



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**SUCCESSION CAUSE NO. 767 OF 2007**  
**IN THE MATTER OF THE ESTATE OF MBALU NZUNZA**  
**NDAMBO ALIAS MBALUKA NZUNZA (DECEASED)**  
**JOHN NZUNZA MBALU.....1<sup>ST</sup> OBJECTOR**  
**DAVID NDAMBO MBALU.....2<sup>ND</sup> OBJECTOR**  
**VERSUS**  
**ALICE NZISA MBALU.....APPLICANT**

**RULING OF THE COURT**

**The application**

1. Before the court is Summons for Confirmation of Grant dated 21<sup>st</sup> April, 2016 filed by the two administrators **John Nzunza Mbalu and David Ndambo Mbalu**. The Summons prays that the Grant issued in the estate of **Mbalu Nzunza Ndambo alias Mbaluka Nzunza** (deceased) on 19<sup>th</sup> November, 2009 be confirmed and further orders made in the following terms;

a. That the Letters of Administration made in this matter on **19<sup>th</sup> day of November, 2009** be confirmed and the estate be divided in terms of the proposed mode of distribution annexed to the Affidavit of **Alice Nzisa Mbalu**.

b. That pursuant to **rule 41 (5) of the Probate and Administration Rules**, this court do appoint a date not later than **six (6) months** from the date of Confirmation of Grant for approval of the completed accounts relating to distribution of the estate.

c. That the list of dependants contained in this court's ruling dated **22<sup>nd</sup> February, 2015** and reproduced in the Affidavit of **ALICE Nzisa Mbalu**, be adopted as the full list of the deceased's dependants.

d. That further orders be made as this court may deem necessary for finalization of the distribution of the estate of the deceased.

e. That the cost of this application be provided for.

2. The Summons is founded on the grounds that the full list of the deceased's assets has been made and there is no dispute in that regard, and that the full list of the beneficiaries has been determined and that the three (3) houses of the deceased have all agreed on the mode of distribution. The Supporting Affidavit expands on the above agreed issues and provides a list of beneficiaries as per each household and also the mode of distribution.

### **The Response**

3. However, the Protester, **Alice Nzisa Mbalu**, filed a Relying Affidavit on **5<sup>th</sup> August, 2016** protesting the said Confirmation on the grounds that the application is made in violation of the Ruling and Order date **22<sup>nd</sup> February, 2016** in that:

- i. No valid consent of all beneficiaries has been sought and the applicant has just attached an impugned consent that was used in obtaining the certificate of confirmed grant dated 17<sup>th</sup> December, 2013 and issued on 19<sup>th</sup> February, 2014 that was set aside by the Ruling and Order above;
- ii. The mode of distribution, without stating the specific beneficiaries, is similar to the one set aside in the ruling and order afore mentioned;
- iii. It ignores the entire issue of confirmation of grant was re-opened so that parties have to agree on the beneficiaries and the distribution of the assets of the Estate.

4. The respondent states that it is imperative that the family of the deceased be given an opportunity to sit down and agree on the beneficiaries and mode of distribution as otherwise the one presented is contested. The respondent's case is that there is no reason to hold properties in trust for other beneficiaries who have nevertheless not been named and can therefore be dispossessed without their knowledge. The assignment of various assets to **James Titus Kisia** is objected to as no beneficiary has ever consented to his assignment, as he is not a beneficiary or dependant of the deceased and further as the joint administrators have never consented to any assignment, which in any event, if at all, is premature as the certificate of confirmed grant has been set aside. The respondent states that the application should be dismissed.

### **Submissions**

5. The application was canvassed by way of written submissions. The Petitioner submitted that the Applicant is fully aware of the Orders made by the Hon. Lady Justice Nyamweya in the Ruling of **22<sup>nd</sup> February, 2016**. The Applicant seeks Orders in the current application among others that;

- i. Timelines be fixed for compliance and;
- ii. That such further orders be made as shall ensure finalization of the distribution of the estate of the beneficiaries.

6. The Applicant submitted that she is seeking such orders and directions as shall ensure that the apparent open-endedness that is currently discernible in the *status quo* does not continue to harm the beneficiaries. The orders and directions sought are complimentary to, and not in contradiction with the ruling made by Lady Justice Nyamweya on **22<sup>nd</sup> February, 2016**. The applicant submitted that this is an application by a beneficiary in recognition of her position of trust in this matter. She seeks intervention of the court, in view of non-co-operation between administrators, to ensure finalization of distribution of the estate of **Mbalu Nzunza** (deceased) for the benefit of the beneficiaries. The inherent powers of this court in dealing with succession matters are inclusive of equitable remedies. The court has not only the powers but also the duty and discretion to act in such manner as will ensure equity and fair play. Applicant referred to **HCSC No. 2395 of 2003 , Estate of Siamento Ole Munguti**, in which Musyoka J. pronounced himself as follows:

**47, “The probate court is a court of equity.”**

7. In the above case, it was submitted that the court ordered that account be rendered by the administrators within forty five (45) days. The applicant submitted that in the instant case, the two administrators have not, whether by Affidavits or through their submissions, offered any reason why the prayer relating to rendering of accounts should be declined.

8. On their part the Objectors submitted that the Applicant has filed her Summons for Confirmation of Grant dated **21<sup>st</sup> April, 2016** pursuant to this Court’s ruling **dated 22<sup>nd</sup> February, 2016**, which had found thus:

i. The confirmation of grant issued on **17<sup>th</sup> December, 2013** and certificate of Confirmation of Grant dated 19<sup>th</sup> February, 2014 be and are hereby revoked.

ii. The Administrators shall file fresh Summons for Confirmation of Grant and shall include the names of all beneficiaries and the distribution of the deceased’s estate to the beneficiaries.

iii. The *status quo* obtaining as at the date of this ruling with respect to occupation and possession of the deceased’s property and assets to obtain and be maintained pending the hearing and determination of the Summons for Confirmation of Grant. There shall however be no further transfer of the deceased’s assets and properties by the administrators and/ or beneficiaries.

iv. Each party shall meet their respective costs of the Summons dated **16<sup>th</sup> July, 2015**.

9. The Objectors submitted that the Summons dated **16<sup>th</sup> July, 2015** had challenged the propriety of preparing the impugned grant without distributing the Estate to specific beneficiaries, all of whom the applicant admits are adults, and also that the applicant had purported to sell certain assets to one **James Titus Kisia** without the authority or consent of other beneficiaries, who in any event were being dispossessed by not being indicated in the grant in their personal capacities. Indeed at page 3 of the ruling above, the Court had stated thus regarding **James Titus Kisia**:

***“The applicants in their joint Supporting Affidavit also stated that one of the joint administrators, Alice Nzisa, has purported to sell to a Mr. James Titus Kisia several properties without the consent of the other administrators, and without the knowledge of the beneficiaries under her. Further that it is therefore imperative that any transfer of property, of disposal, alienation of property comprising the estate of the deceased be stopped pending the hearing and determination of the application herein”***

10. The Objectors submitted that the confirmed grant was therefore revoked for it had poorly distributed the estate of the deceased without distributing the assets to specific beneficiaries, who would be dispossessed by any alienation, including the one purported to have been done to **James Kisia** by the applicant. The Court, by ordering redistribution of the estate of the deceased to include all individual beneficiaries, acknowledged that distribution had to be done again, and negated any purported alienation. Despite the foregoing, and the specific order to file fresh Summons for Confirmation of Grant, the applicant filed the summons above with the following anomalies:

i. She never obtained the consent of the beneficiaries and instead used the consent that had led to the impugned confirmed grant;

iii. She included one **James Titus Kisia** as a beneficiary by virtue of an assignment yet he is not a dependant of the deceased and his alleged purchase of the deceased’s property were disregarded by this court in the ruling above, and are invalid and amounts to dispossessing other beneficiaries not listed in the impugned grant, which anomaly is to be correct by the Court’s ruling aforesaid;

iii. She has repeated the mistake of not specifying each and every beneficiary of the estate of the

deceased despite the clear holding by this Court in the ruling aforementioned.

11. The objector's objection is founded on the anomalies stated above in (i)-(iii), which, militates against allowing the Summons for Confirmation of Grant as made. It is the Objectors' case that the summons the subject hereto has been made in blatant disregard of this court's ruling dated **22<sup>nd</sup> February, 2016**, has not complied with the mandatory requirements of law that all beneficiaries consent to the manner of distribution and has included a stranger as a beneficiary. The same therefore violates the law and this court's express orders and ought to be dismissed with costs. Alternatively, the Objectors submitted that the anomalies can be remedied so that the distribution of the Estate conforms to this court's ruling above and the law.

### **Determination**

12. It is clear that the Summons for Confirmation of Grant herein and the Protest arise from the parties own interpretation of the Ruling of this Court delivered on **22<sup>nd</sup> February, 2016**. Therefore, the only issue for determination is the correct interpretation of the ruling by this court, from which interpretation order will ensue as appropriate.

13. However, the first issue which comes to the fore is the declaration by the applicant that there is no dispute to this application, and that all parties have given consent to the proposed mode of distribution. This declaration is obviously not true if the Objection herein is anything to go by. The Objectors deny having given any consent to the Confirmation of Grant. Their consent attached to the Summons here is dated 12<sup>th</sup> July, 2013, yet the Summons herein is dated 21<sup>st</sup> April, 2016. So the Objectors submission that their consent has not been obtained pursuant to the ruling of this court dated 22<sup>nd</sup> February, 2016 is correct. What the applicant did was to pluck a copy of an old consent, and to attach the same to the current Summons. While that action is improper, it also borders on fraud. The attempt to procure the Objectors' consent fraudulently is wrong. In the ruling dated 22<sup>nd</sup> February, 2016 the court categorically stated that;

***“The administrators shall file fresh summons for confirmation of grant and shall include all the beneficiaries and the distribution of the deceased's estate to the beneficiary”.***

14. A “fresh Summons” also includes fresh consents, because the beneficiaries and interested parties were to be consulted afresh.

15. Another anomaly is the alleged allocation of assets to be held in trust for unnamed beneficiaries. Lady Justice Nyamweya had directed that all the beneficiaries be named, and so also, assets distributed to them. I accept as true the submissions by the Objectors that allocating assets in trust to unnamed beneficiaries is not an act in good faith. In any event, it is stated by the applicant that all beneficiaries are adults. What is the difficulty naming them, even if the assets are to be held in trust for them by heads of their various families?

16. It is the finding of this court that the applicant has not heeded the orders of Justice Nyamweya. In matters like this, there must be full consultation among all the beneficiaries before the grant can be confirmed.

17. The applicant states that they want to have this matter concluded as soon as possible. In my view, the only way to do that is to do things correctly. There is no shortcut in the distribution of a disputed estate. Consultation and consent are paramount. If these attributes are missing the only way is to have the matter fully heard.

18. It is the finding of this court that the Objectors' objection is merited. The applicants have no option but to fully comply with the ruling of Lady Justice Nyamweya dated 22<sup>nd</sup> February, 2016.

19. In the upshot Summons for Confirmation of Grant dated 21<sup>st</sup> April, 2016 are dismissed with costs in

the cause.

**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:**

Kilonzo – for Ombwayo for Protestors