



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 470 OF 2014**

**IN THE MATTER OF THE ESTATE OF THE LATE NDUVA MUSYOKI (DECEASED)**

**DOUGLAS WANJOHI KUNG'U.....1<sup>ST</sup> OBJECTOR/APPLICANT**

**DANIEL MUTINDA MUTUKU.....2<sup>ND</sup> OBJECTOR/APPLICANT**

**CHRISTINE KIROKO NDUVA.....3<sup>RD</sup> OBJECTOR/APPLICANT**

**-VERSUS-**

**MICHAEL MUSEMBI NDUVA.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**SEBASTIAN MAKAU NDUVA.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**JOHN MUSYOKI NDUVA.....3<sup>RD</sup> PETITIONER/RESPONDENT**

**RULING**

1. By Summons dated 8<sup>th</sup> May, 2019, the Objectors/Applicants herein, seek the following orders:

**1. That the Grant of Letters of Administration Intestate issued by this Honourable Court and confirmed to John Musyoki Nduva, Sebastian Makau Nduva and Michael Musembi Nduva be revoked.**

**2. That any transmission or transfer made pursuant to the confirmed grant be nullified.**

**3. That a new grant to issue to new administrators, including the 4<sup>th</sup> Objector/Applicant, who was the son to the deceased herein left out in the succession cause.**

**4. That the objectors and all other children of the deceased who were left out by the Petitioners/Respondents herein be included as part of the deceased's dependants;**

**5. That this Honourable Court proceeds to distribute the estate as consented to by all the parties or allocate 1 acre to Mihango Self Help Group, to which the 1<sup>st</sup> Objector/Applicant is a member and 1 acre to the 2<sup>nd</sup> Objector; and**

**6. That the costs of this application be in the cause.**

2. The application was supported by affidavits sworn by **Douglas Wanjohi Kungú** the 1<sup>st</sup> Objector and **Daniel Mutinda Mutuku**, the 2<sup>nd</sup> Objector.

3. According to the 1<sup>st</sup> Objector, he is the Chairman of Mihango Pamoja Self Help Group (the Group) and the deceased herein, **Nduva Musyoki**, was a beneficiary of the estate comprised in the Land Parcel Number Machakos/Nguluni/721 (the said land) which was to be transmitted to him but he died before the same was done. Through the said Group a sale agreement was entered in which the deceased agreed to sale to the Group a portion of the said land measuring 1 acre from his share in the sum of Kshs 380,000.00 which was cleared in two

instalments of Kshs 280,000.00 and Kshs 100,000.00 each in 2012 but the deceased died before completing the transfer thereof to the Group.

4. Following the death of the deceased the petitioner petitioned for the Grant of Letters of Administration Intestate for his estate which were granted on 7<sup>th</sup> October, 2014 and confirmed on 19<sup>th</sup> June, 2015 and by the confirmed grant, the petitioners as the deceased personal representatives of the estate of the deceased sub-divided and allocated to themselves the entire Land Parcel Number Machakos/Nguluni/721 without transferring to the Group its portion which it bought from the deceased, the 1<sup>st</sup> Petitioner herein transferred to himself a portion measuring 0.81 ha (approximately 2 acres) from the estate of the deceased in disregard of the interests of the Group which is a beneficiary and after the transfer the 1<sup>st</sup> petitioner was issued with a title deed for Land Parcel Number Machakos/Nguluni/4056.

5. According to the deponent, despite making several efforts to resolve the issue with the Petitioners by asking the 1<sup>st</sup> Petitioner to transfer the 1 acre due to the Group, the same has not been fruitful.

6. It was therefore contended by the 1<sup>st</sup> Objector that the Grant of Letters of Administration Intestate was issued and confirmed to the Petitioners fraudulently by failing to disclose to the Court crucial information regarding the interests of the Objectors at the time of the application for grant and its conformation.

7. On his part, the 2<sup>nd</sup> Objector deposed that is a nephew to the deceased herein since their fathers were brothers. Upon the death of their grandfather, the deceased herein and his father were entitled as beneficiaries to the estate of the said grandfather's estate. During the subdivision of the said estate, the deceased herein got his portion with an extra 1 acre and as a result his father got his portion less an acre. In order to equalise the share of each of the beneficiaries, the two families entered into an agreement in which the deceased herein was to surrender the extra 1 acre to the 2<sup>nd</sup> Objector's father. Unfortunately, the deceased herein passed away before transferring the said 1 acre as agreed. According to the deponent, after the death of the deceased herein, he was entitled to receive the said 1 acre in his capacity as an heir to his father's estate hence he had a beneficial and proprietary interest in part of the deceased's estate.

8. Following the death of the deceased herein, the 2<sup>nd</sup> Objector deposed that the Petitioners herein, who are the sons of the deceased herein, petitioned for and obtained a Grant of Letters of Administration Intestate to the estate of the deceased herein which was granted on 7<sup>th</sup> October, 2014 and confirmed on 19<sup>th</sup> June, 2015. While taking out the said Grant, the Petitioners failed to notify the 2<sup>nd</sup> Objector of their intention to do so despite being aware that the 2<sup>nd</sup> Objector had an interest in the estate of their father. Following the said Grant, the Petitioners went ahead to distribute the estate of the deceased by transferring 2 acres of the estate of the deceased herein to the 1<sup>st</sup> Petitioner following which he was issued with Title Number Machakos/Nguluni/4056 which comprises of the 1 acre to which the 2<sup>nd</sup> Objector is entitled.

9. It was deposed that the Petitioners failed to disclose material facts about all beneficiaries of their deceased's father's estate including the 2<sup>nd</sup> Objector. Despite the 2<sup>nd</sup> Objector's efforts to persuade the 1<sup>st</sup> Petitioner to transfer the said 1 acre to him, the same have been fruitless. It was therefore the 2<sup>nd</sup> Objector's case that the above fraud and disinformation by the Petitioners warrants the revocation of the subject Grant.

10. By an affidavit sworn by **Christine Kiroko Nduva**, on 6<sup>th</sup> November, 2019, it was deposed that though she is indicated in the instant Summons as being the 3<sup>rd</sup> Objector and though a beneficiary of the estate of the deceased herein, she had not given instructions for the filing of these Objection proceedings or the revocation of the grant herein since she had no objection to the proceedings leading to the issuance of the grant and the subsequent distribution of the deceased's estate.

11. In response to the Summons the Petitioners took issue with the jurisdiction of this court contending that this Court lacks the jurisdiction to hear and determine the proprietary rights over Land Parcel Number Machakos/Nguluni/721 and Land Parcel Number Machakos/Nguluni/4056, the latter being registered in his name. It was further contended that the Applicant (sic) is a stranger to this estate and therefore lacks *locus standi* to seek any orders herein.

12. Apart from those objections, the Petitioners vide a replying affidavit sworn by the 1<sup>st</sup> Petitioner deposed that the deceased was registered as proprietor in common of the property known as Land Parcel Number Machakos/Nguluni/721 measuring approximately 84 acres alongside his brothers **Kilonzo Musyoki** and **Muema Musyoki** being the Administrators of the Estate of their father, **Musyoki Muasya**. Subsequently the said property was subdivided into seven parcels of land being Land Parcel Number Machakos/Nguluni/3533-3539 which were held by **Kilonzo Musyoki** (deceased), **Muema Musyoki** and the deceased herein, as Administrators of the Estate of their father, **Musyoki Muasya**. The said administrators sold one parcel of the subdivisions while the remaining six parcels were distributed among the six brothers of the deceased herein as had been agreed to during the distribution of the estate of the 1<sup>st</sup> Petitioner's grandfather, **Musyoki Muasya**. In that distribution, the deceased herein got Land Parcel Number Machakos/Nguluni/3536 as agreed and none of the beneficiaries of the estate of the said **Musyoki Muasya** has challenged the said distribution.

13. It was deposed that upon the death of the deceased herein, Land Parcel Number Machakos/Nguluni/3536 was registered in the names of the Petitioners herein in transmission in their capacity as administrators of the estate of the deceased herein. According to the 1<sup>st</sup> Petitioner, during his lifetime, the deceased herein sold 10 acres portion of his entitlement from the estate of **Musyoki Muasya** and that prior to his death, the deceased herein duly informed the Petitioners of the sale of the said 10 acres of his portion of Land Parcel Number Machakos/Nguluni/721 to St Veronica ACK Church Mwiki which Church through its trustees duly paid the consideration for the property and there was evidence to that effect. Upon the death of the deceased herein the Petitioners duly transferred the said 10 acres to the said Church. The Petitioners averred that had there been a sale to the Group herein, the same would similarly have been disclosed just like the one to the Church. It was however alleged that the 1<sup>st</sup> Objector failed to avail any proof of payment of the purchase price for the alleged sale.

14. It was deposed that all the beneficiaries were aware of the proceedings leading to the grant and consented to the Grant being made to the Petitioners as well as the subsequent confirmation thereof. Upon the said confirmation, Land Parcel Number Machakos/Nguluni/3536 was

subdivided into three parcels being Land Parcel Number Machakos/Nguluni/4055, 4056 and 4057 and Land Parcel Number Machakos/Nguluni/4055 was transferred to St Veronica ACK Church in accordance with the agreement between the deceased and the registered trustees of the said Church. Land Parcel No. Machakos/Nguluni/ 4057 was registered in joint names of the Administrators of the estate of the deceased which subsists to date while it was agreed that Land Parcel No. Machakos/Nguluni/4056, it was agreed be transferred to the 1<sup>st</sup> Petitioner as reasonable compensation for the expenses incurred by him in the administration of the estate. Upon that agreement all the Administrators of the estate of the deceased duly executed a transfer and obtained consent to transfer the property to the 1<sup>st</sup> Petitioner which transfer was duly registered in his name and the title deed issued to him.

15. According to the 1<sup>st</sup> Petitioner, the 1<sup>st</sup> Objector lodged a complaint to the CID alleging that the estate received money from them by false pretence and pending the investigations, the CID place a restriction on the property on 21<sup>st</sup> March, 2018 and after investigations, the CID concluded that there was no fraud and requested the Land Registrar to remove the said restriction which was duly removed. The 1<sup>st</sup> Petitioner therefore averred that the allegations made have no merit and should be dismissed.

### **Objectors/Applicant's Submissions**

16. It was submitted on behalf of the Objectors/Applicants that **Nduva Musyoki** (deceased) died on 13<sup>th</sup> August 2013 and upon his death, the Respondents applied for and obtained a Grant of letters of Administration Intestate to his estate which Petition was granted on 7<sup>th</sup> October 2014 and subsequently confirmed on 19<sup>th</sup> June 2015.

17. It was however submitted that while taking out the above mentioned Grant, the Respondents failed to notify and involve the 1<sup>st</sup> and 2<sup>nd</sup> Applicants knowing well they had an interest in the estate of the deceased. It was contended that among the assets left by the deceased was Title number Machakos/Nguluni/721 which was originally registered in the name of **Musyoki Muasya** (deceased), who is the father to **Nduva Musyoki** (deceased) and grandfather to the 2<sup>nd</sup> objector. After the confirmation, the Respondents went ahead to distribute the estate of the deceased by transferring 2 acres of the estate to **Michael Musembi Nduva** the 1<sup>st</sup> Respondent herein, following which he was issued with title number Machakos/Nguluni/4056, which comprise 1 acre to which the 2<sup>nd</sup> Applicant is claiming.

18. It was submitted that the Late **Nduva Musyoki** was a beneficiary of the estate of **Musyoki Muasya** comprised in land parcel number Machakos/Nguluni/721 part of which was to be transmitted to him, but died before the transfer happened.

19. It was further submitted that **Nduva Musyoki** entered into a sale agreement with Mihango Pamoja Self Help Group, and he agreed to sell a portion of land measuring 1 acre to be obtained from his share in parcel number Machakos/Nguluni/721 at the total purchase price of KShs. 380, 000.00, which Mihango Pamoja Self Help Group cleared in two instalments, KShs. 280, 000.00 and KShs. 100,000.00 in 2012. The portion of land sold to Mihango Pamoja was demarcated with beacons and live fence, planted around it and it falls within the portion of land given to **Nduva Musyoki**. Similarly, the Late **Nduva Musyoki** died before completing the transfer of the above portion of land to Mihango Self Help Group.

20. From the confirmed grant, the 1<sup>st</sup> Objector discovered that the Respondents who have been the personal representatives of the deceased estate, have sub-divided and allocated to themselves the entire parcel number Machakos/Nguluni/721 without transferring to Mihango Self Help Group the portion that was bought from **Nduva Musyoki**. Instead, the 1<sup>st</sup> Respondent herein, **Michael Musembi Nduva**, transferred to himself a portion containing the measurement zero decimal eight one (0.81) hectares (approximately 2 acres) from the estate of the deceased including the area purchased and fenced off by Mihango Self Help Group and after the transfer, **Michael Musembi Nduva** was issued with a title deed for Machakos/Nguluni/4056.

21. According to the Objectors, this Court has jurisdiction to determine the issues raised herein. It was submitted that the Constitution of Kenya, 2010, under Article 165 gives the High Court has unlimited jurisdiction over criminal and civil matter and since the matter raised herein is a civil matter this Court has jurisdiction to hear and determine this matter. Further, Section 47 of the **Law of Succession Act** stipulates that the High Court has jurisdiction to adjudicate on all matters arising in regards to that Act which in this case our Application is on Revocation of a Grant under Section 76 of the **Law of Succession Act**. It was submitted that this Application is not about title to the land but is entirely about revocation of a Grant. Titles to land resulting from a succession will therefore suffer the natural consequence of the finding of the Succession Court. The Environment and land Court on the other hand has no jurisdiction to revoke a Grant even if the said grant was is the foundation of title to land.

22. Regarding the question whether the certificate of confirmation of grant and the grant itself should be revoked, it was submitted that the **Law of Succession Act** under Section 76 stipulates the circumstances under which a grant may be revoked or annulled and that the Grant obtained by the Respondents was fraudulently obtained by failing to disclose to this Honorable Court crucial information regarding the interests of the Objectors in the land parcel number Machakos/Nguluni/721 during their Application for Letters of Administration Intestate and confirmation of the same.

23. It was contended that the portion of property Machakos/Nguluni/4056 was and is not free property as defined under the **Law of Succession Act** and should not have been included in the deceased estates up for distribution to any beneficiary except the purchasers. According to the Objectors, the late **Nduva Musyoki** having sold his interests over, by measurement 1 acre to be obtained from his share in parcel number Machakos/Nguluni/721, to the 1<sup>st</sup> Applicant/Objector, that 1 acre should not be part of his estate available for free distribution, it's a claim against his estate that the administrators must fulfil by a transfer to the purchasers. In support of their submissions, the Objectors relied on Succession Cause No. 196 of 2005, a decision by **Mativo, J** where the Respondents deliberate failed to involve the applicants at the time of filing the proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in view in bad faith and amounted to concealment of material facts. The Judge concluded that the proceedings leading to the issuance of the grant were defective in substance and that material information was not disclosed to the court in that had the court been made aware that there were other beneficiaries who were interested in the deceased's estate, the court would have hesitated to issue the grant.

24. It was the Objectors' submissions that the Respondents did not disclose very important material facts regarding the parcel of land Machakos/Ngaluni/721. The Purchase by Mihango Self-help Group and ST Veronica ACK Church Mwiki were never disclosed to the Court. The sale to Mihango Self-help Group is not denied but conveniently the administrators transferred land as purchased to one group and is denying the other. Accordingly, the failure to disclose the existing sale of the two parcels to the succession court is material enough for this court to revoke the Confirmed grant.

25. As regards the costs, the Objectors relied on Section 27 of the *Civil Procedure Act* and urged this Court to find it deserving that the Respondents/Petitioners are awarded the costs from the foregoing circumstances.

26. In conclusion, it was submitted that this Court has jurisdiction to adjudicate on the Summons for Revocation of Grant brought forth by the Applicants/Objectors following proof of non-disclosure of material facts concerning land parcel number Machakos/Ngaluni/721 by the Respondents when applying for the Grant and its confirmation thereafter. The Court was urged to find relevance in the proof of issues brought forward by the Objectors/Applicants in support of the Summons of Revocation of Grant and award costs to the Respondents.

### **Petitioners/Respondents' Submissions**

27. On behalf of the Petitioners/Respondents, it was submitted that this Court lacks jurisdiction to determine the issues raised herein based on the Court of Appeal's decision in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**. According to the Petitioners, the Applicants are inviting this court to determine their alleged interests in property Title Number Machakos/Ngaluni/4056, a determination which is the preserve of the Environment and Land Court pursuant to Article 162 of the Constitution and section 13 of the *Environment and Land Court Act* No. 19 of 2011. It was submitted that the 1<sup>st</sup> Respondent alleges that he is a representative of Mihango Self Help Group which purchased a portion of Title Number Machakos/Ngaluni/721 from the Administrators of the estate of **Musyoki Muasya** and further allegedly agreed that the portion purchased shall be carved from the portion of **Nduva Musyoki**. The 1<sup>st</sup> Applicant relies variously on handwritten notes allegedly executed by the deceased. According to the Petitioners, the question of whether or not the 1<sup>st</sup> Applicant and/or the Self-help Group is entitled to the portion allegedly purchased is the preserve of the Environment and Land Court which is mandated to determine issues of interests in land.

28. As regards the 2<sup>nd</sup> Applicant, it was submitted that in his Affidavit he deposes that he is a nephew of the deceased, his father being the brother to the deceased. It is noteworthy that **Nduva Musyoki** pre-deceased the father of the 2<sup>nd</sup> Applicant. According to the Petitioners, the 2<sup>nd</sup> Objector's case is in effect that **Nduva Musyoki** allegedly held the 1-acre portion in trust for his father and subsequently for him as the heir of his deceased father. To the Petitioners, the question of whether the deceased held the 1-acre portion in trust for the 2<sup>nd</sup> Applicant is the preserve of the Environment and Land Court as aforesaid.

29. It was further submitted that both the 1<sup>st</sup> and 2<sup>nd</sup> Applicants are strangers to the estate as they are not beneficiaries of the estate of **Nduva Musyoki** (deceased herein). Therefore, the issues raised in the Summons filed by the Applicants cannot be determined by this Court as they allege that the deceased held a portion of the estate in trust for them. It was submitted that though the deceased herein died in August 2013, the Applicants have taken no steps to obtain orders from the Environment and Land Court declaring that the deceased held the portion of Machakos/ Ngaluni/721 in their trust. Further, they brought no such claim during the process of succession which was conducted in accordance with the law; which included gazette in the Kenya Gazette to invite any objections, if any. In support of their submissions the Petitioners relied on the decision of **Muchelule, J In re Estate of James Flavian Chege Munene (Deceased) [2019] eKLR**, the case of **In re Estate of Solomn Mwangi Waweru (Deceased) [2018] eKLR**, and the **High Court Succession Cause Number 864 of 1996 [2015] eKLR**.

30. In light of the foregoing, the court was urged to find that it does not have jurisdiction to hear determine the issues raised by the Applicants as their claim should be determined by the constitutionally mandated court, the Environment and Land Court.

31. As to whether the certificate of confirmation of grant in this cause should be revoked, the Petitioners cited Section 76 of the *Law of Succession Act* as reproduced in **The Matter of the Estate of L A K – (Deceased) [2014] eKLR**. According to the Petitioners, the Objectors/Applicants allege that the Grant was obtained fraudulently by failing to disclose all the children of the deceased and by failing to disclose the interests of the Applicants herein. However, the succession proceedings of the estate of the deceased herein were conducted according to the law and procedure. All the beneficiaries disclosed to the Court and their consents obtained prior to the confirmation of the grant thereof. In order for the orders sought to be granted, the objectors must prove that the grounds for revocation have been satisfied.

32. As regards the issue whether the respondents fraudulently obtained the confirmation of the grant by concealing material facts as to all the children of the deceased, it was submitted that all the beneficiaries of the estate of the deceased were included in the succession proceeding leading to the issuance of the certificate of confirmation of Grant and subsequent confirmation of the same. It is also noteworthy that none of the beneficiaries of the estate have challenged the Grant of Letters of Administration as they were involved in the process and consented to the same. Indeed, **Christine Kiloko Nduva**, irregularly named as the third objector has sworn an Affidavit stating that she does not object to the proceedings leading to the confirmation of the Grant of Letters of Administration. Similar averments have been made by **Patrick Kalumba Nduva** who was allegedly named as an Objector in the Hearing Notice dated 2nd September 2019 and name indicated as **Pius Karumba**. It was therefore submitted that the succession proceedings were done in a transparent manner, followed due procedure and involved all the beneficiaries of the deceased.

33. As to whether the Objectors have an interest in the Estate which the Respondents failed to disclose to the Honourable Court, it was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants are strangers to the estate of the deceased as they are not dependents of the deceased. The 1<sup>st</sup> Applicant has not brought to this court, any authority from the alleged self-help group authorizing him to bring the claim against the estate if the deceased on behalf of the self help group. That notwithstanding, it was submitted that the alleged self-help group and/or the 1<sup>st</sup> Applicant do not have an interest in the property Machakos/ Ngaluni/721 or against the estate of the deceased or at all. While reiterating the fact that the alleged interest of the said Group was no disclosed by the deceased, it was submitted the Group has not proffered any explanation as to why they did not bring the claim upon the demise of **Nduva Musyoki** or during the succession process of his estate and that the Group has

not brought any proof of payment of consideration to the deceased for the alleged purchase. It was therefore submitted that the 1<sup>st</sup> Applicant and/or the Self-Help Group has not proved any interest in the estate of the deceased and any knowledge of the alleged interest by the Respondents.

34. As regards the alleged interest of the 2<sup>nd</sup> applicant, it was submitted that the 2<sup>nd</sup> Applicant is the nephew of the deceased herein. It was submitted that his claim is malicious and unsubstantiated as the distribution of the estate of **Musyoki Muasya** was done in accordance with the Agreement of all the beneficiaries of his estate and the property subdivided accordingly. According to the Petitioners, the 2<sup>nd</sup> Applicant is essentially challenging the mode of distribution of the estate of **Musyoki Muasya** in the proceedings relating to the estate of **Nduva Musyoki**. His claim in these proceedings is therefore untenable. Since the deceased herein pre-deceased the father of the 2<sup>nd</sup> Applicant, if any such claim existed, the father of the 2<sup>nd</sup> Applicant would have pursued the claim against the estate.

35. It was further noted that the 2<sup>nd</sup> Applicant has not brought to this court any proof that the alleged interest of the deceased passed to him as he is not the only dependent of his father. The Court was therefore urged to dismiss the claim that the Grant issued in this cause was fraudulent for failure to disclose the alleged interests of the Applicants to the Court.

36. As regards the issue whether the transfer of Machakos/Nguluni/4056 to the 1<sup>st</sup> Administrator/Respondent was fraudulent, it was reiterated that this court does not have the jurisdiction to make a determination on whether or not the 1<sup>st</sup> Respondent transferred the property to his name.

37. It was nevertheless submitted that none of the beneficiaries of the estate of the deceased challenged the Agreement and transfer to the 1<sup>st</sup> Respondent as it was the Agreement of all the beneficiaries. Despite the 2<sup>nd</sup> Objector's criminal complaint, the same was found baseless and accordingly the restriction was lifted. It was therefore submitted that the Applicants have not proven fraud on the part of the Respondents in the transfer of the property Machakos/ Nguluni/4056 to the 1<sup>st</sup> Respondent. Having failed in the criminal process, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants are now forum shopping in this court.

38. As regards the costs, the Petitioners relied on Section 27(1) of the *Civil Procedure Act* as well as the case of **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others [2014] eKLR**.

39. It was therefore submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants (sic) are deserving of this Court's exercise of discretion to award them costs as the circumstances allow. According to the Petitioners, the mere fact that this is a family court should not be a ground for denying costs to the Respondents and reliance was placed on Court of Appeal's holding in the case of **Mary Wanjiru Muriuki vs. Ndirangu Mwaniki [2007] eKLR**.

40. The costs should therefore be awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

41. In summary, it was submitted that this court does not have jurisdiction to adjudicate on the alleged interests of the Applicants in the estate and particularly in title number Machakos/Nguluni/4056 and therefore the Summons for Revocation of Grant should be struck out with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. However, in the unlikely event that the Court finds that the Court has jurisdiction, it was submitted that the Applicants have failed to prove the issues alleged in the Summons for Revocation of Grant. They have failed to prove that the Grant herein was issued pursuant to fraud, misrepresentation and/or concealment of material facts. In that event, the Court was urged to dismiss the Summons with costs to the Respondents.

#### **Determination**

42. I have considered the issues raised in this application. Section 76(a), (b) and (c) of the *Law of Succession Act* provides as hereunder:

**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;**

43. Since the Petitioners have challenged this Court's jurisdiction, as was held by Nyarangi, JA in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1**:

**"Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

44. In this case, it is contended that the Applicants are inviting this Court to determine their alleged interests in property Title Number Machakos/Nguluni/4056 yet the determination of interests in land is the preserve of the Environment and Land Court pursuant to Article 162 of the Constitution and section 13 of the **Environment and Land Court Act** No. 19 of 2011. In this case it was contended that the 1<sup>st</sup> Respondent alleges that he is a representative of Mihango Self Help Group which purchased a portion of Title Number Machakos/Nguluni/721 from the Administrators of the estate of **Musyoki Muasya** and further allegedly agreed that the portion purchased shall be carved from the portion of **Nduva Musyoki**.

45. It was contended that the question of whether or not the 1<sup>st</sup> Applicant and/or the Self-help Group is entitled to the portion allegedly purchased is the preserve of the Environment and Land Court which is mandated to determine issues of interests in land.

46. As for the 2<sup>nd</sup> Applicant, it was contended that from the supporting affidavit, **Nduva Musyoki** predeceased the 2<sup>nd</sup> Applicant's father. And it is alleged that in the distribution of the estate of **Musyoki Musya**, his Grandfather, **Nduva Musyoki** got 1 acre more than the father of the 2<sup>nd</sup> Applicant. To this end, it was allegedly agreed that **Nduva Musyoki** would transfer the 1 acre to the 1<sup>st</sup> Applicant's father since Nduva Musyoki allegedly held the 1 acre portion in trust for his father and subsequently for him as the heir of his deceased father. Again, it was submitted that the question of whether the deceased held the 1 acre portion in trust for the 2<sup>nd</sup> Applicant is the preserve of the Environment and Land Court as aforesaid.

47. According to the Petitioners, both the 1<sup>st</sup> and 2<sup>nd</sup> Applicants being strangers to the estate as they are not beneficiaries of the estate of **Nduva Musyoki** (deceased herein), the issues raised in the Summons filed by the Applicants cannot be determined by this Honourable Court as they allege that the deceased held a portion of the estate in trust for them.

48. The Objectors' position is however that this Court has jurisdiction to determine the issues raised herein since the Constitution of Kenya, 2010, under Article 165 gives the High Court has unlimited jurisdiction over criminal and civil matter and since the matter raised herein is a civil matter this Court has jurisdiction to hear and determine this matter. Further, Section 47 of the **Law of Succession Act** stipulates that the High Court has jurisdiction to adjudicate on all matters arising in regards to that Act which in this case our Application is on Revocation of a Grant under Section 76 of the **Law of Succession Act**. According to the Objectors, this Application is not about title to the land but is entirely about revocation of a Grant. Titles to land resulting from a succession will therefore suffer the natural consequence of the finding of the Succession Court. The Environment and land Court on the other hand has no jurisdiction to revoke a Grant even if the said grant was the foundation of title to land.

49. The question that this Court has to decide is whether the dispute herein is a land dispute or a succession dispute. Article 165(3) of the Constitution provides as follows:

**(3) Subject to clause (5), the High Court shall have—**

**(a) unlimited original jurisdiction in criminal and civil matters;**

.....

**(e) any other jurisdiction, original or appellate, conferred on it by legislation.**

50. Article 165(5)(6) and (7) thereof on the other hand provides:

**(5) The High Court shall not have jurisdiction in respect of matters—**

**(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**

**(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).**

**(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**

**(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.**

51. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land.

52. While it is true that Article 165(3) of the Constitution clothes this Court with jurisdiction in criminal and civil matters, the High Court's power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. By specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.

53. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which fall within the jurisdiction of the courts contemplated in Article 162(2) aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to "determine the jurisdiction and functions of the courts contemplated in clause (2)", Parliament did enact **The Environment and Land Court**

Act, 2011 which Act commenced on 30<sup>th</sup> August 2011. Section 13 of the said Act provides as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

54. It is therefore clear that the power to hear and determine disputes relating to title to land and any other dispute relating to environment and land was donated to the Environment and Land Court. In this case, the 1<sup>st</sup> Objector's case, from the copy of the agreement exhibited was that it was agreed between the owners of Land Parcel No. Machakos/Nguluni/721 who were **Kilonzo Musyoki, Nduva Musyoki and Muema Musyoki** and Mihango Pamoja Self Help Group that the former would sell to the latter a portion of the said land measuring 70 metres by 70 metres from the share of **Nduva Musyoka**, the deceased herein.

55. According to the Petitioner, the deceased was registered as proprietor in common of the property known as Land Parcel Number Machakos/Nguluni/721 measuring approximately 84 acres alongside his brothers **Kilonzo Musyoki** and **Muema Musyoki** being the Administrators of the Estate of their father, **Musyoki Muasya**.

56. As for the 2<sup>nd</sup> Objector, his claim was that he is a nephew to the deceased herein since their fathers were brothers. Upon the death of their grandfather, the deceased herein and his father were entitled as beneficiaries to the estate of the said grandfather's estate. During the subdivision of the said estate, the deceased herein got his portion with an extra 1 acre and as a result his father got his portion less an acre. In order to equalise the share of each of the beneficiaries, the two families entered into an agreement in which the deceased herein was to surrender the extra 1 acre to the 2<sup>nd</sup> Objector's father. Unfortunately, the deceased herein passed away before transferring the said 1 acre as

agreed. According to the deponent, after the death of the deceased herein, he was entitled to receive the said 1 acre in his capacity as an heir to his father's estate hence he had a beneficial and proprietary interest in part of the deceased's estate.

57. It is therefore clear that the transaction was between the Group and the Administrators of the Estate of the said **Musyoki Muasya** on one hand and the interest of the 2<sup>nd</sup> Objector's father in the estate of their father, **Musyoki Muasya**, the grandfather of the 2<sup>nd</sup> Objector. These proceedings however relate to the estate of **Nduva Musyoka**. The only way in which the Objectors can claim from the Estate of the deceased herein is therefore by claiming that the deceased's portion of land inherited from **Muema Musyoki** included the Objector's entitlement. In other words, that the deceased herein held the said land partly as a trustee for the Objectors. In those circumstances I agree with the position adopted in *the case of In re Estate of Solomon Mwangi Waweru (Deceased) [2018] eKLR*, where the Court observed that:

**“M.K. Ibrahim J (as he then was) in a decision cited with approval by this Court In the matter of the Estate Peter Igamba Njoroge, Nakuru Succession Cause Number 432 of 2009 had this to say on the issue of a probate court's jurisdiction to resolve a claim based on land held in trust (and in our case purchase or transfer of land);**

**“I have also considered the second question which really is of *locus standi* or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position in law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors' father. In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed.**

**The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed. Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties. In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/rights. They are lucky that the claim or trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate. I therefore do hereby hold that this court has no jurisdiction to determine the claim or trust or to give any relief in respect thereof. It is unfortunate that the question of jurisdiction was raised at the end of the hearing. It is always appropriate and reasonable for jurisdictional issues to be raised at the beginning of hearing or trials. Preferably, they should be raised in the pleadings at the outset. Be that as it may, the fact that it is raised at the end does not change anything. If a court has no jurisdiction, then it has none. The conclusion of hearing does not confer any jurisdiction of the court. This will only go to the question of costs.”**

58. I also associate myself with the position adopted by *Musyoka J.* in the High Court Succession Cause Number 864 of 1996 – In re Estate of Mbai Wainaina (Deceased) [2015] eKLR in which the Judge stated:

**“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court. Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust. In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”**

59. It is therefore my view that these are not the appropriate proceedings in which the two Objectors ought to stake a claim to their interests in the subject property. Their claim falls squarely within the jurisdiction of the Environment and Land Court.

60. Since the Objectors' claims arise from their alleged interest in the estate of **Musyoki Muasya**, their claims ought to have been against that estate if at all the two Objectors wanted to stake a claim in succession proceedings.

61. Apart from that whereas the 1<sup>st</sup> Objector herein is **Douglas Wanjohi Kung'u** who claims that he is the Chairman of Mihango Pamoja Self Help Group (the Group), there is no evidence that he was authorised to object in his own name on behalf of the Group

62. According to the Summons herein, one of the grounds was that the Petitioners failed to disclose all the children of the deceased. No evidence was led to prove which of the deceased's children were left out. To the contrary some of the said children disowned these proceedings.

63. In the foregoing premises, I find no merit in the Summons dated 8<sup>th</sup> May, 2019 which I hereby dismiss with costs.

64. It is so ordered.

**Ruling read, signed and delivered in open Court at Machakos this 3<sup>rd</sup> day of November, 2020.**

**G. V. ODUNGA**

**JUDGE**

**In the presence of:**

**Miss Mireri for the 2<sup>nd</sup> Respondent**

**CA Zakia**