



**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 207 OF 2004**

**N THE MATTER OF THE ESTATE OF NORMA KASOO MWANIA – DECEASED**

**BETWEEN**

**MULUNJE MWANIA MAKAU.....APPLICANT**

**BENEDETTA WANZUU MUTIO.....APPLICANT**

**VERSUS**

**SARAH MULIKE KASOO.....INTERESTED PARTY**

**JACKSON MULINGE KASOO.....INTERESTED PARTY**

**PETER MWAKA MUANGE.....INTERESTED PARTY**

**RULING**

1. By Summons for Revocation of Grant dated 5<sup>th</sup> March, 2018, the Applicants herein seek in substance an order that the Certificate of Confirmation of Grant issued on 19<sup>th</sup> January, 2017 and dated 7<sup>th</sup> February, 2017 be revoked and the Summons of Confirmation of Grant dated 3<sup>rd</sup> June, 2015 be heard de novo.

2. According to the Applicants, they are step brother and step sister in law respectively of the deceased hence are beneficiaries to his estate. The 1<sup>st</sup> Respondent on the other hand is the widow of the deceased while the 2<sup>nd</sup> Respondent is the son of the deceased. The 3<sup>rd</sup> Respondent is a purchaser from the deceased's estate.

3. The applicants' case is that the deceased left an estate comprising Land Parcel No. Nzaui/Nziu/416 which was registered in his name and that the grant of letters of administration were issued to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein on 26<sup>th</sup> July, 2014. According to the applicants, the said land parcel was originally owned by **Mwania Makau**, deceased, who had 2 wives, **Ntheu Mwanja Makau**, deceased, being the 1<sup>st</sup> wife and **Kitungu Mwanja Makau**, deceased, being the second wife. **Ntheu Mwanja** had 3 sons namely **Ndumbuthi Mwanja**, **Norman Kasoo Mwanja** and **Mbaluka Mwanja** all of whom are deceased. **Kitungu Mwanja Makau** also deceased had 4 sons namely, **Mulunje Mwanja Makau**, **John Mutio Mwanja** (deceased) **Waita Mwanja** (deceased) and **Muimi Mwanja** (deceased). It was however disclosed that the said **Mwania Makau** had another parcel of land (hereinafter called "**the first land**") in addition to the land parcel no. NZAUI/NZIU/416 and both parcels were equally shared amongst the two houses thus creating 4 portions which were clearly demarcated and boundaries put in place.

4. According to the Objectors, all members of the family from the both houses embarked on the use of their respective pieces of land without any dispute and that when the adjudication process began in the early 1970s, **Mwania Makau** passed on and his widows and other family members agreed that the 4 portions of the land would be registered as follows:-

**a. The two portions of the first land were registered one in the name of Ndumbuthi Mwanja on behalf of 1<sup>st</sup> house and the other in the name of Mulunje Mwanja Makau on behalf of the 2<sup>nd</sup> house**

**b. The other two portions land which later became NZAUI/NZIU/416 were registered in the name of Norman Kasoo Mwanja both to hold in trust for all family members.**

5. According to the applicants, they are only interested in the land parcel no. NZAUI/NZIU/416 as the other land does not have a dispute

arising there from. They averred that in the year 1992 all sons of **Mwania Makau** being the beneficiaries of his estate shared the four portions of the two parcels of land amongst themselves in accordance with the number of their individual families in the presence of **Kitungu Mwanja Makau**, who was the only surviving widow of **Mwania Makau** and all the other family members including **Sarah Mulike Kasoo**, the 1<sup>st</sup> respondent herein and sisal plants were planted to demarcate the delineations and everybody lived in harmony thereafter. It was averred further that the portion of land registered in the name of **Ndumbuthi Mwanja** in the first land was shared equally between himself and his brother **Mbaluka Mwanja** and their beneficiaries are living in harmony to date thereon while the portion registered in the name of **Mulunje Mwanja Makau** in the same land was shared equally with his 2 brothers **Waita Mwanja** and **Muimi Mwanja** whose beneficiaries are living in harmony to date.

6. It was deposed that the parcel of land No. NZAUI/NZIU/416 was equally shared out between **Norman Kasoo Mwanja** of the 1<sup>st</sup> house and **John Mutio Mwanja** of the 2<sup>nd</sup> house and the portions for each were clearly delineated and used by the beneficiaries of each accordingly.

7. According to the applicants, the 2<sup>nd</sup> applicant herein is the widow of **John Mutio Mwanja** and is therefore the one in open and active use of this share of land. However, **Norman Kasoo Mwanja** however died before transferring to **John Mutio Mwanja** his share of the land. However, prior to his death and in the year 2002, **Norman Kasoo Mwanja** fell sick and was admitted at Kenyatta National Hospital. He needed money for treatment so he authorised his brothers and his wife, the 1<sup>st</sup> respondent herein, to sell his share of land equivalent to half of the land parcel NZAUI/NZIU/416 and the said was subsequently sold to **Peter Mwaka Muange** for Kshs 120,000/= whereby the 1<sup>st</sup> applicant herein and **Dominic Kimanthi Mulungye** witnessed money given to the 1<sup>st</sup> respondent herein. Thereafter, the 3<sup>rd</sup> respondent immediately took possession of the half share purchased and was shown the boundaries thereof and has since been using the half share only without interfering with the other share which was being used by the family members of **John Mutio Mwanja**.

8. It was averred that each used their portions of land with harmony till 14<sup>th</sup> September, 2017 when all the family members were summoned to the chief's office where they found the respondents. The chief informed them the whole land now belonged to **Peter Mwaka Muange** and that they should vacate the land immediately after harvest the food crops in the *shamba*. It was then that the applicants herein discovered that the 1<sup>st</sup> and 2<sup>nd</sup> respondent had obtained letters of administration in respect of the estate of the deceased herein and had the letters confirmed granting the whole land to themselves to transfer to the 3<sup>rd</sup> respondent herein. They further discovered that the title to the said land parcel NZAUI/NZIU/416 had been transferred to **Peter Mwaka Muange** on 23<sup>rd</sup> February, 2017 and title subsequently issued. According to the applicants, the transfer of the whole land to the 3<sup>rd</sup> respondent knowing very well the he had purchased only a half share thereof and that the other half belonged to the family of **John Mutio Mwanja**, and that the confirmation of grant ought to have taken that into account.

9. The applicants lamented that they were not involved or informed by the Respondents of the succession proceedings herein knowing very well that the 2<sup>nd</sup> applicant had a direct and protectable interest in the land and the actions of the respondents mount to utterly disinheriting her of her family's inheritance.

10. The applicants asserted that everybody else is settled on their land comprising ancestral land of **Mwania Makau** and if the orders herein are not granted, the 2<sup>nd</sup> applicant will be rendered landless and destitute together with her children. It was averred that as no consent was sought from or granted by the 2<sup>nd</sup> respondent despite the glaring interest in the land, therefore the certificate of confirmation of grant was obtained fraudulently by the concealment of material facts by the respondents herein.

11. In opposing the application the Respondents relied on the following notice of preliminary objection:

**1) THAT the application dated 5-3-2018 is not properly before this honourable court as the Applicants hearing do not fall with the provisions of Section 29 of the Law of Succession Act (Cap 160).**

**2) THAT the application herein related to Land Reference Number Nzau/Nziu/416 where a title deed has been issued to the 3<sup>rd</sup> Respondent and hence any issues relating to such property fall under the provisions of Section 101 of Land Registration Act 2012.**

**3) THAT this honourable court therefore lacks jurisdiction to hear and determine the issues raised herein.**

#### **Determination**

12. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

13. 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;*

14. In this case the applicants' contention is that the petitioners did not disclose the fact that they have interest in the properties that were allegedly indicated in the summons for grant of administration to belong to the deceased.

15. The applicants' factual averments were not controverted by the Respondents since the Respondents did not file any replying affidavit. I agree with the position in Kennedy Otieno Odiyo & 12 Others vs. Kenya Electricity Generating Company Limited [2010] eKLR wherein the court held:-

***“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deposed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant.”***

16. Similarly in Mohammed & Another vs. Haidara [1972] E.A 166 at page 167 paragraph F-H, Spry V.P considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows:

***“The respondent made no attempt to reply to these allegations and they therefore remain unrebutted...Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied...”***

17. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

***“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”***

18. What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J citing the case of Autar Singh Bahra And Another vs. Raju Govindji, HCCC No. 548 of 1998 appreciated that:

***“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.***

19. Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

20. In the case of Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, Makhandia, J (as he then was) held that:

***“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.***

21. In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

***“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.***

22. Similarly, in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

23. I must however state that where the allegations made even in an affidavit fall short of the legal threshold expected in a matter the Court may still decline to grant the orders sought and this must be so even in cases where the application is not opposed. This was the Court of Appeal's position in Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998 where it was held that it is an error for the Court to hold that a failure to file grounds of opposition automatically entitles the applicant to orders *ex parte* as the applicant is not relieved of the onus on him of justifying his application.

24. This is my understanding of the holding of Rajah, JA in Britstone Pte Ltd vs. Smith & Associates Far East Ltd [2007] 4 SLR (R) 855 at 59 that:

**“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”**

25. In this case it is clear that section 76 of the *Law of Succession Act* does not restrict those who can apply for revocation of grant to only the beneficiaries of a particular estate. Accordingly, it is my view that any person whose interests have been adversely affected by the issuance of the grant or confirmation thereof is properly entitled to apply for its revocation or annulment.

26. As for the issue whether the issuance of the title bars such an application, I associate myself with the position adopted by **Ougo, J** in the **Re Estate of Wambui Kiigi- Deceased (2017) eKLR** where it was stated that:-

**“The subject matter before this court pertains to two properties acquired through the estate of the late Wambui Kiigi via Succession Cause 49 of 1975 issued to her step-sons in accordance to customary laws as opposed to the deceased daughters who at the time were married. The dispute over the property thus stems from a succession matter of the deceased estate, thus this court has jurisdiction over the said matter.”**

27. Without any replying affidavit, it is clear to this Court from the depositions by the applicants that the applicant’s interests in the suit properties were adversely affected by the failure of the Respondents to notify them of the said proceedings and the eventual inclusion of the suit property as part of the estate of the deceased without their knowledge. Section 51 of the *Law of Succession Act* provides as follows:

***(1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.***

***(2) An application shall include information as to-***

***(a) the full names of the deceased;***

***(b) the date and place of his death;***

***(c) his last known place of residence;***

***(d) the relationship (if any) of the applicant to the deceased;***

***(e) whether or not the deceased left a valid will;***

***(f) the present addresses of any executors appointed by any such valid will;***

***(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;***

***(h) a full inventory of all the assets and liabilities of the deceased; and***

***(i) such other matters as may be prescribed.***

28. In this case clearly the interests of the applicants clearly constituted a liability to what was on the face of it the estate of the deceased and that ought to have been disclosed.

29. In the premises, I am satisfied that the grant herein was obtained and confirmed by the making of a false statement or by the concealment from the court of something material to the case and that further the same 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.

30. In the premises the summons for revocation of grant succeeds to the extent that the confirmation of the grant herein is hereby revoked

31. There will be no order as to costs.

32. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 5<sup>th</sup> day of March, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Ms Kilonzo for the Administrator**

**Mr Muthama for Miss Gichuki for the Applicants**

**CA Geoffrey**