



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**SUCCESSION CAUSE NO. 549 OF 2013**

**IN THE MATTER OF THE ESTATE OF ELIJAH MUAMBI MUSILA (DECEASED)**

**ARRON MUTUA MUAMBI.....PETITIONER**

**VERSUS**

**DOMITILA KITILO MWANZIA.....OBJECTOR**

**RULING**

**The Summons**

The Petitioner herein is a son of the deceased Elijah Muambi Musila (hereinafter referred to as “the deceased”), and he was issued with a grant of letters of administration intestate on 30<sup>th</sup> September 2013 with respect to the estate of the deceased, which grant was confirmed on 3<sup>rd</sup> March 2016. The Objector, who claims to be a daughter-in-law to the deceased, having been married to the late Geoffrey Mwanzia Muambi who is a son of the deceased, thereupon filed a summons for revocation of the grant dated 26<sup>th</sup> August 2016, seeking the following outstanding orders:

1. The Grant of letters of Administration issued to Aaron Mutua Muambi and confirmed on 3<sup>rd</sup> March, 2016 be revoked and or annulled for mispresentation of facts and because the same was obtained by fraud and failure intentionally to disclose the status of the objector as a representative of the house of Ndila Muambi.
2. That an order do issue prohibiting any transaction that might have been commenced by the Petitioner by use of the illegal grant herein and or disposal of any of the properties to the estate, subdivision surveying implementing the distribution by subdividing and surveying for transmission allotted plots by a surveyor who has failed to identify himself.
3. An Order issued to Geopartial Surveyors at Makueni restraining the firm from implementing Distribution of the estate on the instructions of the petitioner.

The grounds for the Objection as set out in the said application and supporting affidavit sworn on the same date by the Objector, are that the grant was obtained fraudulently and through concealment of material facts because the Petitioner indicates in his petition that Geoffrey Mwanzia died leaving no child or wife, whilst he was married and he is survived by Domitla Kitilo Mwanzia as a wife and three children.

Further, that the Petitioner deliberately fraudulently failed to indicate in the petition that his father had sold portion of parcel No. Makueni/Mubau/301 to his son Geoffrey Mwanzia before he died, and

therefore that Geoffrey Mwanzia was a creditor of the estate. She attached a copy of the sale agreement and averred that her late husband bought the land from his father in the presence of the Petitioner and his step mothers.

According to the Objector, she was not made aware of the filing of the petition for grant by the Petitioner, and did not grant her consent to the Petitioner to obtain the Grant of Letters of Administration as required in law. She explained that the deceased had four wives, namely Grace Ndulu Muambi, Ndila Muambi, Kawisya Muambi and Muthoki Muambi. Further that she represents the house of Ndila Muambi and her son Geoffrey Mwanzia Muambi, and was therefore entitled to a plot separately, which was not done.

The Objector contended that she is illiterate, and that she did not give her consent to the confirmation of the Grant at all. She alleged to have been misled after she was served with court papers and attended court when her identity card was taken by an advocate who did not give reasons for taking the identity card. Further, that the administrator never invited her in the meeting of descendants/beneficiaries of the estate to discuss and approve mode of distribution of the estate.

The Objector asserted that she was legally married to Geoffrey Mwanzia Muambi under Kamba customary law and they had six children, and that her husband died on parcel No. Makueni/Muvau/301 where he is buried and whereon she is living with her six children. She claimed that she only came to know of the distribution when a surveyor came unto the land and started surveying the land. Further, that the Petitioner employed the surveyor secretly without consulting the Objector and other beneficiaries, and took advantage of the objector illiteracy to deprive her of a share as a representative of the house of Ndila Muambi.

Paul Kisongoa & Company Advocates for the Objector filed submissions dated 22nd December 2016 wherein the foregoing averments were reiterated, and it was submitted that the Objector was legally married to the Deceased's son Geoffrey Mwanzia Muambi under the Kamba Customary Law and was thus entitled to a share of the estate of the Deceased as embedded under Section 40 of The Law of Succession Act. Reliance was placed on the decision of Jaden J. in **The Matter of the Estate Mutua Ndiku - Deceased, Succession Cause No. 896 of 2011**. Further, that it is only fair that this Court issues orders restraining and/or prohibiting the Petitioner and surveyors from implementing the distribution of the estate of the Deceased under the umbrella of fair hearing, as explicitly embedded under Article 50(1) of the Constitution.

### **The Response**

The Petitioner filed an affidavit in response to the Objector's application on 18th October 2016, and stated that the Objector fully participated in the succession and was present and gave her consent during the confirmation of the grant, and that her application is malicious and an afterthought. Further, that all material facts were disclosed to the court including all beneficiaries, and that the Objector's husband Mwanzia Muambi had in a family meeting held on 18th August 2013 agreed that the estate be shared equally including the parcel of land sold to Geoffrey Mwanzia Muambi, and the said agreement superseded any other prior agreement. The Petitioner annexed a copy of the said agreement in Kamba language and a translation thereof.

The Petitioner's Advocates, Kamolo & Associates Advocates, reiterated the above arguments in submissions dated 17th February 2017 that they filed in Court, in which it was emphasized that the estate was shared equally amongst all deceased sons and wives and not as per the deceased houses, so that each member got an equal share with the other.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made by the Objectors and Petitioner. It is not disputed that the Objector is the wife of the late Geoffrey Mwanzia Muambi who was a son of the Deceased. The issues therefore to be decided are firstly, whether the Petitioner is culpable of non-disclosure of this material fact; and secondly whether the Petitioner's confirmed grant of letters of

administration should be revoked.

A perusal of the Petition for Letters of Administration Intestate filed by the Petitioner on 25<sup>TH</sup> July 2013 and the affidavit in support shows that neither Geoffrey Mwanzia Muambi nor the Objector were included as survivors of the Deceased. I have also perused the affidavit sworn by the Petitioner on 31<sup>st</sup> July 2015 in support for the summons for confirmation of grant. It is indicated therein that Geoffrey Mwanzia Muambi was a son of the deceased who died leaving no child or wife. Likewise, the proposed distribution in the said affidavit leaves out the Objector and her children. The consent to the said distribution however includes the Objector's name with a thumbprint next to it, but there is no indication as to whose thumbprint it is. Lastly, it is not indicated in the Court record if the Objector was present in Court during the confirmation proceedings on 3<sup>rd</sup> March 2016.

It is evident that there was material disclosure on the part of the Petitioner in failing to disclose the existence of the Objector and her children. Section 76 of the Law of Succession Act (Chapter 160 of the Laws of Kenya) provides as follows in this regard:

**“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.”**

However, this Court is mindful that the law prioritizes the persons who can be administrators of a deceased's estate, and as between the Objector and Petitioner, the Petitioner who is a son of the Deceased would have priority in a contest as to who should be the administrator of the estate of the deceased. Section 66 of the Law of Succession Act provides a general guide as to those who will be preferred to administer the estate of a deceased 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:**

**Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will. “**

The ranking of beneficiaries of an intestate is provided under Part V of the Act, and section 36 of this part specifically provides that where an intestate has left a surviving child or children but no spouse as in this application, the net intestate estate shall be equally divided among the surviving children. It is only where an intestate has left no surviving spouse or children, that the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority under section 39 of the Act-

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

It is notable from these provisions that while relatives by marriage such as the Objector can be administrators of a deceased intestate, they are the last in line in priority among a deceased's relatives, and only in the event that the deceased intestate has no surviving spouse and children. In the circumstances it is only the confirmation of grant that is liable to revocation, and the Objector will also have the opportunity to state her case in fresh confirmation proceedings.

The prayers in the Objector's Summons for Revocation of Grant dated 26<sup>th</sup> August 2016 are therefore allowed only to the extent of the following orders:

1. The certificate of Confirmation of Grant issued herein to Arron Mutua Muambi on 3rd March 2016 with respect to the estate of Elijah Muambi Musila (Deceased) be and is hereby revoked.
2. The Petitioners shall file and serve the Objector with fresh Summons for Confirmation of Grant within 60 days of the date of this ruling.
3. The Objector shall be at liberty to file and serve and Affidavit of Protest within 30 days of service of the said Summons for Confirmation of Grant.
4. The *status quo* that shall obtain as regards all the properties and assets belonging to the estate of the deceased and particularly the property known as the properties known as Makueni/Mubau/301 pending the confirmation of grant shall be that the Petitioner, Objector and beneficiaries of the deceased's estate shall continue to be in possession and occupation of the properties and assets they currently occupy as at the date of this ruling, and the Petitioner, Objector and beneficiaries shall not sell, transfer, lease or in any manner dispose of or waste the said properties and assets,.
5. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 4<sup>th</sup> day of May 2017.

**P. NYAMWEYA**

**JUDGE**