



**REPUBLIC OF KENYA**

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

**HC. SUCC. CAUSE NO. 124 OF 2017**

**IN THE MATTER OF THE ESTATE OF JAMES KAINDI MUTWAMBWII (DECEASED)**

*(Formerly Machakos Succession Cause No. 64 of 2015)*

**JULIUS MUTETI MAILU ..... PETITIONER**

**RULING**

1. The Applicant filed the summons dated 7<sup>th</sup> December, 2018 seeking to revoke the confirmed grant of letters of administration intestate issued to **Julius Muteti Mailu** in respect to the estate of the late **James Kaindi Mutwambwii** made on 7<sup>th</sup> day of June, 2018.
2. The main grounds on which the application is based are as follows: -
  - a) Julius Muteti Mailu is a stranger and meddlesome interloper to the estate of the late James Kaindi Mutwambwii as he is neither a beneficiary nor a child of the late James Kaindi Mutwambwii.*
  - b) The proceedings to obtain the grant were defective as there was already another Succession Cause 286 of 2011 at the High court at Machakos involving the same estate.*
  - c) The said grant was obtained fraudulently by the concealment from this court of a material fact that the late James Kaindi Mutwambwii had 11 surviving children and that Julius Muteti Mailu is not one of them, adopted or otherwise.*
3. The application is also supported by the affidavit of the Applicant **Richard Maundu Kaindi**. He has deponed that the deceased was his father and he died on 4<sup>th</sup> June 2010. He was the sole registered owner of land parcel No. **MAKUENI/KAKUTHA/628 (Title deed RMK2)**. A succession cause was filed as High Court Machakos Succession Cause No. 286 of 2011 (RMK3) and a grant issued in the name of their mother who later died. An application for substitution was made (**RMK -4**) and allowed. Another grant was issued (**RMK – 1**) in the names of the new administrators.
4. They applied for confirmation of grant vide an application dated 12<sup>th</sup> October, 2018 (**RMK 5**). On or about 22<sup>nd</sup> November, 2018 they received a copy of a confirmation of grant issued to the Petitioner (Julius Muteti Mailu) in respect to the same estate of their father vide High Court Makueni Succession Cause No. 124 of 2017 (**Formerly Machakos Succession Cause No. 64 of 2015 – RMK 6**).
5. He deponed that they were not aware of the Makueni Succession Cause. Further on or about 5<sup>th</sup> December, 2018 they were served with a letter from the Makueni County surveyor ordering them to attend a site visit on 10<sup>th</sup> December, 2018 with a view to partitioning the subject land as per the Land Control Board consent. (RMK 7). Petitioner/Respondent is not a beneficiary of the estate of the late James Kaindi Mutwambwii.
6. The Petitioner/Respondent filed a replying affidavit sworn on 24<sup>th</sup> June, 2019 and filed on the same day. He deponed that he is an administrator of the estate of the late James Kaindi Mutwambwii and cousin to the Applicant. The letters of administration were annexed as **JMM 1**. He depones that his father Mailu Mutwambwii was a brother to Kaindi Mutwambwii the father of the Applicant.
7. Further, that the land **Makueni/Kakutha/628** is an ancestral land which belonged to their late grandfather Mutwambwii. He annexed a copy of the father's death certificate (**JMM2**).
8. He deponed that he was one-year-old when his father died and the Applicant's father misled the land officers and had the land registered in his name. Therefore, the title is held in trust for all other family members. He avers that the **Machakos Succession Cause No. 286 of 2011** was done by the Applicant with full knowledge of the existence of the land case between him and Kaindi Mailu.
9. That the late Kaindi Mailu had sued him over his said land vide **Machakos Civil Suit No. 453 of 1999** and the said suit was dismissed

with costs, (*JMM5*). He states that the confirmed grant directed that the subject land be registered in the joint names of Munyao Kaindi (brother to the Applicant) and himself. He opposed the application.

10. On 24<sup>th</sup> January, 2019, directions were given to the effect that the summons for revocation of grant would be heard by way of viva voce evidence.

11. When the matter came for hearing, the Applicant gave evidence on the basis of his witness statement and supporting affidavit which has already been set out above. It was his evidence that the grant issued in **Machakos Succession Cause No. 285/2011 to Richard Kaindi, John Kaindi and Bondace Kaindi**) jointly was confirmed on 20<sup>th</sup> June, 2019.

12. The land in issue belonged to his grandmother and she divided it to her two sons. Namely:

- **Kaindi Mutwambwii**

– **Malele Mutwambwii**. The third son Mailu Mutwambwii did not get a share as he died in 1959 and his widow Ndumi returned to her parents. They had been blessed with a child (daughter)

13. He testified that the Petitioner/Respondent is a son to Ndumi but born to another man called Nasi long after his father's death. The said Ndumi is also deceased. He added that in 1996 the Respondent had come to their home and a meeting held at the DO's office. He was not part of this meeting. He admitted that his father (Kaindi) and his brother had filed a case against the Respondent but the same was dismissed for want of prosecution.

14. He testified that the Respondent did not involve them when he filed this case. In cross examination, he stated that the Respondent's mother Ndimu attended the meeting at the D. O's office and she had stated categorically that the Respondent was not Kaindi's son.

15. His witness **Anthony Nzioka Mutua** (Pw2) told the court that the Respondent's mother is his cousin. That Nasi was the Respondent's father, and not Mailu Kaindi. He said Kaindi died 1959 in Nyeri and was buried there while the Respondent was born in 1964. He stated that the Respondent could not inherit land from Mailu Kaindi's family, as he was not one of them.

16. The Respondent on the other hand testified and insisted that Mailu Kaindi was his father who was a brother to James Kaindi Mutwambwii and Malilu Mutwambwii. He referred to the proceedings of the land case in this case. He asked the court not to revoke the grant since he had followed all the procedures.

17. He claimed to have served the Applicant's family with all the processes before the grant was issued and confirmed. He had even registered the land as per the confirmed grant. It was during the survey process that he learnt of parallel proceedings. He argued that they could not have parallel succession proceedings. He asked the court to determine who followed the correct procedure.

18. In cross examination, he admitted having obtained a death certificate whose date of death and place of death differed from what is in the D. O's proceedings. He admitted that Mailu was not his father as admitted by his own mother. He also admitted not having called for any family meeting of the Kaindis before filing this case.

19. When asked about any consent agreements he may have had with the Kaindi family, he said they were all with his lawyers. He even claimed that Benson Munyao Kaindi signed a consent for filing of the case but the said consent was with his lawyer. He admitted to not having forced the Kaindi family into filing a succession cause by citing them.

20. His witnesses Jeremiah Mung'alo Masuku, Bernard Kithuka Wamuinde and Paul Kinyenze Kalei (RW2, RW3 and RW4) also gave evidence to the effect that they recognized the Respondent as a son of Mailu. That the land in issue should be shared out between the Respondent and the Kaindi family.

### **Determination**

21. I have considered the application, affidavits and the oral evidence adduced. The issue for determination is whether any of the grounds for revocation of a grant have been proved to the satisfaction of this court. Section 76 of the Law of Succession Act provides as follows: -

“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 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 has failed, after due notice and without reasonable cause either –*

*i. To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or*

*ii. To proceed diligently with the administration of the estate; or*

*iii. To proceed to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) 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.***

22. A perusal of the record here shows that the Petitioner/Respondent first filed a Succession Cause No. 1 of 2015 before the Makueni P. M's court. It is in respect of the estate of Kaindi Mutwambwii. On 13<sup>th</sup> January, 2015 the learned trial Magistrate well observed that there was a pending **Succession Cause No. 286 of 2011** at Machakos High Court.

He/she directed the Respondent to file the application in that cause. By a letter dated 21<sup>st</sup> January, 2015, the file from Makueni was forwarded to the Deputy Registrar Machakos High Court for necessary action.

23. It is apparent that instead of the Makueni Magistrate's file being placed in the **Machakos High Court Succession Cause No. 286 of 2011** file, a new file Machakos High Court Succession No. 64 of 2015 was opened. It was at this point that parallel proceedings begun, over the same estate of the late James Kaindi Mutwambwii.

24. The said **Machakos High Court Succession Cause No. 64 of 2015** was transferred to Makueni High Court and registered as Succession Cause No. 124 of 2017 which is the current file. At the same time **Machakos High court Succession Cause No. 286 of 2011** remained alive.

25. Both files have grants which have been confirmed in the names of different parties over the same estate and same property. This is an anomaly that would have been sorted out early enough if the Deputy Registrar in Machakos then, had been keen enough especially after being alerted by the Makueni PM's court.

26. Secondly, the Respondent was well aware of the reason why his Succession Cause had been transferred to Machakos High Court. The reason was that there was a pending case there. He cannot therefore come and feign ignorance of the existence of a parallel file at Machakos High Court. I therefore find first of all that there are parallel proceedings in respect to this estate, which is unprocedural.

Secondly it is clear that there was concealment of a material fact in this petition for letters of grant which has led to the parallel proceedings. The current proceedings were also conducted without the knowledge or participation of the nuclear family of James Kaindi Mutwambwii which had already filed a succession cause and who are the immediate beneficiaries of his estate.

27. I therefore find that the application dated 7<sup>th</sup> December, 2018 has merit and I allow it and make the following orders:

**i. The grant issued in Makueni High Court Succession Cause No. 124 of 2017 on 22<sup>nd</sup> December 2015 and confirmed on 22<sup>nd</sup> June 2017, is hereby revoked.**

**ii. The same must be returned to this court within the next 10 days.**

**iii. Any transactions entered into and / or any registrations made using the said confirmed grant are declared null and void.**

**iv. Machakos High Court Succession Cause No. 286 of 2011 with typed proceedings to be forwarded to this court within 21 days for perusal before further directions are given.**

**v. Mention on 29<sup>th</sup> July, 2019, for further orders.**

Orders accordingly.

**DELIVERED, SIGNED & DATED THIS 5<sup>TH</sup> DAY OF JULY 2019, IN OPEN COURT AT MAKUENI.**

.....

**H. I. ONG'UDI**

**JUDGE**