



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 122 OF 2014**

**IN THE MATTER OF THE ESTATE OF MUSAU NTHEI (DECEASED)**

**KALONDU MUSAU.....APPLICANT**

**VERSUS**

**JOSEPH MUTHAMA MUSAU.....RESPONDENT**

**RULING**

1. By a summons dated 14<sup>th</sup> May, 2018, the applicant seeks the revocation and or annulment of grant issued by this court on 22<sup>nd</sup> March, 2018 to Joseph Muthama Musau. He further seeks that a restriction order be issued to the Registrar of Lands from registering or transferring Donyo Sabuk/Komarock Block 1/246 and **Mbiuni/Ulaani/372** pending the hearing and determination of this application.

2. The applicant who alleges that he is the deceased 2<sup>nd</sup> wife contended that there was concealment of all the deceased's beneficiaries and children and their interest in his estate. She particularly stated that the administrator misrepresented that he was the only son to the deceased yet the deceased had ten children. That the administrator failed to include her and the other children in the petition. That he failed to inform the beneficiaries of the deceased who are his uncles and to whom the deceased was holding properties for in trust. She stated that the administrator is now in the process of transferring and selling the properties to the detriment of the beneficiaries.

3. This court notes that despite being granted leave to file a replying affidavit to the summons and to file submissions, the respondent failed to do so. The applicant on its part filed submissions which was essentially a reiteration of the averments in the summons. In support thereof, section 76 of the Succession Act and the case of **Re Estate of STM (2017) eKLR** were relied on.

4. I have given due consideration to the application and the submission by the Applicant. It is clear from annexure KM-2 which is a letter from the subject area chief that the deceased had beneficiaries other than those revealed by the administrator while applying for confirmation of grant. Having failed to contend the said fact, I find that the facts as alleged by the applicant are true having not been rebutted. See **Kipyator Nicholas Kirpono Biwott v. George Mbugus and Kalamka Ltd Civil Case No. 2143 of 1999** where it was held:

***“...Having filed no replying affidavit to rebut the averments in the plaintiff's affidavit in support of the application. I, therefore have no alternative but to strike out paragraphs...of the defence and enter judgment for the plaintiffs on liability.”***

5. It transpired that the Respondent had already been cited vide **Kangundo Cause No. 11 of 2017** by the Objector's herein and it is therefore quite baffling that the Petitioner/Respondent herein having been cited filed the present cause and failed to include the objector and her children as beneficiaries. The conduct of the Petitioner in concealing this crucial fact merits an order of revocation of the confirmed grant so that the parties herein could get back to the drawing board and proceed on a clean slate where all those entitled to benefit from the estate of the deceased are involved.

6. In the result, I find merit in this summons and it is allowed in the following terms:

- (a) The grant issued to Joseph Muthama Musau by this court on 20/02/2015 and confirmed on 15/03/2018 is hereby revoked.
- (b) A fresh grant be issued in the name of **JOSEPH MUTHAMA MUSAU** and **KALONDU MUSAU**.
- (c) A fresh summons for confirmation of grant be filed within thirty (30) days upon issuance of the fresh grant.
- (d) A restriction order do issue to the Registrar of Lands from registering or transferring or in any manner dealing with Land Reference Numbers **DONYO SABUK/KOMAROCK BLOCK 1/246** and **MBIUNI/ULAANI/372** until the final determination of this cause.

(e) There shall be no order as to costs.

It is so ordered.

**Dated and delivered at Machakos this 6<sup>th</sup> day of February, 2019.**

**D.K. KEMEI**

**JUDGE**