



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

P&A MISC. APPLICATION NO. 678 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE NGUI MUA (DECEASED)

NICODEMUS MUA MAKAU.....ADMINISTRATOR /RESPONDENT

VERSUS

KAMULA WAMBUA NGUI

ALEXANDER NGUI MUTUNGI.....APPLICANTS

RULING OF THE COURT

1. The Summons before the court is dated **5th November, 2014** filed by the applicants seeking the following orders;

- a. That court file in respect of High Court Succession Cause No. 111 of 2013, the estate of the late **Ngui Mua** (deceased) be reconstructed as a matter of urgency.
- b. That the administrator/respondent be ordered to furnish the court with the copies of the Petition documents filed in court together with copies of the Letters of Administration and Certificate of Confirmed Grant issued by court.
- c. That the administrator be ordered to suspend the administration of the deceased's estate and render an account of all the deceased's assets as at the time of filing this application.
- d. That in the mean time and for the ends of justice to be met a skeletal file with respect to High Court Succession Cause No. 111 of 2013, the Estate of the late **Ngui Mui** (deceased) be opened for the expedient disposal of the applicant's urgency application dated **30th June, 2014**.
- e. That the costs of this application be in the cause.

2. The application is supported by affidavit of **Alexander Ngui Mutungi**, the 2nd applicant on his own behalf and on the behalf of the 1st applicant. The applicant's case is that he is an adult male and the 2nd applicant herein thus competent to swear this affidavit. The deceased **Ngui Mua** died on the 20th day of April, 1967 and a grant of Letters of Administration (*intestate*) was made to **Nicodemus Mua Makau**, the Petitioner herein on 23rd May, 2013. The deceased herein, the applicant's grandfather, was registered as the owner of all that parcel of land known as **Makueni/Mubau/37**. The said Ngui Mua had three (3) wives namely **Kuthea Ngui, Wavinya Ngui and Nduku Ngui** and the land was registered in the

Petitioner's name to hold in trust for these three (3) houses. The Petitioner/Administrator hails from the third house by virtue of being a grandson to Ngui Mua (*the deceased herein*). His father was Makau Ngui who is since deceased, while the 1st applicant herein hails from the first house and the applicant from the 2nd house.

3. The applicant's case is that members and heirs of the 1st and 2nd houses that were not cited and have been disinherited are the applicants together with grandsons to the deceased from the 1st and 2nd households, their home and farms are situated on the land in dispute. These facts were not revealed to this court at the time the grant herein was obtained. The said grant was later confirmed with the said **Nicodemus Mua Makau** getting all that parcel of land known as **Makueni/Mubau/37** in whole and the petitioner hurriedly and clandestinely registered the entire parcel into his name and caused a title deed to be issued on 28th March, 2014. The petitioner has started disposing off portions of the land, unilaterally, and for his own benefit to the detriment of all other beneficiaries of the estate. The applicant's case is that the Administrator herein filed petition and obtained grant fraudulently by the making of a false statement and was granted Letters of Administration on 23rd May, 2013 which were subsequently confirmed on **29th January, 2014**.

4. The applicants obtained notice of the Administrator's fraudulent acts when the deceased's estate more so land parcel No. **Makueni/Mubau/37** was registered in the name of the Administrator instead of the deceased.

5. The applicants filed Summons for Revocation of Grant on 1st July, 2014 contemporaneously with an application for conservatory orders to preserve land parcel No. **Makueni/Mubau/37**, but the application cannot be heard since the court file in respect of High Court Succession Cause No. 111 of 2013, the estate of the late Ngui Mua (*deceased*) has been missing and has not been traced causing the applicants to be greatly prejudiced by the subsisting position as the Administrator is engaged in a frenzied sale of the deceased's property which is held in his name as at the moment there is no court order preventing him from disposing of the subject estate and yet the file cannot be traced. The primary documents filed by the petitioner while petitioning are in the possession of the administrator, and the disappearance of the court file from the Probate and Administration Registry without urgent reconstruction of a skeletal file for purposes of hearing the applicant's application for conservatory orders will defeat the applicant's application for conservatory orders, thus greatly prejudicing the applicants if land parcels No. **Makueni/Mubau/37** which is registered in the name of the Administrator is wasted for the mere reason that the court file has not been properly kept and cannot be found. From the conduct of the administrator it is fair to say that he shall not avail any documents unless ordered by the court and it is only fair and just to reconstruct court file in respect of High Court Succession Cause No. 111 of 2013, the estate of the Ngui Mua (*deceased*), in terms of annexed bundle of documents namely;

Item	Pleading/document	Date filed or issued	Filed/ issued by
1	Grant of Letters of Administration	16.05.2013	Court
2	Certificate of Confirmed Grant	29.01.2014	Court
3	Notice of Appointment	14.05.2014	Applicants
4	Summons for preservation of the deceased's estate under Certificate of Urgency	30.06.2014	Applicants
5	Summons for Revocation of	30.06.2014	Applicants

	Grant		
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6. The application is opposed by the Respondent vide a replying affidavit sworn by the respondent on **1st July, 2015**. The respondent's case is that he is the Administrator herein fully conversant with the facts of this Cause hence competent to depone hereto. The respondent's case is that he duly followed all procedures recognized by the law in instituting and pursuing the Succession Cause No. 111 of 2013, and that the grant of representation in respect of the deceased's estate was obtained with due regard of the law and procedure, and that in terms of **Section 29(b)** of the **Law of Succession Act Chapter 160** the applicants are obligated to prove dependency. The applicants have not demonstrated whether and how they were dependent upon the deceased immediately prior to his death, which is a fatal omission. As for the missing court file, the respondent's case is that he is not a custodian of court files, and so the applicant's application dated 5th November, 2014 is grossly incompetent, frivolous, vexatious and an abuse of the court process. The same should be dismissed with costs.

7. Parties with the leave of court filed submission which I have considered. The issue I raise at this stage is whether there is enough grounds to re-construct the file on High Court Succession No. 111 of 2013.

8. The respondent's position is that the file need not be re-constructed because the applicants have not shown that they are dependants of the deceased in that cause. However, in my view, the need to re-construct the file is not a partisan issue. The respondent himself will need the said file to enable him administer the estate as the petitioner. Besides, the applicants have shown that they have an interest in the said estate. It is important that they are given a chance to prosecute their protest which they commenced through their Summons for Revocation of Grant dated **30th June, 2014**.

9. It is therefore the Ruling of this court that the said file be re-constructed, and that the respondent shall fully cooperate and provide all the documents in his possession for the reconstruction of the cause file. In the upshot the application before the court is allowed as prayed with costs in the cause.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 15TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of;

Mr. Muleli for the applicant

Court Assistant – Mr. Munyao