



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 193 OF 1997**

**IN THE MATTER OF THE ESTATE OF ELIJAH MBONDO NTHEKETHA (DECEASED)**

**RULING**

1. The applications for determination are dated 23<sup>rd</sup> September 2014 and 25<sup>th</sup> March 2015.
2. The application dated 23<sup>rd</sup> September 2014 is a summons for revocation of grant. It is brought at the instance of Rose Mueni Mutua Kithuka. She seeks two principal orders, revocation of the grant made on 30<sup>th</sup> September 2005, on the ground that the grant had become useless and inoperative, and for appointment of persons named in the application as administrators.
3. In her affidavit in support, the applicant states that she is a daughter in law of the deceased, being the widow of a son of the deceased called Boniface Musyoki Mbondo. Her late husband was one of the administrators of the estate following his appointment on 30<sup>th</sup> September 2005. He died on 29<sup>th</sup> November 2006, and she was appointed administrator of his estate. She avers that her late husband has never been replaced as administrator in the instant cause, and that that has had the effect of stalling the administration process, which has exposed the estate to wastage. She feels that his substitution as administrator would pave way for the confirmation of the grant. She avers that the grant made on 30<sup>th</sup> September 2005 became useless and inoperative following the death of her husband. She would therefore want that the same be revoked and that a fresh appointment be made which should include her as one of the administrators of the estate, alongside Richard Muema Mbondo, Sarah Muthio Mbondo and Bernard Nthekeha Mbondo.
4. There is a reply to the application, by Constance Mutheu Sadia. She swore an affidavit on 1<sup>st</sup> May 2015. She is a grandchild of the deceased. She opposes the application, in particular with respect to the applicant her being appointed as administrator. She accuses her of having previously worked together with some of the administrators to plunder the estate. She cites criminal cases at the Kangundo law courts where the applicant was allegedly charged with selling a property known as Donyo Sabuk/Komarock 1/223. She states that the family had agreed on the appointment of herself, Sarah Muthio Mbondo, Bernard Nthekeha Mbondo and Mutile Mbondo to represent the four houses of the deceased.
5. She has attached to her affidavit several documents. There is copy of the charge sheet in respect of Kangundo SRMCCRC No. 490 of 2013, where Rose Mueni Musyoki and Patrick Ulanga Musyoki were charged with obtaining money from a Rockefeller Mateli Mung'ati sometime in 2007/2008 by falsely pretending that they could sell to him a property known as LR No. 24605/5, with a second count of intermeddling with that property contrary to section 45 of the Law of Succession Act, Cap 160, Laws of Kenya by selling ten acres thereof in 2007. There is also a copy of a charge sheet in respect of Kangundo SRMCCRC No. 125 of 2015, where Rose Mueni Mutua was charged with obtaining money from John

Maina Chege and John Chege Maragara sometime in 2015 by falsely pretending that she was selling Donyo Sabuk/Komarock 1/223.

6. The other response is by Alice Mwelu Mbondo through an affidavit sworn on an unknown date in 2015 but filed herein on 26<sup>th</sup> March 2015. She is one of the surviving children of the deceased, and puts her age at eighty-one years. She is opposed to the application dated 23<sup>rd</sup> September 2014. She asserts that the applicant is not a biological child of the deceased and therefore she is of lower priority with respect to entitlement to representation. She also mentions that she has also refused to be identified with the family and has no blessings of the family. She adds that the applicant had been conspiring with third parties to defraud the estate and mentions her activities with regard to Donyo Sabuk/Komarock 1/223 and LR No. 24605/5, and has attached the charge sheets mentioned here above.

7. The applicant swore a further affidavit, sworn on 23<sup>rd</sup> July 2015, in support of her application. She asserts that no record of her conviction on the alleged criminal conduct with respect to the estate have been tabled by Constance Mutheu Sadia. She states that the charge sheets attached are not evidence of convictions.

8. The application dated 26<sup>th</sup> March 2015 is brought at the instance of Alice Mwelu Mbondo. She seeks several orders, as follows –

- (a) That an order be made that payments in respect of the Tala Bus Stage Park be deposited in a joint account in the names of the advocates on record;
- (b) That she be appointed administrator in the place of Musyoki Mbondo, who is now deceased, to represent the first house;
- (c) That Richard Muema Mbondo be removed as administrator and another member of the second house be appointed to take his place;
- (d) That the administrators be ordered to account for their handling of the estate of the deceased;
- (e) That any transfers of assets of the deceased done illegally be cancelled; and
- (f) That Sarah Muthio Mbondo be called upon to account for all the money she collected from the coffee on the farm at Sengani and for all the other assets in her possession.

9. In the affidavit in support of the application, sworn on 26<sup>th</sup> March 2015, she states that she is a daughter from the first house, and that the representative for that house has since died and should be substituted by her. She says she is more qualified for appointment than her sister in law, Rose Mueni Kithuka, for the same reasons as those advanced in her affidavit mentioned in paragraph 6 hereabove, among others. She accuses the administrators of having mal-administered the estate and mentions several assets that she says they mishandled. She would like them to account generally and with respect to these assets.

10. The first reply to the application is by Rose Mueni Mutua Kithuka, through her affidavit sworn on 23<sup>rd</sup> July 2015. She asserts that the said application was malicious and appears to be a response to her application dated 23<sup>rd</sup> September 2014. She states that even though there could be criminal charges against her the same do not amount to convictions but are mere allegations that are subject to proof.

11. The other reply to the application is by Sarah Muthio Mbondo. She swore an affidavit on 27<sup>th</sup> July 2015. She states that there is no corporate payment due from the Tala bus park, adding that all Environment and Land Court matters have been stayed to await further directions. She states that the applicant has been collecting rents with regard to a lease to Evergreen Crops Limited. She denies any acts of maladministration as alleged by the applicant. She asserts that the application dated 26<sup>th</sup> March 2015 is malicious.

12. There is a third reply to the application by Rehema Mutunga on behalf of an interested party called Evergreen Crops Limited, through an affidavit sworn on 28<sup>th</sup> July 2015. She states that a property known as LR No. 24605/6 is owned by the interested party and therefore it does not form part of the estate of the deceased, and it is therefore not available for distribution. She says that the issue of that property being sold by the administrators did not arise. She states that the interested party has leases on two estate properties, being LR No. 24605/5 and 24605/7, which were extended to the company by the registered proprietor on behalf of the estate. She asserts that the company has been dutifully paying its dues with regard to the two to the advocates for the administrators.

13. Directions were given on diverse dates that the two applications would be disposed of by way of written submissions to be highlighted. The parties complied by filing their respective written submissions which were highlighted on 29<sup>th</sup> July 2015. I have gone through the written submissions and noted the arguments made therein.

14. The two applications have one thing in common; they seek substitution of a dead administrator. The application dated 23<sup>rd</sup> September 2014 claims that the grant has become useless and inoperative on account of the death of one of the administrators. Prior to his death the number of administrators was four, and his death reduced the number to three. The argument that the grant became useless and inoperative does not hold given the provisions of section 81 of the Law of Succession Act, which provides as follows –

*‘Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them: provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with him.’*

15. The usual process of dealing with a scenario where one of several administrators dies is to move the court so that it confirms the surviving administrators and directs that the grant be amended to reflect the changed circumstances. Clearly, there is no basis for revoking the grant on the grounds advanced in the application dated 23<sup>rd</sup> September 2014. In the circumstances what I should be considering is the replacement of the dead administrator. The court had appointed four administrators to represent the four houses of the deceased. The applicants in the two applications are from the first house, which the dead administrator represented. They would like to be appointed to take his place. There is also Constance Mutheu Sadia, a grandchild from that house who also stakes a claim to the position.

16. Both applicants have not presented any material to show that the other members of the first house have consented to their being appointed on behalf of that house; and they have not even asserted that any such consents exist. Constance Mutheu Sadia alleges that the members of the first had anointed her to represent them as administrator, but she presented no papers to assert that assertion. The applicant in the application dated 23<sup>rd</sup> September 2014 appears to ground her claim on the fact she has been appointed administrator of the estate of the late administrator, while the applicant in the application dated 26<sup>th</sup> March 2015 stakes her claim on the fact that she is a child of the deceased. She asserts that the other claimants have a lesser right. It is also alleged by her rivals that the applicant in the application dated 23<sup>rd</sup> September 2014 has criminal cases against her with respect to the estate, which ought to make her unsuitable as administrator. The applicant in the second application is aged eighty-one years old and it has been suggested that her great age makes her unsuitable.

17. I note that none of the parties has argued that the applicants have no capacity to be appointed as administrators in terms of section 56 of the Law of Succession Act. That is to say with regard to the claimants being minors, persons of unsound mind or bankrupts. Those appear to be the only disqualifying factors identified in the Law of Succession Act. That would mean that all three are qualified for appointment subject to section 66 of the Act which sets out the criteria founded on priority or preference measured according to the familial closeness to the deceased. It should also be subject to suitability.

Section 66 of the Act states as follows –

*‘When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference –*

*(a) surviving spouse or spouses, with or without association of other beneficiaries;*

*(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*

*(c) the Public Trustee; and*

*(d) creditors ...’*

18. The provision in section 66 of the Act is not mandatory. The court has discretion over the matter, and therefore the provision provides a guide to the court when it comes to appointments in intestacy. According to Part V of the Act, that is to say sections 35 to 39, the surviving spouse has the biggest stake in the estate of an intestate, followed by surviving children, surviving parents, surviving siblings, surviving half siblings and other relatives to the nearest degree of consanguinity in that order. Generally, preference is given to the surviving blood relatives of the deceased save the spouse.

19. The surviving spouse in the first house is said to be dead. That being the case then the next in line according to section 66 of the Act ought to be the children of the deceased. Of the three claimants only one is a child of the deceased, the other two are grandchild and daughter in law. Two are blood relations, one is not. In terms of the preference envisioned by section 66, priority ought to be given to the child, followed by the grandchild and the daughter in law, in that order.

20. A person may qualify for appointment but may be barred on grounds of non-suitability or lack of competence. In *Chelang’a vs. Juma* (2002) 1 KLR 339 a brother in law of the deceased, although qualified for appointment, was found to be unsuitable for appointment where the deceased was survived by siblings. Similarly in *Swaboa Nassor Salim Hadi vs. Swaleh Salim Hadi* Nairobi HCP&A No. 52 of 1990 (unreported), the court declined to appoint the daughter of the deceased and the deceased’s brother administrators, although both qualified for appointment, on grounds of unsuitability and lack of competence. The daughter was said to be too young, while the brother was said to be likely to plunder the estate given that he had a lesser stake in the estate.

21. Suitability and competence questions no doubt arise in the present case. Regarding the first applicant, it would no doubt be asked whether it would be prudent to overlook a child of the deceased and appoint his daughter in law as administrator. That may not be suitable, unless the child can be ruled out for some reason. The child is said to be eighty-one years old. The issue of age often arises in matters of this nature, but the courts have generally tended to take the position that the law does not make age, except for minors, a criteria for determining appointment. It arose in *In re Estate of Wamira* (2002) KLR 12, where the daughter of the deceased had just attained the age of majority and it was being argued that she was not suitable on grounds of age, for she was just really a minor. The court appointed her, holding that she was of age and therefore qualified for appointment. In *In the Matter of the Estate of Ravinder Singh Vora (Deceased)* Nairobi HCSC No. 1688 of 2006 (unreported), unsuitability was raised with respect to the old age of one of the proposed administrators; the court held that old age was not a bar to appointment as administrator. It would appear that so long a person is of age and of sound mind he would be suitable for appointment.

22. Issues have been raised on the suitability of the applicant in the application dated 23<sup>rd</sup> September 2014, on account of the criminal charges she faced with respect to obtaining money by falsely pretending she was selling estate property and also for intermeddling with estate property. It is common ground that she faced such charges, but there is no evidence that she has been successfully prosecuted for those

offences. There is no evidence of convictions. However, the office of administrator is one of trust. The property of the estate vests in the administrator, so that he holds the same for his own behalf and for all those who have a beneficial interest in it, be they heirs or creditors. The beneficiaries should be able to trust and have confidence that he would take care of the property on their behalf and for their benefit. The fact that there are criminal proceedings against a person who is not an administrator which touch on estate property is a matter that a court considering appointing such person as administrator of the same estate should take into account. It is a matter that ought to bring to question the suitability of the claimant as administrator, even if the claimant is yet to be convicted.

23. The application dated 26<sup>th</sup> March 2015 invites the court to revoke the appointment of Richard Muema Mbondo as administrator. I have not come across a response by the said Richard Muema Mbondo to that plea. I have, however, carefully gone through the affidavits sworn by the applicant in support of the application, as well as the record before me and I am not satisfied that sufficient basis has been laid for grant of that prayer. The removal of an administrator amounts to revoking his appointment. Revocation of grants is provided for under section 76 of the Law of Succession Act. An applicant seeking to obtain such revocation must build a case founded on section 76. In my view no such case has been presented with respect to Richard Muema Mbondo.

24. The applicant asks that the administrators in general, on one hand, and Sarah Muthio Mbondo, on the other hand, be ordered to render accounts generally of their administration of the estate and with respect to particular assets. The office of an administrator is that of a trustee. The administrator stands in a fiduciary position with respect to the property and the beneficiaries. As trustee he is bound to account to the beneficiaries regarding his handling of the property placed in his hands. Rendering of accounts is a statutory requirement. It is mandatory. It is one of the duties set out in section 83 of the Law of Succession Act. Accounts should be rendered as a matter of course, whether or not called for by the beneficiaries or ordered by the court.

25. There is a prayer in the application dated 26<sup>th</sup> March 2015 that all transfers of assets of the estate effected illegally be cancelled. This prayer is too general. The applicant ought to have identified the assets that she alleges have been illegally transferred. They ought to be mentioned in the prayer so that the court is able to grant orders that are specific. In any event, the applicant has not provided any proof in her affidavits of the property that she alleges has been illegally transferred. Adequate basis has not been laid and therefore there is no basis for grant of this prayer.

26. The other prayer relates to payments with respect to the Tala bus park. The said prayer is vague. The connection between the bus park and the estate has not been brought out. In fact the affidavits sworn in support of the application shed no light whatsoever on the matter of the bus park.

27. I note that the estate comprises of landed assets situated exclusively within Athi River, Kangundo, Tala and Yatta of Machakos County. I note too that there are land matters pending at the land court at Machakos and criminal cases at the Kangundo law courts touching on property belonging to the estate herein. I note also that High Court stations have been established at Kitui and Makeni, to ease pressure on the High Court at Machakos. The High Court at Machakos should now be able to accommodate matters that pend at the Family Division, Milimani, Nairobi, which, ideally, ought to have been filed at the High Court at Machakos.

28. In the end I shall resolve the applications dated 23<sup>rd</sup> September 2014 and 25<sup>th</sup> March 2015 in the following terms –

**(a) that I hereby appoint Alice Mwelu Mbondo a co-administrator of the estate of the deceased in addition to Richard Muema Mbondo, Sarah Muthio Mbondo and Bernard Ntheketha Mbondo;**

**(b) that the grant on record made on 30<sup>th</sup> September 2005 shall be amended to accommodate (a) above;**

(c) that the administrators shall, in the next thirty (30) days of the date herein account for their handling of the estate of the deceased from the date of their appointment to the date of their account, which account shall cover the matters raised in prayers (e) and (f) of the application dated 26<sup>th</sup> March 2015;

(d) that the matter herein shall be transferred to the High Court of Kenya at Machakos for final disposal; and

(e) that there shall be no order as to costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 20<sup>TH</sup> DAY OF JANUARY, 2017.**

**W. MUSYOKA**

**JUDGE**