



REPUBLIC OF KENYA



**In re Estate of Late Mutuku Mutyambui Ndunda (Deceased) (Succession Cause 4 of 2019) [2023] KEHC 23010 (KLR) (2 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23010 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
SUCCESSION CAUSE 4 OF 2019  
TM MATHEKA, J  
OCTOBER 2, 2023  
FORMERLY MACHAKOS 228 OF 2003  
IN THE MATTER OF THE ESTATE OF LATE  
MUTUKU MUTYAMBUI NDUNDA(DECEASED)**

**RULING**

1. What is before me is the Summons for Revocation of Grant dated 3/10/2022 brought by Esther Mbane Muema, Agatha Mbithe Mutuku, Grace Mumbua Nzomo - against Paul Muteti Mutuku and David Malonza Mutuku the administrators of the Estate of Mutuku Mutyambui Ndunda (Deceased)
2. The applicants describe themselves as daughters in law of Mutuku Mutyambui Ndunda (Deceased) while the Respondents are the Administrators of the estate of the deceased.
3. It is their case that the applicants obtained a grant, and certificate of confirmation of grant for the estate of their father in law through fraud, in secrecy, by making of false statement and concealment from the court of the existence of the applicants, hence the proceeding were defective in substance.
4. Their prayers are grounded in Section 76 a, b, and c, and Section 47, and 66(b) of the [Law of Succession Act](#) and Rules 44, 73 of the P & A Rules. They want the grant made to Paul Muteti Mutuku and David Malonza Mutuku be revoked and all the transfers and subdivisions of the property Nzai/Nziu/22 be revoked, cancelled and the Land Registrar Makueni County be ordered to re-issue a title deed in the name of the deceased hence reinstating the property back to the estate.
5. The Summons is supported by the joint affidavit of the applicants - they deponed that they were married to the sons of the deceased who also are deceased - they annex their certificates of death – they list the beneficiaries of the estate to include their deceased husbands and; Kitulu Mutuku , the two respondents and Mbose Mutuku.
6. That they only learnt of the court process when they heard the respondents bragging that they would evict them from the land.
7. That the deceased had 2 wives Kitulu Mutuku and Mbose Mutuku.



8. That the respondent did not provide for the beneficiaries from both houses.
9. Paul Muteti Mutuku filed a replying affidavit sworn on 23/11/2023. He deponed that the allegations by the applicants were false because he always involved them - that the applicants signed a consent filed on 17/8/2005 - that the court heard all the objections raised and gave its ruling on 8/6/2007 and the amended certificate of grant was registered with the land registry.
10. They depone further that a meeting was held where the applicants agreed to refund some money to the respondents before any survey could be carried out on the land in the execution of the certificate for confirmation of the grant- that the issues raised herein could be resolved amicably - they annexed amended certificate of confirmation of grant dated 3/10/2019; a search certificate showing that Nzai / Nziu/22 is registered in the joint names of Paul Muteti and David Malonza Mutuku on the 4/2/2013 ; a document headed Attendance List - “Ref: Subdivision of Nzai/Nziu/22 16.5 Ha - as per court ruling of 8<sup>th</sup> June, 2007” showing that three persons were to refund the sum of Kshs. 17,200 each to David Malonza ‘being the expenses incurred in this cause’ - the three being Paul Muteti, Esther Muema, Agatha Kioko “before any survey” could take place.
11. David Malonza Mutuku filed his replying affidavit on 8/12/2022 (date of swearing not indicated). He depones that he is not opposed to the applicants inclusion in the schedule of distribution as beneficiaries. That they met as a family and agreed that the members of the family would refund to him some monies and he urged this court to compel them to do so. He annexed the attendance sheet at the area chief’s office.
12. Thereafter parties filed written submissions through their respective counsel.
13. The applicants framed 2 issues;
  - i. Whether the concealment of the applicants as beneficiaries warrants the revocation of the grant.
  - ii. Whether there ought to be cancelation of all the transfers and subdivisions of Nzai/Nziu/22.
14. It is argued for the applicants that by virtue of being widows of the sons of the deceased they are entitled to their deceased’s husband’s shares. They cite *Re Estate of Karuri Magu(deceased)* [2016]eKLR where the court stated

“when it comes to distribution this court is guided by Section 38 of the *Law of Succession Act*; the Section provides that the property be divided equally among the surviving children; the protester represents her deceased’s husbands interests”

And *Re Estate of the late M. Thigai Muchangi (Deceased)* [2020] eKLR where the court recognized a daughter in law as a beneficiary of the estate of her father in law where she has survived her husband who is a son of the deceased father in law. The court relied on Karuri above.
15. Counsel further argued on the point of non-disclosure of the fact that the applicants were beneficiaries of the estate - and that the respondents throughout the petition , never mentioned them. The applicant cites *Re Estates of Moses Wachira Kimotho* on the requirement for disclosure. It is argued that sufficient ground has been laid for revocation of the grant.



16. On the second issue - It is argued that upon revocation of the grant all actions that may have proceeded there from will be rendered null and void. For this the applicant relies on *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169 & 1172 where Lord Denning is said to have stated;
- “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
17. On these arguments the applicants argue that the court has jurisdiction to revoke the transactions made under the grant - see *Munyasya Mulili & 3 others vs Sammy Muteti Mulili* [2017] eKLR -to the effect that the succession court has the jurisdictions to revoke title as it has inherent power to make orders for the expediency of, and the ends of justice as provided for under Section 47 of the *Law of Succession Act* and Rule 73 of the P&A Rules.
18. The Respondents filed separate submissions - but with similar issues;
- i. Whether the grant issued to them can be revoked –
  - ii. Whether it should be revoked
  - iii. Whether the 2<sup>nd</sup> respondent is entitled to any refund
19. It is argued by the 1<sup>st</sup> respondent that a certificate of confirmation of grant cannot be revoked and for that proposition the 1<sup>st</sup> respondent cites in *Re Estate of Joel Cheruiyot Ronoh* [2016]eKLR where the court drew a difference between the certificate of confirmation of grant and a grant of representation stating that the certificate of confirmation of grant is an extracted order. That no purpose would be served by the revocation of a certificate of confirmation of grant. In addition he cites in *Re Estate of Kiberege Mukwa (deceased)* [2021] eKLR where the court took the same position – that the invitation to court to revoke - a certificate of confirmation of grant while leaving the orders upon which it was issued in tact is an exercise of futility, a wastage of the courts time effort.
20. On whether the grant should be revoked or not - it is contended that the 1<sup>st</sup> respondent involved all the parties in the proceedings. That the grant would only be revoked in accordance with Section 76 of the *Law of Succession Act* as discussed in *the matter of the Estate of L.A.K (deceased)* [2014] eKLR. It was urged that since the parties had not prayed for this order, the court should be guided by the principle that parties are bound by their pleadings and not issue the order.
21. On the issue of a refund to 2<sup>nd</sup> respondent - it is argued that neither the 1<sup>st</sup> respondent nor the applicants agreed to pay any money to the 2<sup>nd</sup> respondent - neither did they attend any meeting with respect to that. The court was urged to find that he was not entitled to any refund as claimed.
22. The 2<sup>nd</sup> respondent relied on *Re Estate of Prisca Ong'ayo Nande (deceased)* [2020] eKLR and concedes that indeed there was inadvertent concealment of material facts in that the applicants' beneficial right to the estate of Mutuku Mutyambui had not been disclosed. He urges the court to revoke the grant issued on 8/6/2007 – and issue the grant that is in tandem with the surveyor's findings.
23. On the issue of the refund he submitted that he incurred expenses of Kshs. 51,600 in this petition. That this amount was to be refunded before the subdivision of the estate and that there was an agreement witnessed by the Snr. Assistant Chief Nziu



24. I have carefully considered the affidavits, the submissions and the record. The issue is whether the application has any merit.
25. It is on record that on the 8<sup>th</sup> July 2007, the Hon Lady Justice R. N Sitati delivered a ruling whereby the Summons for Confirmation of Grant filed on 17<sup>th</sup> August 2005 was allowed.
26. In it the 2<sup>nd</sup> respondent proposed that the estate of the deceased be Nzau/nziu/22 distributed in equal portions of 8.25HA between himself and the 1<sup>st</sup> respondent, and that the meadow be subdivided equally among the two families as per the annexed schedule.
27. A certificate of confirmation of grant was issued on 30<sup>th</sup> February 2009 in Machakos Succession Cause 228 of 2003 by Lenaola J (as he then was) which simply states that the property Nzau/Nziu/22 be shared equally between the administrators, and that the meadow be shared equally among the two families.
28. This certificate of confirmation of grant appears to have been amended as there is a document given on 24<sup>th</sup> September 2019 by H.I Ong'udi J where the estate is distributed between the two administrators for the land to be shared equally among the two families in portions of 8.25HA, and the meadow, in equal shares.
29. The two administrators's had the property registered in their joint names on 4<sup>th</sup> February 2013.
30. There is no indication in the said document of title to show that the property is being held in trust for anyone. Neither is it indicated that it is to be shared among all the beneficiaries of the estate of the deceased. All it shows is that the two administrators are the absolute proprietors of the property LR Nzau/Nziu/22.
31. On the issue of refund of money to the 2<sup>nd</sup> respondent he alleges are expense incurred in this matter, that issue was not raised with the court and it is not in Justice Sitati's Ruling. The administrator cannot make that determination of what he thinks he is owed and hold it against the beneficiaries of the estate. If indeed he was owed by the beneficiaries a debt as against the estate the right thing would have been to raise it at the hearing so that the beneficiaries would have the opportunity to be heard as well and the issue determined. As it is the debt is denied by the beneficiaries and until it is proved against them or they agree to it, it cannot be the reason not to complete the distribution of the estate.
32. On the other issue it is conceded by the respondents each in his own way that the applicants are not named in the certificate of confirmation of grant and that they are entitled to their share of the estate. It is not in dispute that the estate ought to have been shared among all the beneficiaries from each house. It is not enough to merely involve the beneficiaries in the proceedings. The ultimate purpose of these proceedings is the distribution of the estate to the beneficiaries who are beneficially entitled to the estate.
33. S. 76 of the [Law of Succession Act](#) States provides for the revocation or annulment of grant; that 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;



34. I am aware of the alluded distinction between a certificate of confirmation of grant and the grant and I am not in doubt that the applicants seek the revocation of the grant of representation as confirmed. From the foregoing it is evident that at the confirmation the administrators informed the court that the estate would be shared equally between the two houses of the deceased and among the beneficiaries in each house. However, they registered the land in their two names as absolute proprietors. If that was their intention, then they misled the court into believing that they intended to distribute the estate to the beneficiaries. That grant was obtained by the making of false statements and concealing from court the true nature of their intentions and to that end the grant must be revoked.
35. The summons for revocation of the grant is allowed.
- a. In the circumstances the grant issued to the respondents and confirmed thereafter be and is hereby revoked and the certificate of confirmation of grant is set aside.
  - b. The registration of the estate Nzai/Nzi/22 in the names of the respondents and any transactions pursuant to that registration be and are hereby revoked and the Land Registrar is directed to cancel the registration and revert the title to the name of the deceased.
  - c. The Estate be shared equally between the two houses of the deceased.
  - d. Each administrator represents one of the houses. To ensure equitable distribution of the estate, either each of the administrators or the applicants to file in court the list of the beneficiaries from each of the two houses within 21 days hereof.
  - e. For the beneficiaries who are deceased, the list should indicate not only their widows but their children as well and whether or not the children are minors.
36. Each party to bear its own costs.

**DATED SIGNED AND DELIVERED VIA EMAIL THIS 2<sup>ND</sup> DAY OF OCTOBER 2023**

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**MUMBUA T. MATHEKA**

**JUDGE**

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