



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 108 OF 2010**

**IN THE MATTER OF THE ESTATE OF MBUSYA LAI (DECEASED)**

**SAMMY M. MBUSYA .....PETITIONER/RESPONDENT**

**VERSUS**

**MARTHA KALONDU MBUSYA.....1<sup>ST</sup> APPLICANT**

**ALICE MWIKAZI MBUSYA.....2<sup>ND</sup> APPLICANT**

**CHARLES MUTUNGA MBUSYA .....3<sup>RD</sup> APPLICANT**

**BENJAMIN MUTUKU MBUSYA .....4<sup>TH</sup> APPLICANT**

**DAVID MUTUA MBUSYA .....5<sup>TH</sup> APPLICANT**

**JOSYCE MUNYIVA MBUSYA .....6<sup>TH</sup> APPLICANT**

**RULING**

1. By a summons dated 20/07/2017 the Applicants sought a stay of the orders issued on 7/7/2017, a revocation of grant that was made to **Sammy M. Mbusya** on 10/5/2013 and rectified on 7/7/2017 for the said grant was obtained by concealing the fact that the deceased was survived by two widows, that is **Naomi Mulundu (now deceased)** and **Martha Kalondu Mbusya**. The application was supported by Charles Mbusya vide his affidavit filed on 23/5/2018 wherein he stated that when the petitioners filed the petition, they did not disclose each and every survivor of the estate and the petitioners also listed only one estate, however the deceased had 4 other plots of land, to wit: **Mwala/Kyawango/251, 260, 257 and 247** that were not included in the petition and in light of the same, the grant was obtained fraudulently and by concealment of material facts warranting an order for revocation.

2. The application was opposed by the petitioner who filed a Replying affidavit. The petitioner averred that he disclosed to court all the lawful beneficiaries. He stated that the deceased had only one asset registered in his names; that is **Yatta/Mathingau/1449** and that was captured in filing the petition. He stated that a family meeting was held prior to the filing of the petition where the aforesaid asset was divided between the two houses. The petitioner filed a supplementary affidavit on 2/11/2018 where he averred that the only land available for distribution was **Yatta/Mathingau/1449**. He averred that **Mwala/Kyawango/251, 260, 257 and 247** are not registered in the names of the deceased and therefore not part of his estate. He attached copies of search certificates.

3. The application was canvassed by way of written submissions.

4. The Applicant submitted that **Martha Kalondu Mbusya** is a surviving widow and was not issued with citation to renounce her right to apply for letters of administration. He relied on the case of **Rusa Rufus Ndwiga –v- Jane Gachuku (2014) eKLR** where the court held as fraudulent the concealment that all the parties consented to the making of the application yet this was not the case. Counsel submitted on the bearing of Section 76 of the Law of Succession Act that the concealment of beneficiaries and the listing of only one asset qualified for a revocation of the grant made therein.

5. The petitioner submitted that in petitioning, he filed a list of beneficiaries that was drawn by the chief and the list included beneficiaries from both houses and it cannot be said that he concealed any fact. The petitioner submitted that it is upto the applicant to demonstrate his assertions, and he relied on the case of **Re Estate of Wahome Mwenje Ngonoro (Deceased) 2016) eKLR**. He submitted that the applicant has failed to demonstrate how the grant was obtained fraudulently and thus the summons for revocation should be dismissed.

6. I have considered the contents of the application, the Replying affidavits, the parties' submissions and the respective decisions tendered in

support of each of the parties' cases. I have also perused the court record on which the confirmation proceedings were undertaken and the annexures thereto.

7. The legal basis for confirmation of grants is provided in **Section 71** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya. In cases of intestacy, like in this case, '*the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.*'

8. The chief's letter to the application revealed the beneficiaries to the estate of the deceased. However, the court has noted that the deceased has one surviving wife. I have also confirmed that the co-administrator of the petitioner is deceased and he is the sole administrator. In addition, the properties that the applicant alleges belong to the estate of the deceased are in the names of other persons and thus the said properties are not available for distribution and the court does not have power to determine the interest and claim of the applicant in the said properties that he says have been excluded. The status of those other properties shall have to wait for deliberations during the confirmation of the grant when the parties shall then file their proposed mode of distribution and defend their stand points. If it is then established that the properties are beyond the court's jurisdiction then the parties will be advised to pursue the issue of ownership through other forums.

9. I appreciate the apprehensiveness that the applicant has towards having the petitioner as the sole administrator, being that the deceased's widow is still alive. Whereas I am not satisfied that there is any property that has been excluded, neither have any beneficiaries of the estate been excluded, I see the need to ensure that none of the named beneficiaries are disinherited. The fact that the 1<sup>st</sup> Applicant is the only surviving spouse of the deceased, it is fair and just to have her appointed as a joint administrator so as to ensure that both houses are represented in the administration of the estate. From the several applications filed by the parties against each it so clear that there might be more than meets the eye to suggest that one of the houses is likely to be elbowed out on the matters of the estate. This then calls for the surviving spouse to be brought on board as a joint administrator. There is also the issue of some of the assets which are alleged to have been omitted by the sole petitioner. Hence this calls for reversal of this courts orders made on 7/7/2017 in order to ensure that wrangles amongst the beneficiaries are halted and who should henceforth proceed to finalize this outstanding matter for their benefit.

10. In the wider interests of justice and in consideration of the provisions of **Article 159(2) (d)** of the **Constitution** and the **Law of Succession Act** and with a view to deal with the issues in this matter substantively, I hereby make the following orders.

*(a) The Grant, made to Sammy M. Mbusya on 10/5/2013 and rectified on 7/7/2017 be and are hereby revoked.*

*(b) A fresh Grant shall be issued in the joint names of the Petitioner and Martha Kalondu Mbusya.*

*(c) The Administrators and/or any of them to file for the confirmation of the Fresh Grant within 21 days of issuance of the Grant.*

*(d) The application for confirmation of the grant shall be served upon all the beneficiaries and shall be fixed for directions within 30 days of filing.*

*(e) As the matter involves family members, I make no order as to costs.*

It is so ordered.

Dated and delivered at Machakos this 5<sup>th</sup> day of **February, 2019.**

**D. K. KEMEI**

**JUDGE**