



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 613 OF 2015**  
**IN THE MATTER OF THE ESTATE OF JAMES MBUTHIA MBOCHO (DECEASED)**

**MARGARET WANUNA MBUTHIA**

**DAVID KURIA MBUTHIA**

**JENNIFER WANJIKU KIARIE.....APPLICANTS/OBJECTORS**

**-VERSUS-**

**THOMAS KIHARA MBUTHIA.....1<sup>ST</sup> RESPONDENT**

**RONALD MIGWI MBUTHIA.....2<sup>ND</sup> RESPONDENT**

**FAITH WANGUI MBUTHIA.....3<sup>RD</sup> RESPONDENT**

**AND**

**SAMUEL KIARA NYONGO &**

**SELER KIARA.....INTERESTED PARTIES**

**JUDGMENT**

**PLEADINGS**

The deceased **James Mbuthia Mbocho** died intestate on 28<sup>th</sup> October 2008. A petition for grant of letters of administration intestate was issued to Thomas Kihara Mbuthia and Ronald Migwi Mbuthia (**the 1<sup>st</sup> and 2<sup>nd</sup> respondents**) and confirmed on 23<sup>rd</sup> October 2012.

The Applicants brought the present application dated 13<sup>th</sup> March 2015 for revocation of grant seeking orders that:

- a) the grant issued on 23<sup>rd</sup> October 2012 be revoked;
- b) the grant do issue in alternative in the names of David Kuria Mbuthia, Jennifer Wanjiku Kiarie and Mathew Kinyanjui Mbuthia; and
- c) the estate of the deceased including LR. No. Kiambaa/ Thimbugua/ 6596 and Kiambaa/Thimbugua 6597 subdivisions of LR. No. Kiambaa/Thimbugua 961 be preserved by the order of this court and the same not to be sold, transferred or charged pending the hearing of this application.

The application was supported by the affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> applicant dated 13<sup>th</sup> March 2015.

It was Applicants' case that the Administrators/Respondents did not give a full account of all assets to the estate such as funds withdrawn

from **CFC Bank, Unity Bank Limited and Equity Bank Limited** –Kimathi Street Branch. The Respondents have not involved the beneficiaries in distribution of the deceased's estate and **LR. No. 378 & No. 425** in Gilgil (**5Acres**) which were left out in the summons for confirmation of grant.

The Applicants contended that the administrators excluded **Gema shares** in form of land, **Safaricom shares** and **Gichi Farm shares** for the purpose of administration.

In obtaining the grant, the administrators misrepresented material facts; they left out properties that comprised of deceased's estate and the pecuniary jurisdiction of the Trial Court in Kiambu exceeded the limit then at **Ksh 100,000/-**

Secondly, the distribution of the deceased's estate was not fair, equal or equitable to all beneficiaries. The administrators allocated themselves a larger share than other beneficiaries.

The Respondents filed Replying Affidavit on 15<sup>th</sup> October 2015 and objected to 1<sup>st</sup> Objector their mother who is advanced in age and senile to be joined to these proceedings, The Respondents claimed that in **Kiambu CMCC 208 of 2011**, the objectors consented to the Respondents appointment as administrators and the distribution of the estate. The Objectors had filed Objection in the said suit and then withdrew the same. The administrators were not aware of the properties listed and had no information or seen any documents of the properties so as to include them to the deceased's estate.

It was further their case that the respondents did not distribute the estate fairly as the 1<sup>st</sup> respondent allocated himself a larger share than other beneficiaries. They further averred that the respondents advised one **Donald Mbuthia Muriu** to sell his share of the land and proceeded to get buyers for him.

The Respondents opposed the application. It was their case that the summons for revocation was mischievous, frivolous and an abuse of the legal process. It was their case that the objectors consented to their appointment as administrators and proceeded to withdraw their objection to the issuance of the grant vide a notice dated 25<sup>th</sup> January 2012. They averred that they were not aware of any money that the deceased left at **CFC Bank** as alleged and that no money had been left at Equity Bank which had already been discussed at a family meeting. As regards **LR No. 378 and 425** kikuyu Naivasha, it was their claim that the same did not form part of the deceased estate since there was a long standing dispute regarding their ownership between the deceased and his brother which had not been resolved at the time of the deceased's death. They further averred that the estate was distributed fairly and they did not at any time allocate themselves larger shares as alleged as even prior to the deceased's death he had already subdivided his parcel known as **Kiambaa/Thimbugua/961** into **19** portions and obtained consent for the said subdivisions from land board. They stated that all beneficiaries had already obtained their titles as per the confirmed grant and the instant application was an afterthought. They further averred that upon the distribution of the estate all beneficiaries including Donald Mbuthia muriu had absolute right to deal with their respective properties as they wished and as administrators they had no legal mandate or capacity to restrain or prevent a beneficiary from dealing with his/her share of the estate that had already been allocated to him. It was their case that there were no sufficient grounds adduced by objectors to warrant the revocation of the grant issued more than 3 years after its confirmation.

On 16<sup>th</sup> March 2015, this Court granted interim orders preserving the suit properties **Kiambaa/Thimbugua/6596 and Kiambaa/Thimbugua 6597** subdivisions of **LR. No. Kiambaa/Thimbugua 961**. These orders were issued on 10<sup>th</sup> April 2015. On 15<sup>th</sup> May 2015, this Court issued a further order that any transactions, negotiations and sale of any of the properties of the deceased contrary to the Court order of 10<sup>th</sup> April 2015 are null and void and invalid until hearing and determination of the present application.

On 27<sup>th</sup> October 2015, the interested parties filed application and argued that they had legally purchased **LR. No. Kiambaa/Thimbugua /6597** from Donald Muriu Mbuthia vide their sale agreement having carried out due diligence properly and confirmed there was no encumbrance whatsoever on the title. They sought for the removal of the restriction placed on the said suit premises. It was their case that the order granted on 10<sup>th</sup> April 2015 was extracted and served after the registration of the parcel in their favour. They averred that the seller had capacity as he was a beneficiary and the administrators were present during the negotiations to the transaction and signed all requisite documents thereto.

## **HEARING**

### **The Applicants/Objectors stated their case as follows;**

**David Kuria Mbuthia** (PW1) relying on his affidavits objected to the grant due to the fact the distribution was/is not fair their mother who is alive was not allocated any land. Their father did not leave a **Will** therefore the estate ought to be distributed as an intestate estate. The Administrators collect rent from suit properties and do not account to beneficiaries. He lived/lives with their mother and the Administrators threatened to evict him and his mother who is aged and senile. The Administrators helped the deceased's grandson sell his land to the interested parties. The said grandson is an orphan/drun kard and despite the prohibition on the suit property, the same was vacated and ancestral land was sold despite this Court's order of preservation of the estate till hearing and determination.

**PW2 Jennifer Wanjiku Kiarie** (PW2) told this Court that in the distribution she was allocated less than 1/8 of an acre 50 by 70 ft while the Respondent Administrators allocated themselves 3 acres each in **Kiambaa/Thimbigwa/961. Kiambaa/Thimbigua/377** had/has rental houses that administrators collect rent almost **Ksh 80,000/-** and they do not account for the same and/or take care of their aged mother.

The **Gema shares** and **Gitwe Farmers** property are near Rivers Mall and land is valuable but was not included in deceased's estate.

**PW2** stated that she brought up **Elizabeth Njeri**; her late sibling's children Donald and Judy and Donald is a drunkard and orphan who the administrators helped sell his portion of the land to the interested parties herein. Donald left home thereafter.

**PW3 Donald Mbutia Muriu** testified he is grandson of deceased and his mother **Elizabeth Njeri** was daughter to the deceased. He inherited land from his estate jointly with his sister **Judy Wanja** on **Kiambaa/ Thimbigua/961 Mucatha Plot No J**. He subdivided the Plot into 2 and in 2015 he sold his share to the interested parties for **Ksh 7.1 m**. He confirmed his signature on the Agreement for Sale. He bought a farm in Limuru and shares in Britam. He lives in Ngong.

**PW4 Faith Wangui Mbutia** corroborated the facts by PW1 & 2 as follows;

The share she was allocated in **Kiambaa/Mucatha/377** is where she lives with their aged mother who is senile. She caters for her needs and with no support from the estate; the administrators. She spent **Ksh 10,000/-** a month looking after their mother. Her brother David who lives with their mother is a drunkard and locks himself in the house. She hired a lady to look after their mother. She asked David to vacate the Plot as he had 3 plots and shops to collect rent from but he refused. She said she was content with the distribution of the estate. She confirmed that her nephew Donald sold his land against their wishes and moved away.

The Respondent/Administrators **DW1 Ronald Migwi Mbutia & Thomas Kihara Mbutia** testified they were appointed administrators with beneficiaries' consents. They distributed the suit property according to their late father's subdivision in 2006 after they recovered the documents from his office. They confirmed that subdivision in summons for confirmation of grant and each got a fair share in fact David had a bigger portion, and has refused to vacate their mother's home. They discussed the matter with Chief, elders and in Court all agreed to the distribution. They cannot tell why the Objectors **PW1 & PW2** were not given bigger shares. The divided according to their father's Will.

The properties left out they have no documents of them. The money in the Account in Equity Bank was used for medical expenses for **David Kuria** who was injured on the head by thugs. **LR 378 & 428** there ongoing disputes.

The land allocated to the nephew Donald & Niece Judy, where the larger family opposed Donald selling the land, the administrators allowed and aided to sell because he is an adult and he was responsible now. They collected the money and gave him and he invested the same.

### **SUBMISSIONS**

Parties filed their written submissions which I have considered.

### **DETERMINATION**

The circumstances that can lead to the revocation of grant have been set out in **Section 76 Law of Succession**. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

A grant may also be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate. See - **Matheka and anor v Matheka [2005] 1 KLR pg 456**. It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.

In the case of **Alex Mwenda Mwirigi -vs- Rodah Karimi Jadiel, Succession Cause No 337 of 2011**, in a decision rendered on 2<sup>nd</sup> November, 2016 held that:

***“[5] I will not re-invent the wheel. This is an application for revocation of under Section 76 of the Law of Succession Act CAP 160 of the laws of Kenya and I only need to ask whether it satisfies the threshold provided in law? Given the arguments being presented, the most apt grounds to be met are, whether:***

***(a) The proceedings to obtain the grant were defective in substance;***

***(b) 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; and***

***(c) 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) .....***

In the case of **Albert Imbuga Kisigwa v Recho Kawai Kisigwa, Succession Cause No.158 Of 2000**, Mwita J. in a decision rendered on 15<sup>th</sup> November, 2016, noted thus:

***“[13] Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not adiscretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.”***

I have carefully analysed the evidence on record. It is the Applicants 'case that the process of obtaining grant and confirmation thereof was

defective.

This Court did not obtain the Court proceedings of **CMCC 208 of 2011** to confirm consents to appoint the Respondents as administrators and file petition for grant and later on distribution of the estate in the confirmed grant. Therefore the assertions remain one's word against the other. The Applicants claim that the administrators omitted to include several assets belonging to the estate. To this fact, this is not fatal to the grant as they explained that the assets were not available for distribution as the land have ongoing disputes and money in one of the accounts was spent as medical expenses.

However, to the issue/claim that the distribution of the estate had been done unfairly with the administrators getting a larger share than others; this fact is borne out by evidence. The Applicants daughters of the deceased with exception of **Faith Wangui**, they are allocated less than  $\frac{1}{8}$  of an acre and nothing more. The administrators explain that this is what their father had planned as per the documents found in his office. First, the administrators sought grant of letters of administration intestate. Therefore, there was no valid oral or written **Will** in terms of **Section 9 & 11 of LSA**. There is no evidence placed before this Court to confirm that the said subdivision was by their late father, that they consented to the same being used during confirmation of grant and/or that the Applicants were in Court during confirmation of grant and they consented to the distribution of the estate as such. In the absence of such evidence before this Court, the distribution is found to be contrary to **Section 35 LSA** at the time their mother was alive and **Section 38 LSA** since the demise of their mother in 2018.

This Court noted with concern from the evidence on record that the distribution of the estate as at 2012 did not have any share of the Deceased's surviving spouse; and there were no funds specifically set aside allocated from the deceased's estate for their late mother's medical expenses and upkeep. Instead both Applicants and Respondents swore affidavits in the name of their mother whom they all admitted was aged and senile. They misrepresented and misled the court.

From the above circumstances, this Court finds the proceedings to obtain the grant were defective in substance as the Trial Court exceeded pecuniary jurisdiction because the administrators did not disclose the value of the properties was beyond **Ksh 100,000/-** then; especially after part of one of the properties was sold at **Ksh 7.1 million**.

Secondly, after obtaining the grant the administrators did not proceed diligently with administration of the estate from the facts highlighted above that they relied on subdivisions allegedly by deceased but did not seek consents of all beneficiaries to use them. The grant and confirmed grant are hereby revoked.

With regard to the sale of **LR Kiambaa/Thimbugua 6597**, it is the interested parties case that the said premise was purchased lawfully from one of the beneficiaries PW3. Donald Mbutia Muriu testified in Court that he voluntarily sold the land and he signed agreement for sale. He was paid **Ksh 7.1 m** which he invested and has no claim /complaint and he is now responsible.

The interested parties; after undertaking due diligence and confirming that everything was in order and proceeded with the sale. It was further their case that they were not served with the Court orders preserving the estate of the deceased until hearing and determination of the application.

By the time of service, the suit property was registered in their names and no longer part of deceased's estate. This Court saw copy of title dated 10<sup>th</sup> April 2015, the date of the issuance of the Court Order. They could not have been served on time.

This court saw and heard evidence from **PW3** and is satisfied that the fear by his family that he was not responsible was allayed. The Sale of the land was above board and it was/is a willing buyer/willing seller sale transaction. If any conflict arises it ought/shall be addressed before the **Land & Environment Court**.

With regard to revocation of grant hereinabove the purchase of the suit property was with /from a valid grant and confirmed grant as at the time of sale. Therefore, the proprietary rights of the Purchasers are protected by virtue of **Section 93(1) of LSA**.

## **DISPOSITION**

**In view of the foregoing, the application dated 13<sup>th</sup> March 2015 is partly upheld and partly dismissed as follows;**

- 1. The grant and confirmed grant are revoked by Section 76(a) & (d) LSA;**
- 2. The sale of LR Kiambaa/Thimbugua 6597 is valid regular and lawful if any dispute arises to be canvassed in Land & Environment Court;**
- 3. A new grant shall/is issued to;**
  - a) Matthew Kinyanjui Mbutia**
  - b) Eliud Kamunyo Mbutia**
  - c) Jennifer Wanjiku Kiarie**
  - d) Lucy Wambui Kahiga**

4. Jointly to consult each and every beneficiary with a view to equitable/equal distribution under Section 38 LSA of the remaining properties that comprise of the estate of the deceased.

5. The administrators should not evict any beneficiary from where each resides and no demolition of any permanent structures shall be undertaken.

6. The administrators to after meeting(s) with all beneficiaries shall file summons for confirmation of grant with consents of all beneficiaries any aggrieved party may file protest to be heard and determined by any Court in Family Division.

7. The Court orders of 10<sup>th</sup> April 2015 and 15<sup>th</sup> May 2015 are hereby vacated.

8. Each party to bear own Costs.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 3<sup>RD</sup> JUNE 2019**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**M/S RACHEL WANJIRU/ KAHUTHU ADVOCATES FOR APPLICANTS**

**JENNIFER KIARIE – IN PERSON**

**DAVID KURIA – IN PERSON**

**COURT ASSISTANT - JASMINE**