropriate order.
80. The Ruling by Hon. A. Makhandia J on 29/2/2012; Ruling by Hon L. N. Mutende LJ on 28/4/2015, Ruling by Hon G. V. Odunga J on 10/11/2021 & Ruling by Hon G. V. Odunga J on 20/7/2022 all confirm the 1<sup>st</sup> Objector's claim of 3 Ha from the estate of the deceased. The Rulings remain valid and legal orders of the Court subject to successful setting aside, review or appeal. The Objector is and has been consistent of his claim, purchase of 3 Ha from No. Donyo Sabuk/ Komarock Block 1/18554 since 2007-8 to date.



81. The Protestor, Macharia Chege's interest on the estate of the deceased by dint of the fact that he had entered with the Deceased into Sale Agreement of a portion of land measuring 3 Ha from Land parcel Donyo Sabuk/ Komarock Block 1/4189 at a consideration of Kshs 210,000/- and paid Kshs190,000/- with a balance Kshs 20,000/- which was to be paid upon the Deceased obtaining consent to transfer from the Land Control Board. He lamented that he is aware of the precise location where his 3 Ha fall within the Deceased estate since at the time of purchase, a surveyor who was contracted by the deceased clearly demarcated his parcel of land and placed the beacons and that he contracted the 1<sup>st</sup> Administrator to put up a perimeter fence. When the deceased died the Administrators herein occupied his land, uprooted the fence and started subdividing it amongst themselves.
82. He reported the matter to the local chief who referred the matter to Land Tribunal at Matungulu and thereafter he registered a land restriction order (annexed and marked copy of the restriction order).
83. On the ground area in which he is entitled to as the land he purchased, it has been built up by strangers with the blessings of the Administrators and any attempt to enter into the said land to exercise the 3 Hectares as directed by the court is hostile; the likelihood of a breach of peace is imminent as the busy bodies on the ground have already threatened him with unspecified consequences.
84. The powers and duties of Administrators as personal representatives of the estate of the deceased are spelt out by sections 82 & 83 of *Law of Succession Act*; specifically, section 82 (b) and 83 (d) of the Act; to sell the property of the deceased upon confirmation of grant and account to the estate/beneficiaries and to settle debts of the deceased from the estate. The 1<sup>st</sup> Protestor /Objector has laid claim of 3 Ha of the deceased's estate for over 15 years now. There is an Agreement for Sale presented, the matter was adjudicated before Matungulu Land Tribunal and ruled in his favour. The Courts have heard and determined the Protestor's claim and unanimously found in his favour. To sell the land to avert the Protestor's claim amounts to the Administrator's and/or their estates being held liable by virtue of section 94 of *Law of Succession Act*.
85. The Administrators as confirmed by the Court record refused to attend or participate in proceedings or consider mediation. Instead upon delivery of the said Rulings, the Administrators sold portions of land comprising of the deceased's estate to other unsuspecting purchasers who have/had no notice of defective title to avert effecting the Protestor/Objectors claim now an order of the various Courts as confirmed by the Record.
86. The Administrator(s) deposed/submitted the purported agreement for purchase is a forgery. The Deceased did not sign it. The 1st Administrator is not aware of the position of the 3 HA allegedly bought by the Protestor/Objector. If the purchase of 3 Ha is a forgery as claimed by Administrators; they did not pursue forgery claim, report to Police engage handwriting expert/Document Examiner to look at the Document/Agreement and confirm forgery.
86. Hon. Gikonyo J. in the case of *Alex Mwenda Mwirigi vs Rodah Karimi Jadel*, Succession Cause No 337 of 2011, in a decision rendered on 2<sup>nd</sup> November, 2016 held that:
- ..... Here, I must state that forgery is a very serious allegation and would require strict proof based on quite preponderant amount of evidence. But, none was adduced in this case. I expected some report to the police or investigation to have been afoot on that allegation. I will not, therefore, rely or make any finding on the allegation of forgery at this stage. That matter ends there for now. (Emphasis added)
87. In the absence of Administrators undertaking verification of Agreement for sale of 3Ha and/or seeking review and setting aside of the various Rulings mere denial of the claim/purchase will not wish away



the Objector's claim. If the said Purchase/Claim is unfounded, unknown and illegal by Objector/ Protestor as deposed why did the Administrators make an offer to the Protestor/Objector vide Letter of Offer of 4/6/2021 to offer him 2 Plots 40 ft by 60 ft & Ksh 1,000,000,000 which he declined?

### **Disposition**

1. The totality of the evidence on record particularly Rulings by various Courts confirm the Objector'/ 1<sup>st</sup> Protestor's claim, Macharia Chege of 3 Ha. The Court grants and uphold the Application of 13/10/2022 as follows;
  - a. The Administrators are hereby ordered to execute all necessary transfer documents to effectuate the registration of 3 Hectares out of Land Parcel No. Donyo Sabuk/ Komarock Block 1/18554 to the Applicant within 30 days hereof,
  - b. In default the Deputy Registrar of Machakos High Court to execute all necessary transfer documents to effectuate the registration of 3 Hectares out of Land Parcel No. Donyo Sabuk/ Komarock Block 1/18554 to the Applicant
  - c. KBC Police Station within Komarock Location within Matungulu Division to provide security to the Applicant and his team, and Surveyor to be appointed to excise of 3 Hectares out of land parcel No. Donyo Sabuk/ Komarock Block 1/18554 and to preserve the peace during such enforcement and enforce the certificate of Confirmation of Grant of 28/7/2022.
  - d. The Revocation of Grant Applications of 3/11/2022 & 15/12/2022 are dismissed.
  - e. The outlined/Listed Rulings of the Court remain legal valid and regular orders of this Court until otherwise legally set aside reviewed or appealed against.
  - f) This is a family matter each Party to bear own costs.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 24<sup>TH</sup> JULY 2023 (VIRTUAL/PHYSICAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

IN THE PRESENCE OF:

Mr. Muema - For The Adminstrtors

Noappearance - For The Protestors

Mr. Mutava- For The Interested Party

