



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 63 OF 2006**

**IN THE MATTER OF THE ESTATE OF MUTHENGI MULUNGU MASYUKO (DECEASED)**

**1. LUKAS KILIKU NDOLO**

**2. PHILOMENA MUKONYO MUTHENGI....PETITIONERS**

**VERSUS**

**1. DAVID MUSYOKA**

**2. JOSEPH MUNYAO**

**3. JAMES KIMEU**

**4. PETER MUTUNGA**

**5. ANN NDULULU.....OBJECTORS**

**RULING**

A grant of letters of administration intestate was issued on 23<sup>rd</sup> June 2006 to the Petitioners herein with respect to the estate of Muthengi Mulungu Masyuko (hereinafter referred to as “the Deceased”). The said grant was confirmed on 22<sup>nd</sup> September 2008. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners are grandson and wife of the Deceased respectively. The Objectors herein allege to be the second wife of the deceased and her sons with the Deceased, and they filed a summons for revocation of grant dated 1<sup>st</sup> March 2012 seeking the following orders:

1. THAT , the grant issued to Phelomena Mukonyo Muthengi and Lukas Ndolo be annulled/revoked.

2. THAT, an order do issue prohibiting any transactions that may be commenced by use of the grant herein and/or disposal of any of the properties to the estate.

The grounds for the application are that the grant was obtained by the concealment of material facts, and that the interests of the Objectors have not been taken care of in the said grant. The Objectors explained in a supporting affidavit sworn on 1st March 2012 by the 1st Objector, that the deceased who was his father had two wives namely Anna Ndululu and Philomena Mukulu who are both alive. Further, that the 1st Objector is a son to Anna Ndululu, the fifth Objector herein.

Therefore, that in the circumstances the succession cause ought to have been lodged by Philomena

Mukonyo Muthengi and Ann Ndululu who have the priority in law to do so, and that the 1st Petitioner namely Lukas Kiliku Ndolo who is a son to Ndolo Kituku is a son to Beth Weto Ndolo, a daughter of the deceased who is alive and married, and hence he has no interests whatsoever in the estate of the deceased. The Objectors reiterated that the cause herein was lodged in secrecy and completely locked them out, and that they have all along not been aware of the process.

The Petitioners filed a replying affidavit sworn by the 1st Petitioner on 1st February 2016 in response to the Objectors, application. The Petitioners denied that David Musyoka Muthengi (the 1st Objector) is a son to the late Muthengi Mulungu Masyuko, and that the 5th Objector herein is a wife nor was she ever married to the late Muthengi Mulungu Masyuko. They also denied that they moved the Court secretly towards obtaining Letters of Administration Intestate to the estate of the late Muthengi Mulungu Masyuko, and stated that they followed the laid down procedure upon which their Petition was gazetted in Gazette Notice No. 1651 of 10th March 2006.

The Petitioners averred that they have not and did not exclude the objectors from the deceased estate in that they are not beneficiaries nor dependants of the late Muthengi Mulungu Masyuko. Further, that upon obtaining confirmed grant herein, they proceeded to cause land parcel number MBIUNI/KABAA/308 to be sub divided as per the schedule of the confirmed grant and new titles were issued, being MBIUNI/KABAA/1045, 1046, 1047 and 1048. Therefore, that Land Parcel Number MBIUNI/KABAA/308 is not existent and the orders sought cannot be availed to the objectors. They attached copies of the title documents to the said land parcels of land.

In addition, that upon obtaining letters of Administration to the Estate of the late Muthengi Mulungu Masyuko, they filed HCCC No. 63 of 2008 seeking to evict the objectors from Land Parcel Number MBIUNI/KABAA/308, and an order of injunction to restrain the objectors from interfering with the said land in whatever manner were issued pending the hearing and determination of the said suit and which suit is yet to be determined. According to the Petitioners, the court ought to be moved in the appropriate manner as provided for under the Land of Registration Act, 2012 for the titles issued to them to be cancelled, and/or rectified, and that the orders sought to revoke and/or annul the grant issued herein will serve no purpose in that the estate has been distributed and thus completed.

### **The Evidence**

The Court on 1<sup>st</sup> December 2015 directed that the Objector's application would proceed to hearing by way of viva voce evidence, and at a hearing held on 4<sup>th</sup> October 2016 in the absence of the Petitioners, and after the Petitioners had been given various opportunities to file their statements and adequate notice of the hearing date.

The Objector called five witnesses during the hearing. Their first witness (PW1) was Annah Ndululu who is the 5th Objector herein, and who testified that she was married by the deceased because the 2nd Petitioner, Philomena Mukonyo, did not have male children but two daughters only. As a result, the deceased approached her while she was a spinster and she agreed to marry him. Further, that, the 2nd Petitioner was in full support of the same and she used to accompany the deceased whenever he was going to meet the 5th Objector. She further testified that after she was married, the deceased paid dowry 5 goats, 4 cows and later 70 goats thus completing the ceremonies under Kamba Customary Law.

PW1 further informed the Court that they had eight children together with the deceased, and that she was accompanied by the Deceased when she went to apply for her identity card in the name of the Deceased. Further, that after the deceased married her, he constructed a matrimonial home on the suit property, MBIUNI/KABAA/308 where they lived together until the time of his death.

David Musyoka Muthengi (PW2) and Joseph Muniyao Muthengi (PW3) testified that they are the biological children of the deceased, being the children of PW1 and the deceased, and that they were born and grew up at Mbiuni at Kabaa, where they lived with the deceased. PW4, Franscisca Nthenya, who is a wife a brother of the deceased, testified that she attended the dowry payment with the deceased for PW1. Further, that the dowry paid was five goats, two cows and one bull and food that was taken to PW1's

home. She stated that PW1 was the deceased's wife, and that the deceased has agreed with the 2nd Petitioner to marry PW1 as they had no sons, and that the ceremony is known in Kamba customs as *Iweto*.

Francis Katili Kipati, who was PW5 informed the court that he is aged 70 years, and the deceased was a brother to his mother. He also stated that he is fully conversant with Kamba customary law. His testimony was that the first wife of the deceased had two daughters and when the daughters got married, the deceased contracted a second marriage with PW1 which is known as Kamba customary law as *Iweto*. Further, that the owner of the family who was the deceased, is the one who conducted the *Iweto* marriage, and the second wife then became the wife of the deceased, and her children the children of the deceased. He further stated that he was present when the deceased paid dowry for PW1, but was not present when the goats were taken.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made by the Petitioner. The issues to be decided are firstly, whether they Objectors are beneficiaries of the deceased, and secondly, if so, is whether the grant issued to the Petitioners should be revoked. The Objectors ask for revocation of the grant on account of their being wife and children of the deceased, and on account of their non-participation in the Petition for, and confirmation of the grant.

On the first issue, the Objectors claim that the 5<sup>th</sup> Objector was a wife of the deceased and the 1<sup>st</sup> to 4<sup>th</sup> Objectors children of the deceased as a result of a marriage entered into between the 5<sup>th</sup> Objector and deceased, and with the consent of the 2<sup>nd</sup> Petitioner. The Petitioners deny that the Objectors are wife or children of the deceased. The Objectors' legal counsel, B.M Mungata & Company Advocates filed written submissions dated 6<sup>th</sup> October 2016 wherein they urged the Court to find that the Objectors have proved that they are dependants of the deceased, and to order that the grant herein be revoked and all titles issued pursuant to it be recalled and cancelled.

From the evidence adduced, it is evident that dowry was paid for the 5<sup>th</sup> Objector by the deceased and 2<sup>nd</sup> Petitioner under Kamba customary law. The formalities of a Kamba Customary marriage were therefore met as regards the 5<sup>th</sup> Objector. It is also evident from the evidence of the Objectors' witnesses, as well as the Petitioners' replying affidavit that the Objectors have been residing on the deceased parcel of land at Mbiuni in Kabaa. What is not evident is whether the 5<sup>th</sup> Objector was married as a second wife to the deceased or in an *Iweto* marriage. An *Iweto* marriage under Kamba customary law is described in **Restatement of African Law Volume 1: The Law of Marriage and Divorce** (1968) by Eugene Cotran at page 26 as follows:

**‘WOMAN-TO-WOMAN MARRIAGE. Where a husband dies leaving a childless widow who is past child-bearing, the widow may marry a wife (iwetu) by giving ngaswya to her family in the usual way. The widow then selects a man (mutuany) from her late husband's relatives to have sexual intercourse with her wife and any children resulting from such cohabitation are regarded as the children of the widow and her deceased husband. This form of marriage can also take place during the lifetime of a husband where the wife is barren or has not produced male children.**

It is therefore apparent that whether or not the 5<sup>th</sup> Objector was married as a second wife or in an *Iweto* marriage, her children are considered children of the deceased and are therefore beneficiaries. In addition, PW4 and PW5 specifically testified that the 5<sup>th</sup> Objector was married in an *Iweto*, which is a special marriage that is quite distinct from a polygamous union. In the circumstances I do not find the 5<sup>th</sup> Objector to be a wife of the deceased, since as an *Iweto* she was customarily the putative wife of the 2<sup>nd</sup> Petitioner, and is therefore only entitled to the 2<sup>nd</sup> Petitioner's share of the deceased estate.

On the second issue, the grounds for revocation of a grant is provided in section 76 of the Law of

Succession as follows:

**“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 has ordered or allowed; 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.”**

I have perused the Petition for Letters of Administration Intestate, and affidavit in support of the said Petition filed herein by the Petitioners on 27<sup>th</sup> February 2005. The Objectors are not listed therein as the beneficiaries of the estate of the deceased despite their relationship with the deceased and 2<sup>nd</sup> Petitioner. Likewise, the attached consent by the beneficiaries does not have the consent of the Objectors.

The summons for confirmation of grant dated 12<sup>th</sup> June 2006 and filed in court on 8<sup>th</sup> June 2007, and affidavit in support thereof also do not include the Objectors as beneficiaries. There is no consent by the Objectors to the said summons for confirmation on record. The said confirmation sought to distribute the property of the deceased namely Mbiuni/Kabaa/308 to the Petitioners and daughters of the 2<sup>nd</sup> Petitioner.

I therefore find from the foregoing that there was concealment of material facts and/or untrue allegations made by the Petitioners, and that any and all of the distribution of the deceased's estate so far has been illegal. In addition, the 1<sup>st</sup> Petitioner cannot rank in priority to the 1<sup>st</sup> to 4<sup>th</sup> Objectors as an administrator of the deceased's estate under section 66 of the Law of Succession Act, as the said Objectors are children, and the 1<sup>st</sup> Petitioner a grandson of the deceased. In the premises, these succession proceedings will require to start afresh.

I accordingly order as follows:

1. The grant of letters of administration intestate issued to Philomena Mukonyo Muthengi and Lucas Ndolo on 23<sup>rd</sup> June 2006 with respect to the estate of Muthengi Mulungu Masyuko (Deceased) be and is hereby revoked.

2. The Certificate of Confirmation of a grant issued to Philomena Mukonyo Muthengi and Lucas Ndolo on 22<sup>nd</sup> September 2008 with respect to the estate of Muthengi Mulungu Masyuko be and is

hereby revoked.

3. Any distribution, transfers and dispositions of any kind to and/or by Philomena Mukonyo Muthengi and Lucas Ndolo of the deceased's property known as MBIUNI/KABAA/308, and any other subsequent dealings with the said properties be and are hereby declared unlawful and null and void and shall be cancelled forthwith.

4. A new grant of letters of administration shall issue to Philomena Mukonyo Muthengi and David Musyoka Muthengi as joint administrators of the estate of Muthengi Mulungu Masyuko (Deceased).

5. The joint administrators shall file a fresh summons for confirmation of grant within 60 days.

**6. The *status quo* that shall obtain as regards the properties and assets belonging to the estate of Muthengi Mulungu Masyuko (Deceased) pending the confirmation of grant of administration shall be that the Petitioners, Objectors and Beneficiaries shall continue to be in possession and occupation of the properties and assets they currently occupy; and that the Petitioners, Objectors and Beneficiaries of the estate of the deceased shall not sell, transfer, lease, undertake any further developments on, or in any manner dispose of or waste the said properties and assets, nor in any manner interfere with the current occupation and possession of the same by any party.**

7. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 1<sup>st</sup> day of March 2017.

**P. NYAMWEYA**

**JUDGE**