



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 624A OF 2010

IN THE MATTER OF ESTATE OF THE LATE NZOVE WAMBUA (DECEASED)

DANIEL MULI JUSTUS.....1ST APPLICANT

AND

AGNES MBULWA JUSTUS.....2ND APPLICANT

VERSUS

RICHARD MUTUA NZOVE

ANTHONY WAMBUA NZOVE.....ADMINISTRATORS/ RESPONDENTS

RULING ON DIRECTIONS

1. The deceased herein **NZOVE WAMBUA** died on 9th February, 2006. Before his death the deceased was presumably the registered owner of land **Title No. Mavoko Town Block 3/2997** that is currently registered in the names of Richard Mutua Nzove and Antony Wambua Nzove as from 18.6.2014.

2. The application filed on 15.2.2016 dated 23.1.2016 sought revocation of the grant that was issued on 11.4.2011 on the grounds of concealment of material information and misrepresentation of facts. The said application was dismissed and found to lack merit and this prompted the instant application that was brought under **Sections 47 and 76(b) and (c) of the Law of Succession Act** and **Rules 68 and 73 of the Probate and Administration Rules** seeking orders that:

a). *Spent.*

b). *Spent*

c). *This Honourable Court's Orders/Ruling dated 22.5.2018 dismissing the 1st applicant's application dated 18.2.2016 be reviewed and set aside.*

d). *The confirmed grant issued to Richard Mutua Nzove and Anthony Wambua Nzove be revoked.*

e). *That the 1st and 2nd Applicants, whom the deceased had taken and recognized as his children and dependants during his lifetime be included in the list of beneficiaries of the deceased's estate and be given their shares thereof.*

f). *The costs of the application be provided for.*

3. The Respondent, via undated replying affidavit opposed the application.

4. Counsel for the Applicants sought that oral evidence be tendered, and that she be allowed to call witnesses. However the respondent suggested that the application ought to be canvassed vide submissions.

5. Having carefully considered the arguments of counsel for the Applicants and the Respondent, it is my view that the substantive issue for

determination is what procedural direction may be given for canvassing the issues raised in the review application.

6. As the Court determines this issue, it will take into account that at this juncture, it is not called upon to determine the disputed issues with a finality especially since the application is based on affidavit evidence. An affidavit is a written statement of facts and is accepted as evidence and from the circumstances before the court, the application relates to the review of a ruling that the court had previously passed. Where such evidence has been tendered, the only instance that the witnesses may give oral evidence is where it is sought to cross-examine them as per the provisions of Order 19 rule 2 of the Civil Procedure Rules that states as follows

Power to order attendance of deponent for cross examination.

“2. (1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.”

7. The arguments by counsel do not reflect an intent to cross-examine the deponents thereby implying that the applicants will have the opportunity to convince the court as to whether they meet the threshold for grant of the orders sought via submissions, whether oral or written and by admitting viva voce evidence would amount to putting the cart before the horse. The issue of whether viva voce evidence will be taken shall only take place after the determination of the review application.

8. In my view, there being no objection to the evidence via the affidavits that have been filed, and there being no demonstrated need to summon the deponents of the affidavits for cross-examination, at this stage it would be for the counsels to argue out their application either orally or by written submissions.

9. In the upshot the court makes the following orders:

That the Application dated 30th January, 2019 be canvassed either via written or oral submissions.

It is so ordered.

Dated, delivered and signed at **Machakos** this **13th** day of **May, 2019**.

D.K. KEMEI

JUDGE