



REPUBLIC OF KENYA



**In re Estate of Daniel Musau Nzyoka (Deceased) (Probate & Administration
443 of 2017) [2024] KEHC 17188 (KLR) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 17188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
PROBATE & ADMINISTRATION 443 OF 2017**

TM MATHEKA, J

NOVEMBER 19, 2024

FORMERLY MOMBASA HC. SUCC. CAUSE NO.385 OF 2011

IN THE MATTER OF THE ESTATE OF DANIEL MUSAU NZYOKA (DECEASED)

BETWEEN

LUCA KYALO MUSAU PETITIONER

AND

JOYCE TOM 1ST OBJECTOR

MUSAU MUTUKU 2ND OBJECTOR

RULING

1. Before me is the Summons for Revocation of Grant dated 10/08/2023 brought under section 76 of the Laws of Succession Act and Rule 44 of the Probate and Administration Rules – It seeks:-
2. That the Amended Grant of Letters of Administration Intestate made to one Lucas Kyalo Musau on the 27th day of September 2021 be revoked.
3. That the Rectified Certificate of Confirmation of Grant made to one Lucas Kyalo Musau and the resultant title deed to Land Parcel Nzau/Kalamba/80 be cancelled and/or revoked.
4. That this Honourable Court be pleased to appoint Lucas Kyalo Musau, Joyce Mueni Tom and Walter Simon as the Administrators of the Deceased Estate.
5. That this Honourable Court be please to confirm the grant issued on (c) above in the following terms and do issue a Certificate of Confirmation of Grant over Land Parcel Nzau/Kalamba/80 as follows:-
6. Lucas Kyalo Musau – to get 9.38 acres
7. Joyce Mueni Tom – to get 9.38 acres



8. Walter Simon Mutuku & Musau Mutuku – to get 9.38 acres jointly
9. Nancy Matumu & Josephine Mumbua Muoki – to get 9.38 acres jointly.
10. Munywoki Mavi – to get 1 acre.
11. That the costs of this application be in the cause
12. The summons is supported by the joint affidavit of applicant Joyce Mueni and Walter Simon sworn on 10/8/2023. They depone inter alia that:
13. Lucas Kyalo Musau who is also a beneficiary of the deceased estate was appointed as the Administrator of the Estate on the 23/5/2012 which Grant was Amended on the 27/09/2021
14. The Administrator filed the petition for Letters of Administration Intestate on 30/09/2011 in respect of this cause without informing all the beneficiaries of the deceased nor obtaining their consent hence concealing some material facts necessary towards the Estate of the deceased.
15. The Grant of Letters of Administration and its subsequent amendment to remove the name of Titus Kyumwa Musau was done secretly with non-disclosure of vital material facts towards the estate of the deceased.
16. The petition of Letters of Administration Intestate as filed by the petitioner/Respondent does not disclose all the beneficiaries of the Estate nor does it disclose liabilities of the estate of the deceased.
17. The aforesaid Lucas Kyalo Musau made an application for the Confirmation of Grant where he left out the beneficiaries of the deceased estate on the mode of distribution adopted by the court.
18. The mode of distribution proposed by the petitioner/respondent and as adopted by the court on the 27th September 2021 was and/or is unfair and not in accordance with the wishes of the deceased family to have the shares of each beneficiary registered in their names. Instead the petitioner/respondent holds the whole land parcel Nzau/Kalamba/80 in trust for all the other beneficiaries.
19. The mode of distribution is unfair and strange to the objectors/applicants herein since it is not clear on the shares of each beneficiary.
20. The beneficiaries of the deceased realized that the petitioner/respondent transmitted the title of land parcel Nzau/Kalamba/80 into his name which fact the Administrator did not disclose to the other beneficiaries of the estate.
21. Initially the petitioner/administrator had filed a proposed mode of distribution which seemed fair through Kanui and Company advocates sometimes on the 14th June, 2018 which mode he abandoned.
22. Administrator/respondent has threatened to disinherit some of the beneficiaries for their rightful shares of the estate and infact taken some of the purchasers of the estate of the deceased to court vide Makueni ELC case No. E018 of 2023.
23. The summons for the confirmation of grant by the petitioner/respondent was made in bad faith, fraudulent in nature and meant to disinherit some beneficiaries of their shares of the estate.
24. What is deponed to hereinabove is true to the best of our knowledge, information and belief save where the sources of such information have been disclosed.
25. It is noteworthy that in the application filed on 14/6/2018 the respondent had made the following proposal –



Name Relation to the Deceased

Elizabeth Mulondu Musau Wife Deceased Titus Kyumwa Musau Son Deceased Joseph Mutuku Musau Son Deceased Tom Nzioka Musau Son Deceased

Lucas Kyalo Musau Son

Titus Kyumwa Musau is survived by his daughter Nancy Matumu Tom Nzioka Musau is survived by his wife Joyce Mueni Tom

Joseph Mutuku Musau is survived by his sons Walter Simon Mutuku and Mutuku

The identification and shares of all persons beneficially entitled to the said estate have been ascertained and determined as follows and as in the annexed schedule of distribution.

Item Description of Property Respective Entitlement

Nancy Matumu to hold 9.38 acres in trust for the Estate of the late Titus Kyumwa Musau Joyce Mueni Tom to hold 9.38 acres in trust for herself and the Estate of the late Tom Nzioka Musau. Walter Simon Mutuku and Musau Mutuku to hold for Nzaii/kalamba/80 16.0 hectares themselves 9.38 acres in equal shares respectively. Lucas Kyalo Musau to hold 9.38 acres for himself absolutely. 1 acre to Munywoki Mavi – absolutely 1 acre to be sold by the Estate to defray expenses in administration of the Estate at Kenya Shillings 250,000/= and the balance from the sale to be shared equally amongst the beneficiaries to the estate.

The summons is opposed through the affidavit of the petitioner sworn on 11/10/2023

The Petitioner/Respondent depones inter alia:-

That the Petitioner is the Legal Representative of and Administrator of the Estate of his late father Daniel Musau Nzyoka.

That their father has four children namely, Titus Kyumwa Musau (deceased) Joseph Mutuku Musau (deceased) Thomas Nzioka Musau (deceased), Hannah Mwikali Musau and himself.

That the 1st objector is the wife of his late brother – Thomas Nzioka Musau.

That the 2nd objector is a son to his late brother – Joseph Mutuku Musau.

That after the death of his father in 1994, his late brother Titus Kyumwa Musau, he initiated the succession of their Father's Estate but unfortunately his brother passed on before the grant of representation was granted.

That in the process of the succession, his late brother, Titus Kyumwa Musau, intermeddled with the estate of his late father by selling parcels of the estate land parcel No. NZAU/KALAMBA/80.

That the 1st objector and the 2nd objectors have also intermeddled with the estate of his deceased father.

That the 1st objector has sold a portion of parcel No. NZAUI/KALAMBA/80 to Muthini Kitili,

Kyumwa Kitili and Bonface Katoloki, while the 2nd objector has sold to Bonface Katoloki, Sammy Muoki and Muunda Ngeli before the confirmation of the grant of representation was confirmed.



That on 29th July 2019, he was issued with written grant of representation to the estate of his father.

That he is in the process of subdividing the estate of his late father as per the court direction but there are trespassers in the land.

That in order to complete the succession process as directed by court, he filed a civil suit No. E018/2023 in order to evict the trespassers who illegally and unlawfully conspired with the objectors to occupy the estate of his late father.

14. That this application by the two objectors is a waste of courts time as it meant to delay and eventually scuttle the ongoing civil suit No. E018/2023 by the objectors acting at the behest of the trespassers living in the estate of his late father.
15. He deposes that he involved the objectors and got the consent in the distribution of and the confirmation of the grant.
16. He relied on the ruling of H. I Ong'udi J. delivered on 29/7/2019 where the Judge stated:-

Para 5: The record shows that the court has given the objectors sufficient time to file their proposed mode of distribution or an affidavit of protest. This is since February 2018.

Para 8: I have considered the summons for confirmation of grant plus the supporting affidavit and the submissions by counsel for the petitioner. His proposal is for even distribution of the estate among the beneficiaries less the liabilities which are clearly set out. It is obvious that in the process of administration, filing of pleadings, searches, the administrator has incurred expenses which must be reimbursed from the deceased's estate. There is nothing unlawful about that.

Para 9: I therefore allow the application and order that a fresh grant do issue in the names of Lucas Kyalo Musau as the administrator. The said grant is hereby confirmed in the following terms:

1. The land Nzau/kalamba/80 measuring 39.52 acres to be distributed as follows:-

One acre to Munywoki Mavi

One acre to be sold to defray legal costs of Kshs.253,000/= . Any balance out of the sale to be shared out equally among the four (4) beneficiaries.

Nancy Mutumu to hold 9.38 acres in trust for the estate of the late Titus Kyumwa Musau.

Joyce Mueni Tom to hold 9.38 acres in trust for herself and the estate of the late Tom Nzioka Musau.

Walter Simon Mutuku and Musau Mutuku to hold for themselves 9.38 acres in equal shares respectively.

Lucas Kyalo Musau to hold 9.38 acres for himself absolutely.



17. He has annexed the certificate of confirmation made on 5/10/2019. He concedes that he as the legal representative of the estate of the deceased holds the estate for himself and for all the beneficiaries after the court distributed the estate equally and fairly among the beneficiaries.

18. He depones further that:

That in reply to paragraph 9 the objectors proposed mode of distribution is the same to what I proposed on 11th July 2019 but which they did not attend as explained above. The only difference is part (d) in which the names of Mumbua Muoki is added. Mumbua Muoki is a wife to my late brother Titus Kyumwa Musau while Nancy Mutumu is their daughter. Therefore, Mumbua Muoki share falls in the estate of Titus Kyumwa Musau.

19. He also depones;

That in reply to prayer (a) and (b), the rectified certificate of confirmation of grant was properly rectified by a competent court and should not be revoked. The objectors have not furnished this court with a reason to revoke the title too. The objectors were served with a notice to appear in court for rectification but chose to ignore

That am advised by my advocate on record which advice I believe to be true that I do not flout any of the provisions of section 76 of the Laws of Succession Act for the grant to be annulled.

That in reply to prayer (c), am advised by my advocate on record which advice I believe to be true that in order of priority or degree in appointment of administrators of the estate of my late father. I rank higher than the objectors as stipulated in section 66 of the *Law of Succession Act*.

That unless the court intervenes dismisses the objectors application, the process of administration of the deceased will be unnecessary delayed.

1. The matter went through Viva voce hearing.
2. The objectors called one witness Walter Simon Mutuku. His position was that this court has pronounced itself (Ong’udi J) and it was upon the Petitioner/ Administrator respondent to comply. He confirmed that the objector’s proposal on distribution was not different from that made by the respondent dave that the respondent had transferred the whole land to his name. He argued that the Judgment by the Judge did not allow for the Respondent to hold the land in trust for anyone, each person family was to get its 9.38 acres.
3. In his testimony the Petitioner respondent told the court that he was now ready to distribute the estate the way the court had said. He claimed that he went to the ELC court to throw out persons who were claiming to be buyers and intended to deal with them first. His claim was that it was those trespassers who had pushed the beneficiaries to seek to have his grant revoked.
4. Parties filed written submissions.
5. The objectors dated 13th May 2024 by CM Muthiani & Co advocates argued that the administrator obtained a rectified grant that went against the provisions of the law on rectification of grants and against the Ruling of this



court on the mode of distribution. That he cancelled the whole distribution and had the estate registered in his sole name to hold in trust for the other beneficiaries, and removed some other beneficiaries.

6. The court was urged to revoke the grant and cancel the title deed in his name and restore it in the name of the deceased to enable the distribution that was confirmed by this court.
7. On his part the of the Petitioner , the submissions were filed on 11th June 2024 by the firm of Kaveke Mwanja & Co Advocates.
8. The Petitioner argues that as the legal representative the estate of the deceased devolved to him as the personal representative of the deceased
9. He argues that the objectors were given the opportunity to file documents in the matter before the Ruling of Ong'udi J and they failed hence they cannot come back to this court to seek the same orders.
10. I have carefully considered the summons , the rival affidavits , the evidence . given in court, the submissions by each party. It is evident that the only issue for determination is whether the title deed held by the petitioner over the estate ought to be cancelled.
11. I say so because as to whether the objectors can become administrators, there is a ruling of this court on the record.
12. As to the distribution of the estate, this court has already pronounced itself, and all the parties are in agreement with that distribution, save that the rectified grant obtained by the administrator left out some names. In obtaining the rectified grant the petition was not completely truthful. In addition, since obtaining the grant in 2019, he went for the rectified grant in 2021. Why the delay?
 13. I do agree with the Petitioner that as the legal representative of the estate he exercises certain powers, however he cannot do so contrary to the law and court directions. In the court's order of 29th July 2019 the court had made provisions for the liabilities of the estate
 14. An order of confirmation of grant cannot be set aside through rectification of the grant. There must be a substantive application for review. The law on rectification is found at s. 74 of the LOSA and Rule 43 of the P&A Rules. s 74. ;
 74. Errors may be rectified by court Errors in names and descriptions, or in setting out the time and place of the deceased's death, or



the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.

1. See Estate of Makokha Nyilisi Musa (deceased) [2020]eKLR

20. The administrator actually misled the court to issue the rectified grant and that he concealed the changes he had intended to make. That why I find that from the foregoing it is clear to me that upon appointment as the administrator the Petitioner did not carry out his duties in accordance with the orders of the court but proceeded to act contrary to those orders of 29th July 2019.
21. The grant that was obtained changed the distribution of the estate and in my view it was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case, and 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,;
22. This is because despite the fact that the Petitioner stated that the purpose was for purposes of distribution, he changed the beneficiaries something he never told the court. He also began other things that he never told the court then, filing other suits, pursuing alleged trespassers yet the ruling of 29th July 2019 had given clear directions on what was to happen. With respect to the alleged buyers.
23. The rectified grant made to Lucan Kyalo Musau be and is hereby revoked.
24. The title deed issued to the Lucas Kyalo Musau with respect to Nzai/Kalamba/80 be and is hereby cancelled to revert to the name of the deceased Daniel Musau Nzioka.
25. A fresh grant to issue to the Lucas Kyalo Musau to carry out the orders of this court of 29th July 2019 within 6 months hereof.
26. Ultimately I find that the Objection has merit and only allow it in the terms set out herein above.:
27. Each party to bear its own costs

DATED, SIGNED AND DELIVERED, VIRTUALLY ,ON 19TH NOVEMBER 2024

MUMBUA T MATHEKA

JUDGE

Ms Nelima /Ms Elizabeth Court Assistants Kaveke Mwanja & Co for the Petitioner N/A

C M Muthiani & Co Advocates for the Objectors

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

