



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 353 OF 2013**

**IN THE MATTER OF THE ESTATE OF THE LATE SOLOMON MUTUNGI MUMBIKA –  
(DECEASED)**

**REGINA MUMBUA PAUL.....1<sup>ST</sup> OBJECTOR/APPLICANT**

**ALIDAN MAITHYA MBINDA .....2<sup>ND</sup> OBJECTOR/APPLICANT**

**RULING OF THE COURT**

**The application**

1. Before the court are Summons for Revocation of Grant dated **16<sup>th</sup> August, 2016** filed pursuant to **Rule 49 of the Probate and Administration Rules**. The Summons prays for the following orders;

- a. This application be certified urgent and be heard ex parte in the first instance.
- b. That the Letters of Administration issued by this court on **13<sup>th</sup> July, 2013** to Paul Mutungi Mumbika, as well as the subsequent confirmation thereof made by the court on **7<sup>th</sup> May, 2014** be revoked.
- c. That this court be pleased to make an order for the preservation of the deceased's estate until the application for revocation of grant filed herewith is heard and determined.
- d. That in particular this court be pleased to order that pending the determination of the application for revocation of grant herein;-
  - i. One Sylvester Nthenge be restrained from entering into, developing, undertaking construction on in any other way interfering with the parcel of land known as KAI 'A' plot number 134/ L.R No. Makueni/KAI/1061 or interfering with the 1<sup>st</sup> applicant's quiet possession thereof.
  - ii. Paul Mutungi Mumbika, the administrator herein be restrained from evicting the 1<sup>st</sup> applicant from the same parcel of land number KAI 'A' Plot No. 134/LR No. Makueni/KAI/1061 or interfering with her quiet possession thereof.
- e. That prayers 2 and 3 be granted in the interim pending service of this application on such parties as the court may order and subsequent *inter partes* hearing of the application.
- f. That the costs of this application be costs in the cause.

2. The Summons is supported by affidavit of **Regina Mumbua Paul**, the 1<sup>st</sup> applicant herein, sworn on **16<sup>th</sup> August, 2016**, and a Supplementary Affidavit of the same person sworn on **5<sup>th</sup> September, 2016**. The Applicant's case is that the above-named Solomon Mutungi Mumbika died on the 18<sup>th</sup> day of January, 2007 and a grant of letters of administration intestate of the said Solomon Mutungi Mumbika was made to Paul Mutungi by this court on 13<sup>th</sup> July, 2013. The said grant was fraudulently obtained as the applicant concealed from the court material facts that made it improper for the grant to be issued to him. In particular the applicant;

- i. Applied for the grant while knowing well that the deceased had before his demise ordered that Alidan Maithya Mbinda, the 2<sup>nd</sup> applicant herein, be the administrator of his estate.
- ii. Secretly obtained for purposes of supporting his application for grant a letter from the chief, Mang'etele sub-location where he lives with his 2<sup>nd</sup> wife but which is about 100 kilometers from the deceased's home, instead of obtaining one from the chief for Nguumo location where the deceased's home as well as the properties comprising the estate are situated.
- iii. Illegally listed one Sylvester Nthenge as a beneficiary of the estate of the deceased while the said Sylvester had no interest in the deceased's estate and has only colluded with him to defraud the genuine beneficiaries.

3. The applicant's case is that the Administrator is her husband but since the year 1985 he abandoned her and went off to Ngwata where he married another wife. That the administrator secretly processed the grant herein and then purported to evict the applicant from the family land vide a letter dated 3<sup>rd</sup> February, 2016 but which was only brought to her on 5<sup>th</sup> August, 2016, the same day when one Sylvester went to start working on the family land and was resisted by the applicant. The administrator had the applicant arrested and taken to the police station at Makindu where she was locked up for a few hours until the 2<sup>nd</sup> applicant went to her rescue, explained to the police officers what was happening and secured her release. The administrator had previously been summoned by the family, by the local chief and even by the District Commissioner and advised to stop selling the family land but it is clear now that he decided to defy all those warnings and proceeded to sell to Sylvester Nthenge, and to craftily transfer the land to him through the process of administration in order for him to circumvent the transfer process that requires spousal consent. The applicant attached the following documents in proof of the above averments and together marked 'RMP'.

- i. Minutes of a family meeting held on 21<sup>st</sup> August, 2004 before the deceased's death at which the deceased specifically said that in the event of his demise Alidan Maithya Mbinda would be the administrator of his estate;
- ii. Letters from the Assistant Chief, Nguumo Location granting permission for several family meetings;
- iii. Minutes of a family meeting held on 28<sup>th</sup> October, 2012 at which the administrator was present and in which he was warned not to sell off family land;
- iv. Letter from the District Commissioner, Makindu requiring the administrator to keep off the family property;
- v. Letter from the 1<sup>st</sup> applicant's advocates requiring the administrator to cease interfering with the family property.

4. The applicant states that it is imperative that the grant issued herein be revoked to enable the designated administrator to apply for a grant of Letters of Administration and administer the estate in a fair and just manner as instructed by the deceased. The applicant denies that her late father-in-law was hospitalized and incurred debts requiring to be paid. The only time the father-in-law as hospitalized was for a few days

at the Makindu District Hospital and the small bill incurred was settled by the 2<sup>nd</sup> applicant. That indeed there is no documentation attached to prove this illness, or any loans taken, and it is clear that the petitioner is just making wild claims. The applicant states that she has capacity to bring this objection. The petitioner is her husband and they have children who are entitled to inherit from the family land he inherited from their grandfather since this is ancestral land. That even the sub-division as indicated in paragraph 11 of the Replying Affidavit is contrary to the grant as confirmed. The confirmed grant had indicated that the parcel of KAI 'A' Plot No. 133, measuring 12.91Ha was to be registered in the names of Paul Mutungi Mumbika and Kavula Mutungi Mumbika. However from the attached copies of the tile deeds these two (2) only got 1.62Ha each, while the bulk of it, 9.67Ha, was registered in the name of Sylvester Nthenge. The Applicant's case is that in transferring the 9.67Ha to Sylvester Nthenge, the Petitioner transferred family property originating from ancestral land without spousal or family consent and thereby deprived his family of their lawful inheritance. That the Petitioner in his replying affidavit only explained one parcel, KAI A plot no. 133, but did not make any reference to Plot Numbers 134 and 135. According to the certificate of confirmation of grant parcel number 134 measures 2.84Ha and was to be registered in the name of Sylvester Nthenge, whereas parcel number 135 measures a total of 11.89 and more than a half of it was to be registered in the name of Sylvester Nthenge. The Applicant states that Sylvester Nthenge never purchased any property from the deceased, and it was erroneous and illegal for the court to recognize him as a dependent of the deceased/beneficiary of the deceased's estate since the only rights he claims arise from transactions between him and the petitioner but not the deceased. The applicant's case is that it is shameful that out of a total of 39.51ha making up the deceased's estate, Sylvester Nthenge has received 25.81Ha, leaving only 13.7 to be shared amongst the genuine beneficiaries. Out of the total 39.51ha, the 1<sup>st</sup> applicant and her six (6) children have just been given a paltry 1.62ha to share, something which cannot be entertained or supported by this court. The applicant finds it telling that Sylvester Nthenge remained defiant even after being warned by numerous authorities to stop interfering with family property, and it is imperative that this court puts an end to his impunity.

### **The Response**

5. The application is opposed vide the Replying affidavit of the Petitioner **Paul Mutungi Mumbika** sworn on **9<sup>th</sup> September, 2016** and a Further Affidavit of the same person sworn on **12<sup>th</sup> October, 2016**. The respondent's case is that Solomon Mutungi Mumbika (now deceased) was his father and that he is his only surviving son. At the time of his demise, the deceased was survived by the Petitioner and Kavula Nthini Mutungi also known as Kavula Mutungi Mumbika, the Petitioner's late elder brother's wife. The Petitioner's case is that he was lawfully appointed by the court to be a co-administrator of the estate, a mandate he and his co-administrator the said Kavula Nthini Mutungi also known as Kavula Mutungi Mumbika have carried out lawfully. The Objectors do not have the capacity to file their application in this matter since they are not dependants of the deceased. The petitioner states that his appointment as a co-administrator was gazetted and no objection was ever raised as stipulated by the law. The petitioner's case is that the Chief of Mang'elele sub location knew the deceased very well since the deceased had land in the area and was buried there, hence upon his demise, the Chief had sufficient knowledge to verify the facts of the ownership of the deceased parcels of land. The petitioner states that the annexures to the supporting affidavit containing so called family meetings are full of manipulated minutes drawn at the instigation of the 2<sup>nd</sup> Objector and the same cannot in law defeat the lawful letters of Administration and Confirmation of grant herein.

6. The petitioner states that Sylvester Nthenge, the first named respondent herein, over a period of time mainly in the years 2005, 2006, and 2007 advanced funds to the deceased which were applied/used to cater for medical expenses towards their then ailing father and since as a family they could not raise the money to pay off this debt, it was decided that out of the parcels forming the estate of deceased a parcel thereof be allocated to Sylvester Nthenge to compensate him. Before approaching Sylvester Nthenge with the request for financial assistance, the family approached several family members, including the 2<sup>nd</sup> Objector to no avail. The petitioner states that plot KAI 'A' 133 belonging to the deceased was sub-divided into three (3) parcels, firstly paying off the deceased's estate's debtor Sylvester Nthenge and the remainder thereof was shared out equally between other beneficiaries namely Kavula Nthini Mutungi and Paul Mutungi Mumbika as follows;

- a. Makueni KAI 'A' 1059 Paul Mutungi
- b. Makueni KAI 'A' 1060 Kavula Nthini Mutungi
- c. Makueni KAI 'A' 1061 Sylvester Nthenge

7. The petitioner states that the 1<sup>st</sup> Objector who is his wife lives in plot Makueni KAI 'A' 1059 where at the instigation of *inter alia* the 2<sup>nd</sup> Objector she chased the petitioner away from home after a lot of harassment and intimidation forcing the petitioner to go and live in another parcel of land with his second wife. The petitioner states that it is not true that he intends to evict the 1<sup>st</sup> Objector from plot 1059 since she lives there with his children and that he has no interest in plot number 1060 belonging to Kavula Nthini Mutungi also known as Kavula Mutungi Mumbika his co-administrator. The petitioner's case is that the present application is wanting in form and is time barred, hence the same is bad in law and should be struck out. Further, the petitioner states that this court lacks the jurisdiction to deal with the present application as brought by the Objectors hence the same should be dismissed.

8. The petitioner states that it is only him and his co-administrator who actually knew what was happening on the family front. During their married life with the first Objector, she never used to see eye to eye with the deceased and therefore she is not in a position to know anything much about the family affairs. The petitioner's father started ailing in the 1980's but the applicant was never aware since she was never close to the deceased. The petitioner states that as administrators of the deceased's estate, they are satisfied that a genuine claim, amongst others was lodged with them, as required by the law and they proceeded to settle those claims including the claim by **Sylvester Nthenge** the 1<sup>st</sup> named respondent.

### **Submissions**

9. Parties filed submissions. The applicant submitted that it is clear from the 1<sup>st</sup> objector/applicant's supporting affidavit and supplementary affidavit that the Petitioner/Respondent deliberately supported his application for Grant with a letter from the Sub-chief, Mang'elele sub-location instead of using the chief, Nguumo location where the deceased was domiciled. The only possible explanation for this is that he knew the local chief could have disclosed to the court the existence of the 1<sup>st</sup> Objector/Applicant as his first wife, and their children. It is therefore clear that the Petitioner/Respondent obtained the Grant fraudulently by withholding this information from the court. It is also clear that petitioner/respondent's application for grant was rendered defective by

- i. The inclusion of one Sylvester Nthenge as a beneficiary of the deceased's estate which was clearly not true. The Petitioner/Respondent has now disclosed in his replying affidavit that the said Sylvester did not acquire any of the land from the deceased and so was not a beneficiary to the estate.
- ii. Failure to obtain the consent of the 1<sup>st</sup> Objector/Applicant and her children, all of who had an interest in the land as they were resident on it. This may not have been necessary if the 1<sup>st</sup> Objector/applicant and the petitioner/respondent and their children were still living happily as a family, but their separation and the petitioner/respondent's re-marriage rendered them independent interested parties entitled to information on the application of the grant and made their consent to the making of the application and the mode of distribution of the estate necessary.

10. Apart from the foregoing, it is worth noting, as averred by the 1<sup>st</sup> Objector/Applicant in her supplementary affidavit, that the way the Petitioner/Respondent has distributed the estate both during, and subsequent to the confirmation of grant, has given about two thirds of the deceased's estate to a stranger, while his wife and children have been given only 1.9 acres. It was submitted that this is outright illegality. The Objector/Applicants invite this court to consider the judgment of the High Court in ***Nakuru Hc. Succ. Cause No. 696 of 2009 Joram Mungai & Benson Njuguna Gakinduru vs James Kang'ethe Mungai and Nyeri Hc. Succ. Cause No. 1042 of 2012 Mercy Njoki Irungu vs. Lucy Wamuyu Maruru***. In both of the above cases the court revoked a confirmed Grant on the basis of non-

disclosure of material facts in circumstances similar to the ones before the court.

11. The petitioner/respondent submitted firstly, that there was no irregularity in the obtaining of letters of administration by Paul Mutungi Mumbika the 1<sup>st</sup> named respondent and his sister-in-law Kavula Nthini Mutungi alias Kavula Mutungi Mumbika. The 1<sup>st</sup> respondent in his replying affidavit and particularly paragraph 7 thereof avers that he obtained a recommendation letter in support of his application for letters of administration from the chief Mang'elete sub location simply because the said chief knew the deceased very well. The deceased owned land in Mang'elete and was buried there upon his demise hence the said chief had sufficient knowledge to verify the facts as he did in the said letter. It was submitted that no evidence has been led by the Objectors/applicants to disapprove that particular averment and in the same breath to prove any fraud on the part of the administrators of the estate. This is clearly a case where the deceased's interests were in both Nguumo location where the subject properties of the present proceedings are located and Mang'elete sub location where other properties are located and where the deceased was buried. A letter from the chief of either locations could suffice in the circumstances and in this case, the letter by the Mang'elete chief was used by the administrators herein.

12. The petitioner/respondent also submitted that the court should find that the administrators of the estate dutifully and diligently filed the application for letters of administration in court and the same was followed by the normal gazettement of the petition in the Kenya gazette which gave anyone with any objection inclusive of the present Objectors/applicants an opportunity to raise such objection then, which did not happen. Subsequently a grant of letters of administration was issued and confirmed through the normal open process of this court.

### **Determination**

13. I have carefully considered the Summons for revocation of confirmed grant together with the supporting affidavit and replying affidavits. I have also considered submission of the parties. I raise the following issues for determination.

- i. Whether the petitioners were properly appointed as administrators herein.
- ii. Whether the distribution of the estate was fair to all the beneficiaries.

14. On the first issue, I am satisfied that the petitioners lawfully petitioned for the letters of administration. The petition was gazetted and there was no objection to the same. The purpose of gazettement is to give opportunity to all the would be objectors to lodge their objection. In law upon gazettement, it is deemed that all would be objectors are aware of the petition. No objection was raised in the petition herein. Further, I have perused the affidavits herein. There is no ground upon which this court can infer that the petitioners did not deserve to be appointed as such.

15. On the second issue, that is, whether the estate was fairly distributed, this court notes both from the said affidavits and from the confirmed grant that a big chunk of the estate was distributed to one Sylvester Nthenge who is alleged to have been a creditor to the estate of the deceased and had given funds to the deceased when he was ailing. However, there is no evidence of such debt, or how much was owed to the creditor to enable him secure more than 15.87Ha of the estate of the deceased, according to the confirmed grant dated 7<sup>th</sup> May, 2014. Further, it is noted that the petitioner claim that the said Sylvester Nthenge was owed money by the deceased.

16. However when the Petitioners petitioned for the grant of letters of administration, they filled form P&A 5 where they stated the assets of the estate of the deceased. However, on the liabilities section they stated "N/A". This means that at the time of filing the petition the estate had no liability. It is not clear when the said Sylvester Nthenge became a Creditor to the estate. However, what is clear is that he was mentioned as a beneficiary in the proceedings to confirm the grant.

17. In fact, in affidavit to confirm the grant dated 4<sup>th</sup> March, 2014 Sylvester Nthenge is named the sole

beneficiary, although in the proposed mode and schedule of distribution the petitioners are also included. The confirmation process was very untidy.

18. The issue which this court must address is: where did the said Sylvester Nthenge emerge from? Is it possible that he is being used as a front by the petitioners to deny the objectors their right to deceased property? There is no agreement attached to disclose the sudden interests of the said Sylvester Nthenge.

19. Secondly, the distribution was made in complete disregard of the 1<sup>st</sup> petitioner first wife with whom they had children who are entitled to inherit their grandfather's estate through their father. The mode of distribution is suspect, and opaque. Since it is agreed that the 1<sup>st</sup> objector and 1<sup>st</sup> petitioner are estranged, it is important that the distribution of the estate be done after consultation with the 1<sup>st</sup> objector.

20. For the foregoing reasons the application succeeds in the following terms;

- a. That the Letters of Administration issued by this court on **13<sup>th</sup> July, 2013** to Paul Mutungi Mumbika, as well as the subsequent confirmation thereof made by the court on **7<sup>th</sup> May, 2014** are hereby revoked.
- b. An order is hereby made for the preservation of the deceased's estate and in particular it is hereby ordered that pending the filing of fresh letters of Grant herein;-
  - i. One Sylvester Nthenge is hereby restrained from entering into, developing, undertaking construction on in any other way interfering with the parcel of land known as KAI 'A' plot number 134/ L.R No. Makueni/KAI/1061 or interfering with the 1<sup>st</sup> applicant's quiet possession thereof.
  - ii. Paul Mutungi Mumbika, the administrator herein be and is hereby restrained from evicting the 1<sup>st</sup> applicant from the same parcel of land number KAI 'A' Plot No. 134/LR No. Makueni/KAI/1061 or interfering with her quiet possession thereof.
- c. That the costs of this application be costs in the cause.

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**E.K.O. OGOLA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2017**

.....

**DAVID KEMEI**

**JUDGE**

**In the presence of:**

Maluki – for Applicant Objector