



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO.499 OF 2007

IN THE MATTER OF THE ESTATE OF RICHARD MBUI NDAVI (DECEASED)

JOHN MUTEI MBUI1ST PETITIONER

JOHNBOSCO NGILA MBUI2ND PETITIONER

VERSUS

TERESIA MWIKALI MWENGI1ST OBJECTOR

FINBAR MUASYA MBUI.....2ND OBJECTOR

SUSAN MUMBUA KILONZO3RD OBJECTOR

AND

JAMES KIILU1ST INTERESTED PARTY

VICTORIA MUENI MUTUA2ND INTERESTED PARTY

PETER KYALO MUTHINI3RD INTERESTED PARTY

WILLIAM MUSYOKI KANUSU4TH INTERESTED PARTY

RULING

1. The Objectors and interested parties filed an application dated 20/09/2018 under section 76 of the Law of Succession Act and Rule 44 and 49 of the Probate and Administration Rules seeking the following reliefs namely:-

(1) *Spent*

(2) *That this Honourable Court be pleased to grant an order directing the Kithimani Senior Principal Magistrate's Court to forthwith stay all proceedings, hearings, mentions, issuing of orders or in any other way proceeding with the hearing in Kithimani ELC No. 1 of 2018 – John Mbui & Another –vs- James Kiilu & Another pending the hearing and determination of the application.*

(3) *That upon hearing this application exparte, this Honourable Court be pleased to enjoin James Kiilu, Victoria Mueni, Peter Muthini and William Musyoka Kanusu as interested parties in this application.*

(4) *That an order of temporary injunction be issued restraining the petitioners whether by themselves, their agents from possessing, trespassing, transferring, wasting, ploughing, cultivating, digging trenches, excavating soil, depositing any foreign materials, demolishing the physical structures, cutting down natural and artificial trees and coffee plantation, harassing the objectors and the interested parties or in any other way from interfering with their shares of property L.R Mbiuni/Kabaa/364 pending the hearing and determination of the application.*

(5) *That the Grant of letters of Administration together with the certificate of confirmation of Grant to the estate of Richard Mbui Ndavi (deceased) confirmed and issued on 2/05/2013 to the Petitioners be annulled and/or revoked.*

(6) *That the title number Mbiuni/Kabaa/364 jointly registered in the names of the petitioners was obtained fraudulently through concealment of material facts and should be nullified and/or revoked.*

(7) *That the costs of the application be in the cause.*

2. The application is supported by the grounds set out in the body of the application and by the affidavit of the 3rd objector Susan Mumbua Kilonzo. She deponed inter alia: that the deceased had ten (10) children one of whom was husband to the 3rd Objector; that the grant was obtained fraudulently by the petitioners who failed to include all the beneficiaries and dependants to the estate; that the deceased prior to his demise had subdivided the suit property **Mbiuni/Kabaa/364** among all dependants including the petitioners and processed a mutation form; that some of the beneficiaries including the petitioners have already disposed of part of their shares to third parties and annexed copies of sale agreements and that the third parties who are actually the interested parties herein ought to get their rightful shares of the property they had purchased for value; that the schedule of distribution presented by the petitioners during the confirmation of grant is skewed as the suit property has been registered in the sole names of the petitioners; that the objectors and biological children of the deceased did not consent to the petitioners being appointed as administrators or even agree to the confirmation of grant; that the petitioners have filed an ELC case at Kithimani court being ELC No. 1 of 2018 seeking eviction of the interested parties from land parcel **Mbiuni/Kabaa/364**; that the objectors and interested parties are entitled to their share of land and hence the need for conservatory orders to preserve the status quo and for the revocation/annulment of the grant issued to the petitioners.

3. The application was strenuously opposed by the petitioners vide a replying affidavit of the 1st petitioner John Mutei Mbui sworn on 4/10/2018 who raised several issues inter alia; that the 3rd objector herein Susan Mumbua Kilonzo was not married by Oscar Mulonzi Mbui (deceased) under any law whether customary or otherwise since the said Oscar Mulonzi was married to one Mueni Oscar Mulonzi and had two children with her namely Angelina Muka Mwiu Mulonzi and Mbui Mulonzi; that that the succession cause was filed with the consent of all the beneficiaries of the estate of the deceased as per the family resolution dated 30/03/2001; that the beneficiaries consented to the confirmation of grant wherein the petitioners are to hold the property in trust; that the deceased did not sub-divide his property among his dependants prior to his death since the properties are still registered in his name save for **Mbiuni/Kabaa/364** which was changed via transmission following the confirmation of grant; that none of the deceased's children have raised any objection to the filing of the succession cause and that the 3rd objector is a stranger to estate; that the **ELC No. 1 of 2018 at Kithimani** has been filed in order to protect the estate from intermeddlers; that the title to **L.R Mbiuni/Kabaa/364** is in the names of the petitioners as trustees and will be sub-divided among the beneficiaries at a later date; that parcel Mbiuni/Kabaa/364 has not been sold by any of the beneficiaries as alleged by the 3rd objector.

4. The 2nd objector **Finbar Muaysa Mbui** swore an affidavit dated 4/10/2018 in which he distanced

himself from the assertions of the 3rd objector and denied having authorized her or any advocate to swear an affidavit on his behalf. He averred that he has no issue with the petitioners who are his brothers and the manner in which they are administering the estate. He maintained that the 3rd objector is not a beneficiary of the estate as she is a stranger. He finally sought to have his name struck out/expunged as an objector from the proceedings.

5. Parties agreed to canvass the application vide viva voce evidence.

6. **Susan Mumbua Kilonzo (OB. W1)** is the 3rd objector herein and who testified that the deceased herein was her father in-law as she had been married by one of the deceased's son Oscar Kilonzo Mbui. She averred that her parents were duly paid dowry in accordance with Kamba customs. She added the marriage took place on 16/05/1984 and that she and her husband set up their rural home on the family land parcel **Mbiuni/Kabaa/364**. She testified that her husband who worked as a senior driver with the Ministry of Agriculture died in a road accident on 5/11/2005. She further stated that she is a beneficiary of her late husband's benefits as she currently receives her husband's pension dues. She produced chief's letter, mortuary receipt, burial permit, certificate of death as well as pension documents as exhibits.

On cross – examination, she stated that she has not obtained letters of grant in the estate of her deceased husband and that she had no children with her late husband. She also confirmed that she had sold a portion of land belonging to her and her late husband to third parties.

7. **Dominic Ndambuki (OB.W2)** testified that the 3rd objector herein had been married by the late Oscar Kilonzo Mbui who was a son to the deceased. He confirmed having accompanied the said Oscar Kilonzo Mbui to the parents of the 3rd objector where dowry was paid in the form of five goats one of which was slaughtered and eaten and that some money was paid to the 3rd objector's parents.

8. **James Muinde Kiilu (PB.W3)** who is the first interested party testified that he had entered into a sale agreement with the 3rd objector where he bought ¼ acre parcel comprised in **Mbiuni/Kabaa/364**. On cross – examination, he stated that each of the deceased's children have their respective portions where they have built homes including the 3rd Objector and her late husband Oscar Kilonzo Mbui. He also confirmed that the land has not been sub-divided and that the 3rd objector has been locked out in the succession proceedings. He finally confirmed that the sale transaction was witnessed by the petitioners. The 3rd objector closed her case. As the 1st and 2nd objectors had disowned the 3rd objector and opted not to proceed in the proceedings, they were deemed to have abandoned their cases.

9. **John Mutei Mbui (Pet Wit.1)** is the 1st Petitioner herein. He testified that the deceased who was his father died on 24/10/1981 and had 13 children six of whom have died leaving six sons and one daughter. He stated that the deceased had three assets namely **Mbiuni/kabaa/364, Athi River/5764 and Drumvale Farm No. 381**. He stated that the family held a meeting in 2001 whereby the two of them were mandated to take up letters of grant of administration. He produced the said family meeting deliberations dated 30/01/2001 as an exhibit. He stated that he and the 2nd petitioner obtained a grant which was later confirmed and that parcel **No. Mbiuni/Kabaa/364** is registered in their joint names and are yet to subdivide the land though the family members reside on their respective portions. He averred that his late brother Oscar Kilonzo had married one Mueni Kilonzo from Kivaa and had one daughter. He stated that he does not know the 3rd objector who is a stranger even though she used to cohabit with his late brother Oscar Kilonzo and that the family has not given her permission to sell the family land prompting them to file a civil case at Kithimani court which is pending determination.

On cross-examination, he confirmed that the petition has left out the late Oscar Kilonzo Mbui. He maintained that the 3rd objector is married to one Makau and not his late brother Oscar Kilonzo Mbui but he agreed that he has not availed the marriage certificate between the 3rd objector and the said Makau. He also agreed that nobody had authority to sell the family land.

10. **John Bosco Ngila (Pet.PW.2)** is the second Petitioner. He maintained that the 3rd objector was an on

and off lover to the late Oscar Kilonzo who had his legitimate wife called Mueni who has a child. He added that the 3rd objector has brought purchasers onto the land culminating in a case being filed at Kithimani Law courts.

On cross –examination, he confirmed that there is no authority from any family member to sell land and went on to deny ever signing any sale agreement. He maintained that the 3rd objector was just a girlfriend to the late Oscar Kilonzo whose remains are buried on his portion of land within plot **Mbiuni/Kabaa/364**. He admitted that the name of Oscar Kilonzo is not in the list of beneficiaries. On re-examination, he stated that they are only holding the title in trust and yet to distribute the asset to beneficiaries and further confirmed that they will cater for the legitimate heirs for the late Oscar Kilonzo.

11. **Malitina Katuku Mbui (Pet.W3)** testified that she is the first born child of the deceased. She stated that she use to see the 3rd Objector accompanying the late Oscar Kilonzo but as far as she is concerned she is a stranger since the late Oscar Kilonzo had a wife by the name of Mueni. She averred that the 3rd objector has since sold the family land yet the deceased had forbade anyone from selling it. on cross – examination, she stated that she was just a lover to the late Oscar Kilonzo and also went ahead to confirm that the 3rd Objector currently occupies a house erected by the late Oscar Kilonzo Mbui and that the petitioners were given authority by the family to take out letters of grant.

12. Parties filed written submissions. Petitioners Counsel’s submissions are dated 18/11/2020 while those of the 3rd objector and interested parties counsel are dated 16.7.2020. Learned counsel for the 3rd Objector and interested parties raised two issues for determination; firstly, whether the confirmed grant of letters of administration had been obtained fraudulently and should therefore be revoked and/or annulled and secondly, whether the property **L.R Mbiuni/Kabaa/364** jointly registered in the names of the petitioners was obtained fraudulently through concealment of material facts and ought to be nullified or revoked.

On the first issue, it was submitted that the petitioners did not file the requisite consent of all beneficiaries when they lodged the petition for letters of grant and that the 3rd objector being the wife of the late Oscar Kilonzo Mbui ought to have been listed as one of the beneficiaries and likewise the wife of the late Francis Mweni. It was also submitted that the 3rd objector established that she was lawfully married to the late Oscar Kilonzo under Kamba customs as the requisite ceremonies were performed namely the “*Ntheo*”. Reliance was placed in the case of **Munyao Ndolo –vs- Mary Mutuku Mutisya [2018] eKLR**. It was further submitted that the evidence of Dominic Kithuku Ndambuki (OB.W2) clearly confirmed the performance of the said traditional ceremony and that the Petitioners failed to prove the existence of another wife to the said Oscar Kilonzo. It was submitted that the 3rd objector’s evidence and documents produced left no doubt that indeed she is the wife of the late Oscar Kilonzo and hence the failure to list her as a beneficiary on behalf of her late husband by the petitioners amounted to concealment of material facts thereby warranting an order of revocation of grant pursuant to section 76 of the Law of Succession Act.

As regards the second issue, counsel sought reliance under section 47 of the Law of Succession Act and urged the court to revoke the title deed on **L.R Mbiuni/Kabaa/364** which is in names of the petitioners and revert it to the name of the deceased so as to protect the interests of all beneficiaries.

13. Learned counsel for the petitioners submitted that the objectors and interested parties application seeking revocation of grant should be dismissed for several reasons *inter alia*:- that the 3rd objector has not availed evidence that she has authority to act on behalf of the other objectors and interested parties; that the 3rd objector has not proved that she is married to the late Oscar Kilonzo Mbui and further does not have letters of grant of representation regarding the estate of her late husband; that the objectors have not availed proof of fraud on the part of the petitioners; that the conduct of the 3rd objector and interested parties in purporting to sell part of the deceased’s land amounts to intermeddling and as such this court should not grant orders to intermeddlers but to proceed to dismiss the application with costs.

14. I have given due consideration to the evidence presented by the petitioners and the 3rd objector together with their witnesses. I have also considered the submissions of the learned counsels. It is not in dispute that a grant of letters of administration intestate was issued to the petitioners and which has since been confirmed. It is also not in dispute that the only free property of the deceased is **L.R Mbiuni/Kabaa/364**. It is also not in dispute that the said property has since been registered in the names of the petitioners as proprietors absolutely. It is also not in dispute that the petitioners have since lodged **ELC No. 1 of 2018 at Kithimani Law Courts** against some of the interested parties who have been labelled as intermeddlers. That being the position, I find the following issues necessary for determination namely:

(i) Whether the 3rd objector has authority to act for the 1st, 2nd objectors and the interested parties.

(ii) Whether the 3rd objectors is wife to Oscar Kilonzo Mbui (deceased) hence a beneficiary of the estate of the deceased herein.

(iii) Whether the petitioners acquisition of title to L.R No. Mbiuni/Kabaa/364 as absolute proprietors pursuant to the confirmed grant was proper.

(iv) Whether the interested parties should be enjoined into this cause and whether an order of injunction should be issued against the petitioners from interfering with parcel No. Mbiuni/Kabaa/364 pending determination of Kithimani Law Courts ELC No. 1 of 2018.

(v) Whether this court should order stay of proceedings in Kithimani law courts ELC No.1 of 2018.

(vi) What orders may the court make?

15. As regards the first issue, I note that the 3rd objector claimed to have the authority of the 1st and 2nd objectors as well as the proposed interested parties in filing the protest. However, there is no written authority filed in that regard. Again, the 2nd objector filed an affidavit dated 4/10/2018 wherein he vehemently denied having instructed the 3rd objector to swear an affidavit on his behalf and further went ahead to confirm that he had no problem with the petitioners and sought to have his name struck off from the application. Further, the 3rd objector in her affidavit of protest has not averred that she has authority to swear on behalf of the proposed interested parties none of whom filed affidavits in support of their request to be enjoined as interested parties. It is trite that a party in a proceeding cannot purport to appear, plead and act on behalf of others until he is authorized to do so in writing and the authority filed in such a proceedings. I am satisfied that the said 3rd objector does not have the authority from the rest of the objectors and the proposed interested parties and hence she is deemed to be the only one pursuing the protest while the interest of the other objectors and proposed interested parties has not been presented and articulated before the court. Even though the 1st proposed interested party James Muinde Kiilu testified herein, the said evidence in the absence of an affidavit of protest does not carry any weight whatsoever and does not support their cause.

16. As regards the second issue, it is clear that the 3rd objector is wife to the late Oscar Kilonzo Mbui as the evidence of Dominic Kithuku Ndambuki (OB.W2) confirmed the same. He stated that he was the one who was approached by the late Oscar Kilonzo Mbui to take dowry to the family of the 3rd objector where the Kamba traditional customs were performed such as “*mbui sya ntheo*” which is an essential step in kamba customary law marriage. It was the evidence of the 3rd objector that she and her late husband set up a rural home on plot **Mbiuni/kabaa/364** where the remains of her said husband were interred. She produced receipts of mortuary fees, burial permit, certificate of death, pension documents, chiefs letter which left no doubt that she is wife to the late Oscar Kilonzo Mbui. Again, she produced copies of land sale agreements with third parties in which the 2nd petitioner is indicated as a witness thereby leaving no doubt that she was known to be wife of the late Oscar Kilonzo. The petitioners did not seriously challenge

these documents despite making feeble attempts and claims that the 3rd objector is a stranger to the estate or a girlfriend of their late brother. I am satisfied by the evidence of the 3rd objector and her witnesses that indeed she is wife to the late Oscar Kilonzo Mbui a son of the deceased herein and therefore she is a beneficiary in the estate of the deceased to which these proceedings relate. I am not convinced by the assertions of the petitioners as it is clear that they have known all these years that the 3rd objector is wife to their late brother Oscar Kilonzo but they now want to throw her under the bus for no good reasons at all. In fact one of the petitioners herein was a witness in some sale of land transactions wherein the 3rd objector was disposing part of her later husband's portion of land thus leaving no doubt that they knew her as their sister in law.

17. As regards the third issue, it is noted upon the confirmation of the grant, the petitioners caused themselves to be registered as absolute joint proprietors of **L.R Mbiuni/Kabaa/364**. The 3rd objector now seeks for revocation of the said grant on the ground that the petitioners concealed material facts from the court. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the law of Succession Act as follows:

“Revocation or annulment of grant of representation, whether or not confirmed may at any time be revoked or annulled if the court decides, either at 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)***
- (e) That the grant has become useless and inoperative through subsequent circumstances.”***

The 3rd objector herein appears to raise the following grounds:-

- (i) 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.
- (ii) 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.

Applying the test of law in section 76 of the Law of Succession Act, the 3rd objector has alleged that the petitioners omitted to list all the family members of the deceased such as Oscar Kilonzo Mbui who is her late husband or herself as his widow and further failed to include all the family members with their consent during the conformation of grant. She finally accused the petitioners of causing themselves to be registered as absolute proprietors of the family land **Mbiuni/Kabaa/364** to the exclusion of the other beneficiaries. To decide in her favour, the 3rd objector must satisfy the court on a balance of probabilities the allegations against the petitioners. Indeed, non – disclosure of material facts to the succession court by the petitioners is the main accusation laid against them by the 3rd objector. I have perused the petition for grant forms and note that the names of the dependants does not contain the name of Oscar Kilonzo Mbui or his widow (3rd objector). The petitioners vide their replying affidavit annexed a list of family members who included Oscar Kilonzo Mbui authorizing the petitioners to file for letters of grant and it seems the petition was lodged in 2007 while the said Oscar Kilonzo is said to have died in 2005. Not only was that an anomaly, it is noted that during the confirmation of grant, the 3rd objector was not

included as a beneficiary, representing the estate of her late husband and further her consent was not sought. One of the daughters of the deceased testified that she and her sisters did not intend to claim anything from the estate of the deceased. The 3rd objector having been established in paragraph 16 above as a beneficiary ought to have been involved in the confirmation of grant proceedings.

Finally, the 3rd objector has accused the petitioners of causing themselves to be registered as absolute proprietors of parcel **Mbiuni/Kabaa/364** yet they claim vide paragraph 26 of their replying affidavit that the land has been registered in their names as trustees of other beneficiaries and at a later date the propriety will be sub-divided and shared out among them. If that was the case then the petitioners should have stated so during the confirmation so that the same could be captured. In the absence of an order that the property is held in trust, there is high likelihood of alienating some beneficiaries from the estate. Such state of affairs calls for revocation of the confirmation of grant. The power granted under section 76 of the Law of Succession Act for revocation of grant is discretionary. Where a case is made out for revocation of a grant under section 76 the court has the option to either revoke the grant or make other orders as may meet the ends of justice. This cause was filed in 2007. Revoking the grant may set the parties back several years yet the 3rd objector's complaint only relates to the share of her late husband Oscar Kilonzo Mbui. The petitioners have admitted that they hold the title as trustee and will later distribute the property. The issue relates only to distribution of parcel **Mbiuni/Kabaa/364**. The beneficiaries are all adults in their own right and ought to get their shares under the estate. As the share of the 3rd objector has not been catered for then it calls for revocation of the confirmed grant so that the petitioners can file fresh summons for confirmation of grant accompanied by the proper schedule of distribution.

The petitioners have claimed that the 3rd objector should first secure letters of grant for her late husband's estate before being included as a beneficiary. I find such a demand to be in bad faith since she has already established that she is wife to the late Oscar Kilonzo Mbui. The petitioners should not be allowed to engage in double speak because they have listed two widows of late sons of the deceased yet they want the 3rd objector to sweat it out by securing letters of grant. Under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules the court has inherent powers to resort to in order to meet the ends of justice and in this regard I find that the 3rd objector being a wife to the late Oscar Kilonzo Mbui and who has a matrimonial home on the suit land is entitled to be made a dependant under the estate. This thus calls for revocation and or cancellation of the confirmation of grant issued to the petitioners and in the same breath call for revocation and or nullification of the registration of parcel **Mbiuni/Kabaa/364** in the names of the petitioners and in its place the title be restored in the names of the deceased Richard Mbui Ndavi.

18. As regards the fourth issue, it is noted that the proposed interested parties entered into sale transactions with beneficiaries over the property of the deceased before the grant was made and confirmed. This is clearly a violation of the clear provisions of sections 45 and 82 of the Law of Succession Act that decrees the dealing in immovable property of a deceased and makes it criminal for those involved. Clearly the said transactions amounted to intermeddling in the estate of the deceased and such transactions must be deemed as void for all intents and purposes and that the proposed interested parties are not creditors to the estate and ought to pursue their redress elsewhere. Already there is an ELC matter at Kithimani where the said interested parties should agitate their interest and should leave the petitioners herein and beneficiaries to sort themselves out in these proceedings. Hence the proposed interested parties request to be enjoined is without merit and is rejected. Further their request for an injunction over the said ELC case at Kithimani is found to have no merit.

19. On the fifth issue and as noted in paragraph 18 above, the prayer for stay of proceedings in **Kithimani ELC case No.1 of 2018** is found to be misplaced. The administrators of an estate of a deceased person have powers to administer the estate and to sue or be sued in their said capacity. If the petitioners saw it fit to institute a civil suit against certain individuals over estate property then that is perfectly in order and that any person affected thereby such as the proposed interested party is at liberty to present his redress before such a court. Consequently, I find no merit in the prayer for stay of proceedings.

20. As regards the last issue and in view of the foregoing observations the following orders are hereby made:-

- (a) The prayer for joinder of the proposed interested parties in these proceedings lacks merit and is dismissed.*
- (b) The prayer for stay of proceedings in Kithimani ELC No. 1 of 2018 lacks merit and is dismissed.*
- (c) The prayer for injunction against the Petitioners from interfering with parcel No. Mbiuni/Kabaa/364 lacks merit and is dismissed.*
- (d) The certificate of confirmation of grant issued to the petitioners on the 2/05/2013 is hereby cancelled.*
- (e) The petitioners are directed to file fresh summons for confirmation of grant in which the interest of the 3rd objector herein is factored within thirty (30) days from the date hereof.*
- (f) Title No. L.R Mbiuni/Kabaa/364 now in the names of John Mutei Mbui and John Bosco Ngila Mbui be and is hereby cancelled and that the same do revert in the name of the deceased RICHARD MBUI NDAVI.*
- (g) The status quo regarding the occupation of parcel number Mbiuni/Kabaa/364 by the beneficiaries shall be maintained pending the determination of the fresh summons for confirmation of grant.*
- (h) Each party to bear their own costs.*

It is so ordered.

Dated and delivered at **Machakos** this **10th** day of **February 2021**.

D. K. Kemei

Judge