



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

*Coram: . Hon. D. K. Kemei - J*

**SUCCESSION CAUSE NO. 765 OF 2012**

**IN THE MATTER OF THE ESTATE OF MUTUNGI MUOKI MBULA (DECEASED)**

**BIBIANA NZISA KIMONYI.....1<sup>ST</sup> OBJECTOR/APPLICANT**

**MUTINDA KIMONYI.....2<sup>ND</sup> OBJECTOR/APPLICANT**

**-VERSUS-**

**KAVINDU MUTUNGI.....PETITIONER/1<sup>ST</sup> RESPONDENT**

**SARAH MWENI MUTUNGI.....PETITIONER/2<sup>ND</sup> RESPONDENT**

**RULING**

1. The ruling relates to the estate of the late Mutungi Muoki Mbula who died on 14<sup>th</sup> November, 2007 whereupon letters of administration were issued on 8<sup>th</sup> October, 2012 and confirmed on 25<sup>th</sup> January, 2016.
2. The application dated 28<sup>th</sup> July, 2016 sought primarily revocation of the grant that was issued to the petitioners on 8<sup>th</sup> October, 2012 and that a fresh grant be issued in the names of the 1<sup>st</sup> respondent/petitioner and the applicants.
3. The grounds of the application as stated in the joint affidavits of the applicants were that the impugned grant was fraudulently obtained by making false statements firstly that the deceased had 3 wives named Yula Mutungi Muoki, Kavesu Kimonyi (now deceased) and Kavindu Mutungi. Secondly, that the first two wives had children with the deceased namely Paul Kimonyi (now deceased), Bibiana Nzisa Kimonyi, Regina Kanini Kimonyi and Regina Kavini Jeremiah of the first wife and Mutinda Kimonyi, Mbithi Kimonyi, George Kioko Kimonyi, Phoeth Ndila Maneno, Sera Wayua Kimonyi, Lydia Mukonye Kimonyi and Kavenya Muia Mbithi of the second wife. Finally, that the petitioners concealed from court that the wives and children of the deceased survived him and are beneficiaries of his estate and therefore in the result they were disinherited without justification. The deponents lamented that the estate of the deceased was shared amongst the third wife and her children to the exclusion of the other survivors of the deceased but however the confirmed grant is yet to be effected as each of the houses is still in possession of their 1/3 share of land. It was revealed that there were several family meetings, most especially as evidenced by minutes dated 13.8.2011 annexed and marked BNK1 where the estate of the deceased was shared out and this was not disclosed to court by the petitioners who were acting in bad faith. The deponents reiterated that the impugned grant was obtained fraudulently by making of false statements and concealment of material facts.
4. In reply to the application was an affidavit deponed by the 1<sup>st</sup> petitioner/respondent who pointed out that the fact that the deceased had 2 wives before his death was disclosed to court and therefore the impugned grant could not be said to have been obtained fraudulently. The deponent denied that the deceased was called Kimonyi and denied that the 2<sup>nd</sup> objector/applicant was a child of the deceased. It was admitted that the deceased before his death allocated a parcel of land to each of his 2 wives whereupon Yula Mutungi Muoki was allocated a parcel of land at Twaandu Location in Makueni and that the petitioner (sic) was allocated the parcel of land at Masii/Kithangani/531. The deponent took issue with the minutes marked BMK 1 for failing to indicate the parcel of land that was being subdivided. The deponent challenged the locus of the 1<sup>st</sup> applicant to protest grant of letters of administration that were issued to the petitioners as her mother, Yula Mutungi Muoki is alive and has priority to protest. It was revealed that the deponent only petitioned for grant in respect of the Parcel Masii/Kithangani/531 that was given to her by the deceased and therefore it was averred that the applicants' intention was to have the said parcel divided amongst the 3 houses to the disadvantage of the petitioners who are in possession of the land that was given to the 1<sup>st</sup> wife by the deceased.
5. Directions were issued that the application be heard by way of viva voce evidence and hearing commenced in earnest on 27.5.2019 where

the 2<sup>nd</sup> applicant Mutinda Kimonyi testified as the objector's PW1. He sought to adopt his affidavit in support of the application dated 28.7.2016 and told the court that the deceased was his father who had three wives and the second wife was his mother. He stated that each of the wives of the deceased had children and the 3<sup>rd</sup> wife petitioned for grant of letters of administration that omitted his family on the allegations that his family members had disappeared. He averred that the petitioner swore a false affidavit. On cross examination, he stated that his mother's name was Kavesu Kimonyi and his father's name was Mutungi Muoki Mbula alias Kimonyi Muoki Mbula. He admitted that he did not have a marriage certificate and that his mother died in 1986. On reexamination, he revealed that his father's home was in Masii Kithangani and that all the 3 wives lived in Masii with the deceased. He maintained that he was a son of the deceased.

6. The objector's Pw2 was the 1<sup>st</sup> applicant, Bibiana Nzisa Kimonyi who told the court that the deceased was her father and that she resided with her mother Yula Mutungi, the first wife to the deceased. She testified that the 3<sup>rd</sup> wife to the deceased was Kavindu Mutungi and that the deceased had several names being Daniel Mutungi, Kimonyi Mbula or Ali. She lamented that the petitioners did not include her name and that of her co-applicant in the petition and therefore she sought that the grant be revoked. She pointed out that it was admitted vide an affidavit deposed in 2014 that the deceased had a wife called Kavesu. She lamented that the confirmed grant had given all the property of the deceased to the petitioner and her children while the 1<sup>st</sup> and 2<sup>nd</sup> house were left out. She told the court that the family land should be shared amongst the three houses. On cross examination, she told the court that the petitioners are harassing her out of the family land. On reexamination, she told the court that Kavumbu and Masii are the same place. She told the court that she built a maisonette on the family land and yet the petitioners unlawfully want to take away the same vide the grant that she seeks to have revoked. On cross examination by court, she testified that the family members had met and the land was subdivided into three portions.

7. The petitioner's Pw1 was Kavindu Mutungi who sought to rely on the replying affidavit dated 3.11.2016. She revealed that the deceased had 3 wives and the land in question had been left for her by the deceased whereas Kavesu was given land in Kambu and Yula was given land in Kalii within Kiboko. She lamented that the 1<sup>st</sup> and 2<sup>nd</sup> houses were harassing her because she did not have sons but now she did not want her portion to be divided into three as the other houses already have their portions. She revealed that the clan purported to come in to subdivide the land but she was not present. She also revealed how the 1<sup>st</sup> objector came to build a structure on the land she had been allocated and that she told the 1<sup>st</sup> objector to go and build on her mother's land parcel in Kiboko. On cross examination, she testified that she was the youngest wife of the deceased and that she was brought into the house of the 1<sup>st</sup> wife called Yula. She told the court that the 2<sup>nd</sup> wife used to reside in Kambu area in Makueni. She admitted not including her wives in the confirmation for grant as they had already been given their portions of land elsewhere. She proposed that if the objectors are after their land then they should be ready to share their portions in Kalii and Kambu equally.

8. The petitioner's second witness was Ngina Mutungi who sought to rely on her statement filed on 21.8.2017. She testified that the 1<sup>st</sup> petitioner is her mother and that the family land is Masii/Kithangani/531 and this was where she grew up. She told the court that Yula, the 1<sup>st</sup> wife resided in Makueni whereas Kavesu, the 2<sup>nd</sup> wife resided in Kambu. She pointed out that there was a dispute where Nzisa, Kimonyi, a daughter of Yula came and set up a house on the family land. She told the court that she wanted her mother to be given back her land. On cross examination, she admitted that the deceased had 3 wives and that the 2<sup>nd</sup> petitioner was a grandchild of the deceased. She confirmed that the family members of Yula and Kavesu were not included in the P& A 5 or affidavit in support of confirmation of grant because they had settled elsewhere on part of the estate of the deceased. She indicated awareness of other properties of the deceased that are situate in Makueni and Kambu that are in the names of the deceased. She told the court that the deceased had already distributed his estate but however she had no evidence of the distribution. She lamented that there was a ploy to snatch her mother of the land because she had no sons. On reexamination, she told the court that none of Yula's children resided on her mother's land.

9. The petitioner's third witness was Florence Katumi who sought to rely on her witness statement filed on 21.8.2017 and testified that the deceased is her father and that the 1<sup>st</sup> petitioner is her mother. She told the court that her father had relocated his wives Yula and Kavesu to Makueni and Kambu while her mother resided on Masii/Kithangani/531 where the deceased was living at the time he died. She told the court that Yula and her mother occupy the land at Masii and that Yula came to the land after the demise of her father. She sought that since the objectors were given their own plots of land then the court should assist her and that if they are after the Masii land then theirs in Makueni and Kambu ought to be shared out as well. On cross examination, she testified that she did not see the names of the other family members from the other houses in the petition. She had no objection to the sharing of all the assets of the deceased. On reexamination, she reiterated that the other 2 wives were moved out of the parcel Masii/Kithangani/531 and added that all the assets of the deceased be totaled and shared among all the houses of the deceased

10. Submitting in support of the application, counsel challenged the fact that the respondents failed to include the 2 other houses in the application for grant. On the other hand, counsel challenged the respondents to produce evidence that there was land belonging to the deceased in Kikumbulyu, Kambu, Kiboko and Kalii. The court was urged to revoke the grant on the grounds that property belonging to the deceased was left out of the grant and that other beneficiaries of the estate of the deceased were left out of the grant. The court was also urged to include each house in the administration of the grant.

11. There are no submissions in opposition to the application.

12. The issue for determination is whether the applicants have met the threshold to warrant grant of orders of revocation of grant.

13. The applicants' case is that they were entitled to benefit from the estate of the deceased yet they were not included in the grant. Their case is that there are properties that have not been included in the grant yet they ought to have been included. The respondents have admitted omitting the applicants on the grounds that the deceased distributed his properties to the other houses but however was not averse to inclusion of all the properties of the assets of the deceased and equal sharing of all of them.

14. 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:

**“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 just 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.”

15. I note that there are no copies of searches that speak to the fact that the applicants or respondents are correct when they maintain that there is property that was left out of the grant. The admission of the respondent that there were beneficiaries of the estate of the deceased who were left out of the grant is sufficient for this court to believe that this is the correct position and resultantly the conditions under section 76(1) (b) of the Law of Succession Act. I am satisfied that the applicants meet the threshold for grant of revocation order. As regards the Respondents claim that the deceased owned other properties in Kambu, Kalii and Kiboko which are in possession of the applicants, it is noted that no documents of ownership such as search certificates were produced to back the claim. Hence, the claim is unsupported by empirical facts and documentary evidence. It transpired from the proceedings that the family members had a family meeting was held on the 13/8/2011 whereby it was agreed that parcel number Masii/Kathangaiti/531 was to be shared between the three households of the deceased and specific measurements were indicated. It is noted that the representative of each house signed the agreement. There was no evidence of any other properties of the deceased discussed in the said meeting and this puts the petitioners claim that there are other properties of the deceased into doubt. The 1<sup>st</sup> petitioner's claim that she is being discriminated against because she does not have sons is not convincing since the property is being shared between the three widows. As the petitioners were aware of the family agreement reached on the 23/8/2011 their failure to include the applicants herein in the filing of this cause and confirmation of the grant was against the law and which was a material fact to the court and which warrants a revocation of the grant.

16. In the result, it is my finding that the objectors' application dated 28/7/2016 has merit. The same is allowed in the following terms:

- i. The grant that was issued to the respondents on 8/10/2012 and confirmed on 25/1/2016 is hereby revoked and a fresh grant be issued in the names of Yula Mutungi Muoki, Mutinda Kimonyi and Kavindu Mutungi.**
- ii. The families are directed to sit down and agree on the distribution of the state of the deceased and then file an application for confirmation of grant within 60 days of the date hereof including all the assets of the deceased.**
- iii. The status quo on the land Masii/ Kithangaini/531 be maintained pending the confirmation of the grant.**
- iv. There is no order as to costs.**

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 12<sup>TH</sup> DAY OF JULY, 2021**

**D. K. KEMEI**

**JUDGE**