



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 178 OF 1994

IN THE MATTER OF THE ESTATE OF NDONYE NDOLO - (DECEASED)

AND

CHARLES MULI MUNYAO.....1ST APPLICANT

BENEDICT KALONGO MUNYAO2ND APPLICANT

VERSUS

MUTETE NDONYEPETITIONER

RULING OF THE COURT

1. Before the court is Summons for Revocation of Grant filed pursuant to **Sections 47 and 76(b) of the Law of Succession Act and Rules 44 and 73 of Probate and Administration Rules**. The Summons prays for orders;

- a) That the grant of Letters of Administration made to *Mutete Ndolo alias Mutete Ndongye* on **11th May, 1993** and subsequently confirmed on **28th July, 1995** be revoked.
- b) The title to **Mbiuni/Kabaa/850** issued to **Mutete Ndongye** pursuant to the certificate of confirmation of grant be revoked and title to the property be issued to the applicants.
- c) That the grant of letters of administration be made to both the applicants jointly.
- d) The cost of this application be awarded to the applicants.

2. The Summons is founded on the grounds that the grant was obtained fraudulently by way of misrepresentation and by concealment from the court of material facts. The only property included in the estate of the deceased being **Mbiuni/Kabaa/850** was improperly and fraudulently included in the estate of the deceased because he had already sold his interest to the applicants' late father, **Munyao Ndolo**. The Petitioner was well aware of the transaction but nevertheless proceeded to have the grant issued to herself. The Hon. Justice Asike- Makhandia in **Machakos HCCC 91 of 2007** filed by the Petitioner seeking to evict the applicants on the grounds that they were trespassers as she had title to the property held that the title issued to the Petitioner was impeachable on grounds of fraud as well as trust.

3. The Summons is supported by affidavit of **Charles Muli Munyao**, one of the applicants, sworn on **24th October, 2012**. The applicant's case is that he is the 1st applicant herein and conversant with the subject matter pertaining to this suit. The other applicants in this suit have authorized him to make this

affidavit on their behalf and as such, he is competent to depone to the facts stated in this affidavit. The applicants are the administrators to the estate of **Munyao Ndolo (deceased)**. The applicants' case is that the Petitioner's late husband, **Ndonye Ndolo** entered into an agreement for sale of **Mbiuni/Kabaa/850** with their late father, **Munyao Ndolo** on **3rd May, 2003**. **Munyao Ndolo** and **Ndonye Ndolo** were step brothers. The Petitioner was well aware of the transaction and in fact, together with her son, **Musyimi** collected the balance of the purchase price after her husband died. The Petitioner's late husband died before he could effect the transfer of the property to the applicants late father's name. The Petitioner, knowing well that her husband had sold this property went ahead to file for letters of administration intestate in which she included the property as part of the estate of the deceased. The applicants did not have knowledge of the proceedings and the subsequent issue of the title to the property until the Petitioner filed a suit against the applicants seeking to permanently bar them from encroaching on the property, an order of eviction, damages for trespass and costs of the suit on the grounds that she was the legal owner of the property. This suit is **Machakos HCCC. 91 of 2007**. Justice Makhandia, heard the matter and held that the Petitioner's title to the property was impeachable on the grounds of fraud and trust. The suit was subsequently dismissed with costs to the defendants. Before this suit was filed, the applicants had included the property in their father's estate **Machakos Succession No. 504 of 2007** but the applicants could not proceed when they realized that the title to the property had already been issued to the Petitioner.

4. It is the applicants' case that the said letters of administration were obtained fraudulently by the making of false statements and concealment from this court of material fact and in particular that the only property making up the deceased's estate had already been sold by her late husband and was, therefore not available for distribution under the estate.

5. It is the applicants' case that the Petitioner deliberately and without any lawful or reasonable excuse concealed the foregoing facts from this court, facts which, if were revealed, then this court would not have made the orders it made. It is submitted that if the grant and the subsequent title issued to the Petitioner is not revoked then the applicants stand to lose irreparably what they are justly entitled to in accordance with the judgment of this court delivered on 6th July, 2012. It is imperative that court's judgments are not issued in vain.

Determination

6. The application is not opposed. It was served upon the Petitioner/Respondent for hearing on 29th June, 2016, but the Petitioner never turned up in court. There is an affidavit of service filed on **29th June, 2016**. The court then directed the applicants to file submissions to the Summons which they did on **11th July, 2016**.

7. The applicants submitted that under **Section 76(b) of the Law of Succession Act** a grant obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case can be revoked. The applicant submitted that the Petitioner herein concealed from the court the fact that the deceased did not leave behind any property at the time of his death since the only property disclosed was land parcel **Mbuini/Kabaa/850** which did not belong to the deceased. The applicants were already in occupation of the said land to the full knowledge of the Petitioner. Upon confirming the grant the Petitioner sought to evict the applicants vide **Machakos HCCC No. 91 of 2007**, which case they lost with the court holding that the title to that plot was impeachable on grounds of fraud as well as trust.

8. I have considered the application and submissions. I have also noted that the application was served but is not opposed for the respondents did not come to court. I have also looked at the proceedings and judgment in **Machakos HCCC No. 91 of 2007 Mutete Ndonye vs. Muli Munyao & 4 others** in which the Petitioner sought, among others, eviction orders of the applicants from the said land. The case was dismissed with costs on 6th July, 2012, with the court observing that the Petitioner's title was impeachable on grounds of fraud as well as trust. The court declared that

“The defendants in the circumstances are therefore rightly and legally in possession of the suit

premises and are not trespassers.”

9. From the foregoing it is clear that the title to the suit property belongs to the applicants since the said judgment has not been challenged. Since this is the only asset of the deceased which was transmitted to the Petitioner vide the Confirmation of the grant, the grant must now be revoked to pave way for the said title to revert to its lawful owners.

10. Pursuant to the foregoing, the application is allowed in the following terms;

- a) That the grant of Letters of Administration made to ***Mutete Ndolo alias Mutete Ndonge*** on **11th May, 1993** and subsequently confirmed on **28th July, 1995** is hereby revoked.
- b) The title to **Mbiuni/Kabaa/850** issued to **Mutete Ndonge** pursuant to the certificate of confirmation of grant is hereby revoked.
- c) That the grant of letters of administration be made to both the applicants jointly, and upon the same being confirmed the title to **Mbiuni/Kabaa/850** be issued to the applicants jointly.
- d) The cost of this application are for the applicants.

.....

E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 16TH DAY OF FEBRUARY, 2017

.....

DAVID KEMEI

JUDGE

In the presence of:

Langalanga – for Applicants