



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 581 OF 2005**

**IN THE MATTER OF THE ESTATE OF THE LATE PHILES MUKULU MUSYOKI (DECEASED)**

**PAUL MUTETI MUSYOKI**

**AGNES MWAITU MUTUA**

**RAPHAEL NDAMBUKI MUTETI.....PETITIONERS**

**AND**

**JOSHUA NZIVO MUTHAMA**

**FRANCIS MUNYAO KIILU.....OBJECTORS**

**RULING**

**Introduction**

1. Before the Court is an application dated 24<sup>th</sup> July 2010 by the Objector/Applicant seeking the following orders:

- i. The grant of representation issued on the 20<sup>th</sup> day of November, 2008 be revoked and or annulled*
- ii. The entire proceedings be declared a nullity.*
- iii. The costs be granted in any event.*

The application is supported by the affidavit of Joshua Nzivo Muthama sworn on 29<sup>th</sup> July 2010.

2. The said Application has three annexures in its support that being -

- i. Certificate of confirmation of grant in succession No. 128 of 2001 in Machakos High Court in the estate of Philes Mukulu Musyoki dated 20<sup>th</sup> May 2002 issued to Paul Muteti Musyoki.*
- ii. Grant of letters of Admission intestate granted to Paul Muteti Musyoki dated 26<sup>th</sup> June 2001.*
- iii. Affidavit in support of protest dated 12<sup>th</sup> June 2010 sworn by Agnes Mwaita Mulwa.*

3. The Application is brought under section 76 (a) (b) (c) of the Law of Succession Act which provides:

**76. Revocation of annulment of grant**

*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 on 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.

d) That the person to whom the grant was made had failed, after due notice and without reasonable cause either;

1) To apply for the confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

2) to proceed diligently with the administration of the estate; or

3) 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) 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.

### **Respondents' Reply**

4. The Respondent's filed a Replying Affidavit dated 21<sup>st</sup> day July 2010 sworn by Raphael Ndambuki Muteti that attached -

i. Grant issued on 20/11/2008 in Succession Cause 581 of 2005

ii. Affidavit by the objector's purporting to be entitled to portions of land in the Estate of the late Philes Mukulu Musyoki.

(a) They aver that the objection is time barred as 30 days after issuance of letters of Administration had lapsed

(b) That they aver that it is a lie that the objectors brought land from the late Philes Mukulu Musyoki.

5. They also aver that many beneficiaries were left out of Succession Cause 128 of 2001 and annex proof by way of -

i. Letter from the Chief of Mutituni location indicating that heirs of Philes Mukulu Musyoki (deceased) are 11 people.

ii. Affidavit in support of petition for letters of Administration (one page of it) showing the beneficiaries to be Paul Muteti Musyoki (married), Francis M Kiilu (Buyer), Joshua N Muthama (Buyer).

6. It is avered that Paul Muteti Musyoki throughout his life time was not aware of the existence of Succession Cause No. 128 of 2001 and that they have no interests in the other succession cause which was meant to transfer the said portions to the objectors.

7. They aver that "if indeed Paul had applied and was issued a Grant of letters of Administration vide High Court Succession Cause 128 of 2001 that was later confirmed in 2002.....why didn't he execute the confirmed Grant and transfer the said portions to the objectors within the three years before his death in 2005?"

8. The Respondents further state that the objectors e.g 1<sup>st</sup> objector passed as a buyer and as a guarantor in Succession Cause No. 128 of 2001 fraudulently without the knowledge of the deceased family. They further state that the objectors are in possession of vital documents of the deceased e.g ID card and death certificate which they use as they please. They have even fenced off portions of land known as No. Mitaboni/Mutituni/2249 interfering with farming activities of the deceased family, and blocking all roads accessing the said land.

9. The Petitioners herein thus state that this Court to expedite justice in this matter and compel the Objectors in this matter to compensate the family of the late Philes Mukulu Musyoki for long term damages caused by their illegal activities and as it has no basis to object the confirmation of this grant.

### **Submissions by Objector/Applicant**

10. The Applicant submits that the application is primarily based on the ground that the estate of the deceased has been conclusively handled in Succession Cause No. 128 of 2001 Machakos and further that this current case touches and concerns the same person and as such we cannot have two succession causes at the same time.

11. They also submit that the grant in cause No. 128 of 2001 was confirmed on 20<sup>th</sup> May 2002, three (3) years before the current Succession Cause was filed, and thus it is an abuse of the court process. They also informed the court of the following:

a. Raphael Ndumbuki Muteti (3<sup>rd</sup> petitioner) is the son to one Paul Muteti Musyoki (1<sup>st</sup> petitioner) in this cause No. 581 of 2005.

b. The late Philes Mukulu Musyoki had only one son/beneficiary Paul Muteti Musyoki (1<sup>st</sup> petitioner) in cause No. 581 of

2005.

*c. That the said Paul Muteti Musyoki filed succession cause No. 128 of 2001 upon demise of the mother Philes Mukulu Musyoki.*

*d. Paul Muteti Musyoki (deceased) passed away on 10/12/2005 and letters of Administration in this cause 582 of 2005 were granted on 20/1/2008 long after death of the said Paul Muteti Musyoki and substitution was never done, the intention grant wrongly issued and ought to be revoked.*

12. The Applicant finally submits that there should not be two succession causes of the same estate and if the petitioners have any genuine concerns then the same should be raised in succession cause No. 128 of 2001.

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

13. The Petitioners herein who are the Respondents filed two sets of Submissions dated 21<sup>st</sup> January 2016 and 25<sup>th</sup> April 2013 but the two raise almost identical issues in that

*a. Succession cause No. 128 of 2001 was fraudulent*

*b. Succession cause No. 128 of 2001 disinherited several beneficiaries of the estate of the late PHILES MUKULU MUSYOKI.*

*c. That succession cause No. 128 of 2001 is strange and unauthentic.*

*d. That the objectors in this matter are not genuine purchasers of the estate.*

14. The Respondents submit that the petitioners in Succession Cause 128 of 2001 who are the Objectors herein, applied for Letters of Administration which they were granted and later had their grant confirmed without informing or seeking the consent of the other interested parties who are beneficiaries of the estate as provided for in Rule 40 (8) of Probate and Administration Rules.

15. The Respondents finally submit that the objectors intend to subdivide the property identified as title No. 2249 into several uneconomic units which is disadvantageous to other beneficiaries and seek the court to arrange and visit the scene to have an opportunity to observe and make a decision of its own.

### **Determination**

16. It is not disputed that there is already another succession cause being Succession Cause 128 of 2001 involving the estate of the deceased Philes Mukulu Musyoki.

17. Section 6 of the Civil Procedure Act bars the Court from proceeding with a subsequent suit similar to a pending or prior suit, as follows:

### **Section 6 Civil Procedure Act**

#### **Stay of suit**

*“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly or substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of their claim, litigating under the same or any other court having jurisdiction in Kenya to grant the relief claimed.”*

18. There cannot be two valid grants of representation issued to different persons in respect to the same estate. In this case, however, the subsequent grant to the Petitioners in this cause is not viable as there is already a grant issued in Succession Cause No. 128 of 2001, whether fraudulently as claimed or not. In accordance with the **sub judice** rule, the Petitioners ought to pursue their interest in the matter under the prior suit.

19. The Court considers that, owing to the existence of a prior succession cause in which the grant of representation in the estate of the late Philes Mukulu Musyoki had been made to the 1<sup>st</sup> petitioner Paul Muteti Musyoki alone, aggrieved Petitioners should, instead of filing this subsequent succession cause and running foul of section 6 of the Civil Procedure Act, they should have exercised their right as provided for by section 76 of the Law of Succession Act, which is still viable to them at this point given their allegations.

### **ORDERS**

20. Accordingly, for the reasons set out above, the Court makes the following orders:

**1. The Petition and the proceedings herein are declared a nullity having been taken after the Court had in Machakos H.C. Succession Cause No. 128 of 2001 already made a Grant in the same Estate to Paul Muteti Musyoki, which was confirmed on 24<sup>th</sup> April 2002.**

**2. The Grant of Letters of Administration herein made to Paul Muteti Musyoki, Agnes Mwaitu Mutua and Raphael Ndambuki Muteti is, therefore, annulled.**

**3. The petitioners are at liberty to file for revocation of the Grant of Letters of Administration in Succession Cause No. 128 of 2001, as they may be advised by their legal advisors.**

21. There shall be no orders as to costs.

*Order accordingly.*

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 1<sup>ST</sup> DAY OF MARCH 2019.**

**G.V.ODUNGA**

**JUDGE**

Appearances

Petitioners in person

M/S B.M. Mung'ata & Co. Advocates for the Respondents