



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CAUSE NO. 61 OF 1995**

**IN THE MATTER OF THE ESTATE OF ISAAC MUSYIMI**

**MUNEENO ALIAS ISAAC MUSYIMI IVULU (DECEASED)**

**BETWEEN**

**BETH KAIWA MUSYIMI.....PETITIONER**

**VERSUS**

**1. DAVID NZIOKA MUSYIMI**

**2. FELIX NDAMBUKI MUIA.....APPLICANTS**

**RULING**

1. The applicants herein filed summons for revocation of grant dated 24<sup>th</sup> September, 2005 on 12<sup>th</sup> October, 2005. The same was brought under sections 47 and 76 (b) of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules. The applicants in particular sought the following orders:

**a. Spent.**

**b. Spent.**

**c. That the grant of Letters of Administration Intestate made to Beth Kaiwa Musyimi and confirmed on 22<sup>nd</sup> July, 2002, be revoked; and the same be issued to both David Nzioka Musyimi & Beth Kaiwa Musyimi.**

**d. That registration of the deceased's properties, which include land parcel No.s Kangundo/Kikambuani/1006 and Kangundo/Mbilini/1462 in the name of Beth Kaiwa Musyimi be cancelled; and the said properties (plus any other belonging to the deceased), be distributed amongst all the rightful heirs of the deceased.**

**e. That costs of this application and of these proceedings be paid by the petitioner Beth Kaiwa Musyimi.**

2. The summons is based on grounds that the deceased had two wives; Esther Syokau Musyimi (deceased) and the petitioner. That the petitioner obtained the grant of letters of administration fraudulently by concealing the foregoing material fact and by presenting to this court an erroneous and fraudulent letter from the area chief indicating that the deceased had only one wife. That the petitioner concealed the existence and identities of the children of the first wife. That in furtherance to the said fraud, the petitioner has registered herself as the owner of the deceased's properties namely land parcel No.s Kangundo/Kikambuani/1006 and Kangundo/Mbilini/1462 which she now holds as her absolute property. That the deceased's entire family including the first wife's children are settled on land parcel No. Kangundo/Kikambuani/1006. That the petitioner has since the year 2004 been threatening the 1<sup>st</sup> applicant and his siblings with eviction and attempts to have the matter solved amicably have failed. It was stated that the petitioner has deliberately failed to disclose all the deceased's assets yet she has all the documents in respect thereof and that the petitioner has threatened to dispose of the deceased's estate which she claims is hers.

3. In reply, the petitioner filed a replying affidavit on 16<sup>th</sup> December 2005. She contended that she knows the 1<sup>st</sup> applicant to be the son of the late Kieti Muneeno and the 2<sup>nd</sup> applicant as the nephew of the 1<sup>st</sup> applicant born to his late brother John Muia Kieti and not as sons to the deceased, Isaac Musyimi Muneeno alias Isaac Musyimi Ivulu. That she is the only surviving wife of the deceased and that their marriage was

celebrated in church. That the deceased left the following surviving him; Joseph Mbithi Musyimi, James Maithya Musyimi, Joshua Muthama Musyimi, Daniel Musyoki Musyimi Peter Muneeno, John Nzomo Musyimi as well as six (6) daughters and herself. That the deceased and the 1<sup>st</sup> applicant's deceased father were the sons of one man but prior to their death each had exclusively his personal movable and immovable property. That after the death of the 1<sup>st</sup> applicant's father, the deceased never inherited the 1<sup>st</sup> applicant's mother since the deceased's marriage with her was still valid as it was solemnized under Christian Marriage and Divorce Act. That the 1<sup>st</sup> applicant's objection is part of a wide scheme to perpetrate his ill intention of acquisition of part of the estate through misuse of this court's process. That prior to his death, the deceased had given out a portion of land from plot No. Kangundo/Kikambuani/1006 to the 1<sup>st</sup> applicant and other members of their house. That the same share was confirmed by family elders on the 23<sup>rd</sup> September, 1989 who put a common boundary using euphorbia. That the two applicants did not consent to the family members' decision. She contended that the summons is misconceived, an abuse of court process and scandalous and no objection was raised to her petition filed in the year 1995 until the year 2005.

4. In rebuttal, the 1<sup>st</sup> applicant filed a supplementary affidavit on 10<sup>th</sup> June, 2014. He maintained that the deceased had two wives; Syokau Musyimi and Beth Kaiwa Musyimi and that he in fact uses the name Musyimi as his surname. That his late mother Syokau Musyimi was the deceased's wife and both he and his siblings are the deceased's children. That the 2<sup>nd</sup> applicant is a son to his late brother Muia Musyimi. He contended that a subsequent church wedding by a polygamous man does not disentitle his children from earlier marriages of his estate. He stated that his three sisters Naomi Nzilani Musyimi, Beatrice Mbula Musyimi and Mary Nthenya Musyimi are married and have since passed on. That he and the family of his late brother Muia Musyimi are settled on the deceased's estate where he was born and lives. That the deceased's estate should be shared equally between the two houses and that the deceased's properties that have already been registered in the petitioner's name on the basis of the confirmed grant should be reverted to the estate and distributed among the deceased's beneficiaries as provided by the law. That the grant should be revoked and re-issued to him and the petitioner.

5. In response, the petitioner filed a further replying affidavit. She denied that she is misleading the court. That contrary to the 1<sup>st</sup> applicant's assertions, the late Syokau Musyimi was never married to the deceased and that Syokau Musyimi was the wife to the deceased elder brother and that it was a taboo for the deceased to inherit her under the Kamba Customary Law. That the name Musyimi appearing on the identity card cannot conclusively confirm and or support the fact that the 1<sup>st</sup> applicant and the 2<sup>nd</sup> applicant's father were the deceased's biological sons save that he cared and maintained them as well as providing education following the death of the 1<sup>st</sup> applicant's father. She contested that the same does not confer the applicant's a right to claim for joint administration of the deceased's estate.

6. The protest was canvassed by way of viva voce evidence. The 1<sup>st</sup> applicant (OB.PW1) stated that his mother Esther Syokau Musyimi was the first wife of the deceased and that the petitioner was his second wife. That the deceased was born in Kalama area of Mbooni. That the deceased had brothers among them Kieti Muneeno Kituku Muneeno and Mwilu Muneeno. That the deceased relocated to Kangundo in the 1930s. That Kieti was the first born while the deceased was the last born. That his first cousins are still alive but Mwilu Muneeno died recently. That Mulinge Kieti is a son to Kieti Muneeno. He stated that it is only the deceased who moved to Kangundo. He stated that he is the fourth born to Syokau Musyimi in the year 1941. He stated that he is not aware that his mother had earlier been married to Kieti Muneeno. That under Kamba Customary Law, a brother to a deceased is expected to take responsibility of his deceased brother's widow and children and that if children are born from that relationship they are considered the deceased's children and not the siring's. He acknowledged that he was present at the wedding of the petitioner and the deceased and that Syokau Musyimi was present too but did not object to the marriage. That Syokau Musyimi was buried in Kieti muneeno's compound where she and Muniyiva lived. With regard to photographs of the marriage ceremony, he stated that same do not show Syokau Musyimi's presence as the deceased's widow. That one of the photographs show the deceased's brother Mwilu and Syokau Musyimi representing her late husband Kieti Muneeno. That the third photograph shows the petitioner seated in front of the deceased's casket while Syokau Musyimi is seated behind in the crowd and further that it is the petitioner who addressed the mourners as the deceased's widow. He however stated that it is the deceased who educated him and his siblings as his own and not as the deceased's children. He stated that the elders later fixed the boundaries to the land and that his family as well as the petitioner has their share. He acknowledged that no one has ordered them out of their portion of the property. He however maintained that the deceased is his father.

7. Mutua Kitumbi (OB.P W2) stated that the deceased was his father in law having married his daughter Beatrice Mbula Musyimi in the year 1960. That his mother in law Syokau Musyimi and the petitioner each had their own houses and that the petitioner is Syokau Musyimi's co-wife. He stated that he paid his wife's dowry to the deceased. He stated that it is against the Kamba customary for a brother to inherit his elder brother's wife.

8. The petitioner's case was as follows. The petitioner (PET.PW1) testified that she is the only wife to the deceased. That Syokau Musyimi was wife to the deceased's elder brother Kieti. That Syokau had already been married by the time the petitioner came to the home and had four children. That she cannot share her property with Syokau Musyimi and her children. That the family land was distributed and Syokau was given a portion. That the deceased had given Syokau's family a portion of the land which they occupy. She stated that the 1<sup>st</sup> applicant should have used Kieti's name since he was his father. That she and the deceased celebrated their marriage which Syokau and her children attended. She denied that Syokau is a second wife to the deceased. She denied that the deceased educated the 1<sup>st</sup> applicant. She stated that the deceased's younger brother is the one who build a house for Syokau.

9. James Muema Mwilu (PET.PW2) stated that he has been the family's chairperson since the year 2010. He denied that the deceased was the 1<sup>st</sup> applicant's father since Syokau was Kieti's wife. That Kieti moved to Kangundo together with Syokau and his two children Nzilani and Muia who are the 1<sup>st</sup> applicant's brothers. That the deceased married the petitioner with whom he had children. That the deceased and the petitioner solemnized their marriage with no objection from Syokau and her children despite their presence in the marriage ceremony. He stated that a younger brother cannot engage in sexual relationship with his elder brother's wife under the Kamba Customary Law. That the deceased established a boundary and set aside land for the 1<sup>st</sup> applicant's family. He stated that the 1<sup>st</sup> applicant's family has not been chased away from their portion and that this claim is baseless. On cross examination, he stated that the 1<sup>st</sup> applicant was educated by the deceased just like Mulinge and that he saw the 1<sup>st</sup> applicant's father Kieti.

10. Harron Mutiso Kivai (PET.PW3) testified that the 1<sup>st</sup> applicant is a son to Kieti and not the deceased. That Syokau publicly stated that her husband was Kieti and not the deceased. That the 1<sup>st</sup> applicant has the deceased's name who was his guardian.

11. Anthony Nzika Mwilu (PET.PW4) stated that Kieti was the deceased's elder brother and that the 1<sup>st</sup> applicant is not a son to the deceased. That there was famine in Kalama and Kieti was forced to relocate to Kangundo with his wife Syokau and his two children. That Kieti left his first wife Ndungwa and her children in Kalama. That the deceased later moved to Kangundo and started taking care of his parents and Kieti's family. That the deceased later married the petitioner and lived with her on a different portion of land. That the deceased then solemnized his marriage to the petitioner in church with no objection from Syokau and her children who were in attendance.

12. The applicant's submissions were a reiteration of his averments. The petitioner on the other hand submitted that section 35 and 66 of the Law of Succession Act provide specific persons who are entitled to petition or to enjoin in the grant in order of priority and permits only the surviving spouse and or children to petition for the grant to the exclusion of other persons. That Rule 26 of the Rules provide that only persons with equal or prior right to petition need to be notified of the petition or their consent obtained before any petition and not otherwise. That the applicants do not fall into the class of the persons referred thereto. That their claim is based on polygamy and concealment of facts and fraud which they have failed to prove. In this regard, the petitioner cited **Re-Estate of Christopher Judi Adele (deceased) (2009) eKLR**. That the applicants are not therefore entitled to a revocation. In further support of her case, the petitioner cited the estate of **Elijah Kilonzo Kithuma; Succession Cause No. 575 of 2008** and **High Court Succession Cause No. 321 of 2003; Estate of Wilson Mutyaavyu Ndunda v. Mathew Ndunda Wilson and others**.

13. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the Law of Succession Act as follows:

**“76. Revocation or 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 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;**
- 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 order or allow; or**
  - ii. to proceed diligently with the administration of the estate; or**
  - iii. 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) 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.**

14. Applying the test, the applicants herein claim in their summons that the deceased was their father and that the petitioner concealed the said facts to the court. The petitioner on her part maintains that she was the only wife to the deceased a fact emphasized by all her three witnesses. I note that despite their claim, the applicants have not tabled sufficient evidence to prove that the deceased was their father. The only evidence tendered is that the deceased educated him. It has further emerged from the petitioner's evidence that the deceased was a younger brother to the 1<sup>st</sup> applicant's father and that being so, the deceased could not inherit Syokau as Kamba customs forbade such arrangement. It also emerged that the deceased gave Syokau's family a portion of land and that the family has not been chased from the land to date. These facts are admitted by the 1<sup>st</sup> applicant. It is clear to me from the evidence tendered that the applicants have not proved their claim that the deceased was their father. On cross examination, the 1<sup>st</sup> applicant acknowledged that her mother Syokau was not seated as a widow to the deceased in the photographs. In fact he stated that her mother had sat behind in the crowd. The applicant confirmed that he and his mother were present during the wedding between the petitioner and the deceased and that they did not raise any objections. Further the applicant confirmed that his mother was buried in the compound of her late husband Kieti. He also confirmed that the photographs did not show his mother as the bereaved widow. He also confirmed that the petitioner addressed mourners as the widow of the deceased herein. He finally confirmed that the clan elders fixed the land boundaries and that he and the petitioner have their respective portions and further that nobody has ordered them to move out of the said land. The applicant's witness also confirmed that a younger brother cannot inherit the wife of his late elder brother as per Kamba customs. The witness agreed on cross examination that the applicant was his friend whom he could help in times of need. In fact the applicant's witness came out as an unreliable person as he could not produce records of the dowry negotiations showing that he had indeed married the applicant's sister. The witness also stated that he was not aware that his mother in law had been married by the deceased's elder brother Kieti. To show that the witness was unreliable is confirmed by his failure to indicate the date that he paid dowry to the deceased as he stated that he did not know when the deceased died. Ordinarily the witness being a son in law was expected to attend the funeral but he says nothing about the issue. The applicant did not confirm if the alleged brother in law now turned friend was present during the burial of the deceased. I found the petitioner to be quite truthful unlike the applicant herein. It seems to me that the applicant despite knowing his real father wants to harass the petitioner for no apparent reason yet his family land is intact and nobody has sought to evict them as the land boundaries had been fixed by the clan elders. The usage of deceased's name by the applicant does not confer upon him any rights to the disadvantage of the deceased's widow and children. The applicant is fixated on the claim that the deceased was his father yet the truth of the matter is that his father was one Kieti. The petitioner has given cogent and convincing evidence that she did not conceal any material evidence as alleged by the applicant. She is the only surviving widow of the deceased and was entitled to file for letters of grant of administration of her husband's estate.

15. In the result it is my finding that the objectors protest lacks merit. The objector's summons for revocation of grant dated 24<sup>th</sup> September 2005 is hereby dismissed. Each party to bear their own costs.

It is so ordered.

**Dated and delivered at Machakos this 4<sup>th</sup> day of July, 2019.**

**D. K. KEMEI**

**JUDGE.**