



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 34 OF 2011**

**IN THE MATTER OF THE ESTATE OF MUSYOKI SILA MUSEI (DECEASED)**

MUMBUA MUSYOKI .....1<sup>ST</sup> APPLICANT  
MUIA MUSYOKI .....2<sup>ND</sup> APPLICANT  
WAEMA MUSYOKI .....3<sup>RD</sup> APPLICANT  
KIIO MUSYOKI .....4<sup>TH</sup> APPLICANT  
KANINI MUSYOKI .....5<sup>TH</sup> APPLICANT  
MUTHIKE MUSYOKI .....6<sup>TH</sup> APPLICANT  
MUENI MUSYOKI .....7<sup>TH</sup> APPLICANT

**VERSUS**

**MBENYA MUSYOKI ..... PETITIONER/RESPONDENT**

**RULING**

The Petitioner herein petitioned for, and was issued with a grant of letters of Administration Intestate by this Court on 20<sup>th</sup> June 2011 with respect to the estate of Musyoka Sila Musei (hereinafter referred to as “the deceased”), who died on 31<sup>st</sup> August 2010. She is the 2<sup>nd</sup> wife of the deceased. The Applicants are the 1<sup>st</sup> wife and children of the deceased .

After the grant of the letters of administration intestate, the Petitioner filed a summons for confirmation dated 16<sup>th</sup> July 2012 filed in Court on 19<sup>th</sup> July 2012 which has not been heard. The Applicants subsequently filed an application by way of Chamber Summons dated 28<sup>th</sup> October 2014, seeking preservative orders against the Petitioner, which was heard and *status quo* orders granted by this Court on 16<sup>th</sup> February 2016. The Applicants have now filed an application by way summons dated 25<sup>th</sup> February 2016 for revocation of the said grant issued to the Petitioner, which summons is the subject of this ruling. The Court directed that the said summons be heard by way of affidavit evidence and written submissions.

The grounds for the application are that the proceedings to obtain the grant were defective in substance and that the grant was obtained fraudulently by material concealment of the actual assets of the estate. The 4<sup>th</sup> Applicant filed an affidavit in support of the application that he swore on 25<sup>th</sup> February 2016,

wherein he stated that before his father died he had made a will, yet the Petitioner filed the cause herein under the intestacy regime, which proceedings were defective as they were in disregard of the existing will and amounted to concealment of material facts. The deponent annexed a copy of the said will.

Further, that the Applicants were never consulted nor did they give their consent to the succession proceedings or appointment of the sureties who are unknown to them. Lastly, that the Petitioner deliberately omitted assets of the deceased namely Machakos/Katheka Kai Block 5/325 and a parcel of land whose identity the Petitioner has concealed. The 4<sup>th</sup> Applicant averred that his home is in Machakos/Katheka Kai Block 5/325, which the Petitioner has been selling to third parties.

The Applicants' Advocates, Kalwa & Company Advocates, filed submissions dated 4<sup>th</sup> April 2016 wherein he reiterated the fact as stated by the Applicants, and detailed out the difference in substance between testate and intestate succession. He submitted that not only were the succession proceedings herein defective due to the existence of the deceased's will, but that the Petitioner did not comply with the tenets of intestate proceedings laid down in Rule 26(1) of the Probate and Administration Rules as regards notice.

### **The Response**

The Petitioner filed a replying affidavit sworn on 22<sup>nd</sup> March 2016, and she averred that the Applicants have not satisfied the conditions for revocation of grant, and she denied concealing any facts, claiming that she duly followed the procedure for obtaining the grant. She contended that the application by the Applicants was incompetent as they had not filed an objection or protest, and denied that the 4<sup>th</sup> Applicant resided on Machakos/Katheka Kai Block 5/325 or that she had concealed other land belonging to the deceased.

B.M Mung'ata & Co Advocates the counsel for the Respondent, filed submissions dated 30<sup>th</sup> May 2016. It was argued therein that the Applicants ought to have propounded the alleged will of the deceased and moved the court to have the will admitted in probate. Reliance was placed on the decision in **Beth Wambui & Another vs Gathoni Gikonyo & 3 Others, (1988) e KLR** in this regard.

Further, that the Petitioner followed the procedure in obtaining and having the grant of representation confirmed, and that the Applicants had not provided any certificate of title to show that the other land parcels alleged to have been concealed by the Petitioner belong to the deceased. Lastly, it was submitted that the Applicants have no *locus standi* to seek orders of revocation as they have not filed any objection or protest.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made by the Applicants and Respondent. The Petitioner have raised a preliminary issue on the *locus standi* of the Applicants to bring the application. In the first instance section 76 of the Law of Succession Act provides that any interested party can bring an application for revocation of grant. Section 76 provides 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.”**

The Applicants have in this regard demonstrated their interest in the estate of the deceased, being the children of the deceased.

Secondly on the argument that an application for revocation of grant cannot be filed if an objection or protest have not been filed, it is my view that this will depends on the circumstances of each case, and cannot apply if an applicant only becomes aware of the grant after it has been made and confirmed. The only option available to such an applicant is to apply for revocation of the grant. In any event an application for revocation of grant can only be made after the grant has been made and not before, which is when an objection is relevant, and is also dependent on the grounds an applicant is relying on. For example, where there has been material non-disclosure or false statements about beneficiaries, or where their consent was not sought as is being alleged by the Applicants, this is a ground that can only be remedied by a revocation of grant and not by a protest.

The issue therefore to be determined is whether the Petitioner's grant of letters of administration should be revoked. This court has jurisdiction to revoke or annul the grant as is clearly set out in section 76 of the Law of Succession Act which is reproduced hereinabove. In the present application the Objector seeks to revoke the said confirmed grant issued to the Petitioner on the ground that the proceedings were defective as there was an existing will at the time the grant was made; that the Applicants were not involved in the said succession proceedings; and that there are assets belonging to the deceased missing from the list of assets of the deceased that are to be distributed.

As regards whether the proceedings in this succession cause are defective by virtue of the existence of the deceased will, the fact of the deceased's will was not disputed by the Petitioner, and she also attached the said will which is dated 8<sup>th</sup> September 2008 as an annexure to the Summons for confirmation of grant she filed in Court, and sought distribution of the deceased's estate in accordance with the terms of the said will. Therefore, the issue in dispute before the Court in this application is one of the form of proceedings that ought to have been taken, and not on the validity or contents of the said will.

I have perused the said will and note that no executor thereof was appointed by the will. The law requires that where there is such a will the procedure that applies is a petition for letters of administration with the will annexed, under section 53 (a)(ii) of the Law of Succession Act which provides as follows:

**“A court may-**

**(a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which the will applies, either-**

**(i) probate of the will to one or more of the executors named therein; or**

**(ii) if there is no proving executor, letters of administration with the will annexed; and**

**(b) if and so far as there may be intestacy, letters of administration in respect of the intestate estate.”**

As regards the person who is entitled to a grant of letters of administration with the will annexed, section 63 of the Law of Successions provides as follows:

**“When a deceased has made a will, but-**

**(a) he has not appointed an executor; or**

**(b) the only executors appointed are legally incapable of acting, or have renounced their executorship, or have died before the testator or before receiving a grant of probate of the will, or have failed within the time limited by a citation to apply for probate thereof; or**

**(c) all proving executors have died before completing administration of all the property to which the will applies, a universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.”**

A universal or residuary legatee therefore has priority to apply for letters of administration with will annexed, failing which sections 64 to 65 of the Act provides for the following order of priority, a personal representative of the universal or residuary legatee, persons entitled to administer the deceased’s estate if he had died intestate; the Public Trustee; any other legatee with a beneficial interest in the estate of the deceased; or a creditor of the deceased.

A residuary legatee is a person named in the will to receive the residue of the deceased’s estate, while a universal legatee is a residuary legatee that receives the entire residuary estate. The parties herein will therefore need to determine whether the deceased’s will had a residuary or universal legatee, and if not, who among them has priority to apply for a grant of letters of administration with will annexed.

The other aspects that are relevant in the form of proceedings that require to be taken in an application for letters of administration with will annexed, which differs from one for letters of administration intestate, is with respect to the requirement set out in Rule 7(5) of the Probate and Administration Rules which states as follows:

**“Where the grant sought is one of probate of a written will or of letters of administration with the written will annexed there shall be lodged in the registry on the filing of the petition the original of the will or, if the will is alleged to have been lost or destroyed otherwise than by way of revocation or for any other reason cannot be produced, then a copy authenticated by a competent court or otherwise to the satisfaction of the court.”**

It must also be emphasized in this respect that the main difference between an administration by way of letters of administration with will annexed and that where the grant is of letters of administration intestate, is that the grant where a will is annexed is conclusive proof as to the terms of the will and that the will has been duly executed, and therefore distribution must be undertaken according to the terms of the will. A grant of letters of administration intestate on the other hand confers authority to the administrator to act and vests the deceased’s property in the administrator. In addition the distribution of the estate is then distributed as agreed by the beneficiaries, and in the absence of such agreement, as ordered by the Court.

Therefore to the extent that the law requires that where there is an existing will the grant that is to be

made is one of letters of administration with will annexed, and the original will or a copy authenticated by the Court needs to be lodged at the time of making such an application, the succession proceedings herein were incompetent.

On the ground raised of the Applicants not having given their consent to the present succession proceedings, I have perused the petition for letters of administration intestate and affidavit in support by the Petitioner filed in Court on 19<sup>th</sup> January 2011, and I note that the Applicants are listed as beneficiaries, as well as in the summons for confirmation dated 16<sup>th</sup> July 2012 filed in Court on 19<sup>th</sup> July 2012 by the Petitioner. However, there is no consent by the Applicants filed with the said Petition or summons for confirmation, and the Petitioner did not deny or confirm the averments by the Applicants that they did not consent to the administration of the estate.

Lastly, on the assets of the deceased available for distribution, there are two assets of the deceased that are listed in the Petition for grant and summons for confirmation of grant dated 16<sup>th</sup> July 2012 filed in Court on 19<sup>th</sup> July 2012 by the Petitioner, namely Machakos/Katheka Kai Block 4/105 and Makueni/Muvau/480. The Applicants have not provided any evidence to show that the property known as Machakos/Katheka Kai Block 5/325 belonged to the deceased at the time of his death, and is available for distribution, or evidence of any other property of the deceased that is not included in the list of assets sought to be distributed.

The Court has also perused the deceased's will relied on by the Applicants dated 8<sup>th</sup> September 2008, and notes that it only devolves the two properties being Machakos/Katheka Kai Block 4/105 and Makueni/Muvau/480. This Court cannot therefore order for the addition of any properties for distribution in the absence of evidence of the deceased ownership of the same.

The findings in the foregoing lend themselves to the conclusion that the grant issued to the Petitioner herein is liable for revocation. This Court in this regard orders as follows:

1. The grant of letters of administration intestate issued to Mbenya Musyoki on 20<sup>th</sup> June 2011 with respect to the estate of Musyoka Sila Musei (Deceased) be and is hereby revoked
2. **The *status quo* that shall obtain as regards all the properties and assets belonging to the estate of the deceased namely Machakos/Katheka Kai Block 4/105 and Makueni/Muvau/480 pending the application for a new grant shall be that the beneficiaries shall continue to be in possession and occupation of the properties and assets they currently occupy, and shall not sell, transfer, lease 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 beneficiary.**
3. **The orders granted herein on 16<sup>th</sup> February 2016 are consequently vacated arising from the findings and orders granted herein in this ruling.**
4. Each party shall meet their respective costs of the Summons dated 25<sup>th</sup> February 2016.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 18<sup>th</sup> day of July 2016.

**P. NYAMWEYA**

**JUDGE**