



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 436 OF 2008

IN THE MATTER OF THE ESTATE OF JOSEPH MUOKI NDIVO (DECEASED)

AND

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 304 OF 1997

IN THE MATTER OF THE ESTATE OF JAMES NDIVO NDUNGWA (DECEASED)

RULING

1. The application that is the subject of this ruling is dated 18th April 2013 and is filed in **HCSC No. 436 of 2008**. For some time now this matter has been handled simultaneously with **HCSC No. 304 of 1997**.
2. The two estates are related in that **HCSC No. 304 of 1997** is in respect of the estate of the deceased father of the deceased person in **HCSC No. 436 of 2008**. Some of the assets the subject of **HCSC No. 436 of 2008** were devolved in **HCSC No. 304 of 1997** to the deceased person in **HCSC No. 436 of 2008**. It will be noted that some of the orders recorded in **HCSC No. 304 of 1997** infact relate to **HCSC No. 436 of 2008**.
3. The background to the matter is that the deceased in **HCSC No. 304 of 1997** died on 2nd November 1996. Representation to his estate was granted on 29th April 1997 to the deceased in **HCSC No. 436 of 2008** jointly with his mother, Teresia Kalee Ndivo, and his sister, Kanini Ndivo, who are the respondents in the application dated 18th April 2013, and also Anthony Muia, who was also his brother. A grant of letters of administration intestate was duly issued on even date.
4. The grant of 29th April 1997 was then confirmed on 24th July 1998. According to the certificate of confirmation of grant of that date, the estate of the deceased in **HCSC No. 304 of 1997** devolved as follows:-
 - a. ***Teresia Kalee Ndivo – vehicle KAB 497U, Plot No. 108 Masongaleni Scheme, Malili Shares registered under her name, house in Southlands Nairobi, house in Woodley Estate in Nairobi Plot No. 157 and Plot No. 2980 in Laikipia.***

- b. **Joseph Muoki Ndivo (the deceased in HCSC No. 436 of 2006) – Nakuru Plot No. 542-01 Rongai, KYR 074, KSA 597, KAA 932, KTV 410, KYQ 015, Malili shares registered under James Ndivo Ndungwa, 16 shares in Aimi ma Kilungu No. 503 and Plot No. LR No. 15 Sec. No. 288.**

3. Anthony Muia Ndivo – Plot No. 259 Masongaleni Scheme.

5. It transpired that the deceased in **HCSC No. 436 of 2006** died sometime in 2004. Irene Nthenya Mutune, who is the applicant in the instant application, filed an application on 7th February 2011, dated 4th February 2011, in her capacity as the widow of the deceased in HCSC No. 436 of 2006, seeking annulment of the grant made on 29th April 1997 on the grounds that the same had become inoperative and useless on account the subsequent death of the deceased in **HCSC No. 436 of 2006**. She alleged that administration of the estate had not been completed and wanted to be substituted in place of her dead husband as administrator of the estate of the deceased in **HCSC No. 304 of 1997**.

6. The application was opposed by the first administrator, Teresia Kalee Ndivo, principally on the grounds that the administration of the estate had been completed. The applicant herein then countered with evidence that property that ought to have vested in the name of her deceased husband was still in the name of the deceased in **HCSC No. 304 of 1997**.

7. Directions were taken before Njagi J. on 2nd May 2012 on the disposal of the application in **HCSC No. 304 of 1997** dated 24th February 2011. It was directed that the same be disposed of by *viva voce* evidence on a date to be given at the registry on priority.

8. At the registry the parties were given the 18th February 2013 as the date for hearing. On the appointed date the matter was placed before Kimaru J. Mrs. Nzei attended for applicant, while Mr. Kitheka was present for the respondent. Mr. Kitheka sought adjournment on the grounds that the respondent in that application was indisposed. The application for adjournment was opposed by Mrs. Nzei. In the end Kimaru J. directed the parties to agree on the properties belonging to Joseph Muoki Ndivo, and fixed the matter for mention on 20th February 2013.

9. On 20th February 2013, the parties recorded a consent whereby the property belonging to the estate of Joseph Muoki Ndivo, the deceased in **HCSC No. 436 of 2008** was listed. The record of the proceedings of 20th February 2013 reads as follows:-

“20/2/2013

Coram: Kimaru, J

Court clerk – David

Kitheka for the Petitioners

Mrs Nzei for the applicant

By consent, the list of properties belong to the Estate of Joseph

Muoki Ndivo:

- i. **L. R. No. Laikipia/Olarabel/232**
- ii. **Tractor make Ferguson KYR 074**
- iii. **Tractor (Combine Harvester) KWR 462**
- iv. **Tractor KSA 597**
- v. **Tractor KAA 932L**
- vi. **Pickup KYQ 015 (Peugeot) (missing)**

- vii. **Shares at Malili Ranch Ltd (in form of parcels of land ie Agricultural Plot No. 2356 (approximately 7.8 acres) Commercial plot 2495**
- vii. **Shares at Aimi ma Kilungu Ltd (inform of parcels of land Agricultural Land No. 1574 measuring 10 acres. Commercial plot -50ft X 100ft Plot No. 344**
- viii. **Land at Rongai, Nakuru Plot No. 54201 (already sold by Joseph Muoki) – sold at 5.6 million – Joseph received Kshs. 5 million in July 2007 – Mary Maingi was paid Kshs. 600,000/- (subject to confirmation).”**

KIMARU, J.”

10. On the same date, Mrs. Nzei applied that the grant made to Teresia Kalee Ndivo and Teresia Kanini Ndivo be amended so as to include Irene Nthenya Mutune. Mr. Kitheka did not object to the application. Kimaru J. consequently ordered that the letters of administration issued to Teresia Kalee Ndivo and Teresia Kanini Ndivo be revoked and a fresh grant do issue to Teresia Kalee Ndivo, Teresia Kanini Ndivo and Irene Nthenya Mutune. Mrs. Nzei was ordered to file an application for confirmation of the grant within thirty (30) days and to serve the same upon Mr. Kitheka.

11. In compliance with the orders of Kimaru J. of 20th February 2013, Mrs. Nzei did file a summons for confirmation of grant on 20th April 2013 in **HCSC No. 436 of 2008**, and served it on Mr. Kitheka who filed an affidavit of protest, in **HCSC No. 436 of 2008**, sworn by the first respondent. Mrs. Nzei’s representative attended the court’s registry on 29th April 2013 and obtained a date for the hearing of the application dated 18th April 2013. The hearing date was fixed for 22nd May 2013. The fixing of the date was recorded in **HCSC No. 304 of 1997**. The application dated 18th February 2013 was heard on 22nd May 2013 in **HCSC NO. 304 of 1997**. Ruling was slated for 24th June 2013, but was not delivered until 25th July 2013. The ruling of 25th July 2013 provoked the filing of other processes in **HCSC No. 436 of 2008** which then culminated in this ruling.

12. After Joseph Muoki Ndivo died on 15th December 2004 representation to his estate was obtained by Teresia Kalee Ndivo and Tersia Kanini Ndivo in **HCSC No. 436 of 2008** in their respective capacities as his mother and sister of the deceased. A grant of letters of administration intestate was accordingly made to them on 16th September 2008. The said grant was confirmed on 15th February 2011 by Kimaru J. and a certificate to that extent duly issued on the same date. The estate was distributed between the two administrators.

13. On 4th December 2012, Mrs. Nzei filed an appointment on behalf of Irene Nthenya Mutune, and followed the same up with a summons for the revocation of the grant made to Teresia Kalee Ndivo and Teresia Kanini Ndivo, confirmed on 15th February 2011. The summons for revocation of the said grant was dated 14th January 2013 and was lodged in court on 20th January 2013. There is nothing on record to indicate whether the application was ever served on the respondents or whether they ever replied to it, but it is certain that no directions were even taken on the disposal of the said application. Indeed, no orders of any sort were made on the said application.

14. While the Summons for Revocation of grant dated 14th January 2013 was still pending, the applicant in that application lodged the Summons for Confirmation of Grant, dated 18th April 2013, on 22nd April 2013. She did that on the assumption that the order made on 20th February 2013 had been made in **HCSC NO. 436 of 2008**, and therefore the grant made on 16th September 2008 had been revoked and a fresh one made to her jointly with others and on the assumption that she had been ordered to file a summons for confirmation of the said grant.

15. The application dated 18th April 2013 was then heard in **HCSC No. 304 of 1997** on 22nd May 2013 and orders made on it in **HCSC NO. 436 of 2008** in a ruling whose delivery is recorded in **HCSC No. 304 of 1997** on 25th July 2013. Proceedings were thereafter taken in **HCSC No. 436 of 2008** for the setting aside of the orders of 25th July 2013. The proceedings were set aside on 26th September 2014 and it was ordered that the application dated 18th April 2013 be heard afresh. The application dated 18th April 2013 was argued afresh on 1st December 2014 by Mrs. Nzei and responded to by Mr. Kitheka. It is the said application which is the subject of this ruling.

16. I indicated in my ruling of 26th September 2014 that there was a mix up in the recording of proceedings in these two matters, which, in my view, arose when the two files were brought together. There is nothing on record to indicate that the two files were ever consolidated. Indeed, their consolidation is not even feasible for the two cases relate to estates of two separate deceased persons or individuals. Mrs. Nzei alluded, on 22nd May 2013, to the fact of the two court files being put together, yet there is no order on record to that effect. I suspect though that the two files were brought together on 20th February 2013 to facilitate the recording of the consent on the assets which made up the estate of Joseph Muoki Ndivo.

17. Be that as it may, there is a fundamental error on record running through both files arising from the events of 18th February 2013 and 20th February 2013, and specifically from the order of Kimaru J. of 20th February 2013 revoking the grant allegedly made to Teresia Kalee Ndivo and Teresia Kanini Ndivo. The said revocation order is itself uncertain for it is not clear whether it relates to the grant made in **HCSC No. 304 of 1997** or that made in **HCSC No. 436 of 2006**.

18. What is clear to me is that what was coming up for hearing on 18th February 2013 in **HCSC No. 304 of 1997** was the Summons for the revocation of the grant made in that cause. The said application was dated 24th February 2011. The matter was then fixed for mention on 20th February 2013. On 20th February 2013 an order was made for revocation of the grant. The only grant available for revocation in proceedings conducted in **HCSC No. 304 of 1997** was the one made in that cause, that is to say the grant made on 29th April 1997.

19. The order 20th February 2013 revoking the said grant is however vague, it does not identify the grant to be revoked by the date of its making, but rather by the names of the persons appointed in it as administrators. The grant that was revoked by the order of 20th February 2013 was allegedly made to Teresia Kalee Ndivo and Teresia Kanini Ndivo. Unfortunately no such grant had been made in **HCSC No. 304 of 1997**, but rather in **HCSC NO. 436 of 2008**. The grant made in **HCSC No. 304 of 1997** was to Teresia Kalee Ndivo, Joseph Muoki Ndivo, Anthony Muia and Kanini Ndivo, while the grant in **HCSC No. 436 of 2008** was made to Teresia Kalee Ndivo and Teresia Kanini Ndivo. The court was obviously misled into revoking a grant in **HCSC No. 304 of 1997** that did not exist. In my view, the order of 20th February 2013 did not have the effect of revoking the grant made on 29th April 1997 in **HCSC No. 304 of 1997**; neither did it have the effect of revoking that made on 16th September 2008 in **HCSC No. 436 of 2008**, for no order could possibly be made in **HCSC No. 304 of 1997** to revoke a grant made in another case in respect of an estate of a different person.

20. As matters stand the revocation application in **HCSC No. 436 of 2008**, dated 14th January 2013 is still pending. Consequently, the grant made on 16th February 2008 is still in force. The orders made on 15th February 2011 confirming the said grant of 16th February 2008 still subsist for they could not have been vacated by orders that were made in **HCSC No. 304 of 1997**. Under those circumstances the application dated 18th April 2013 has not basis. The applicant in it is not the administrator of the estate of the deceased, and, by dint of the provisions of Section 71 of the Law of Succession Act, she has no legal standing to apply for confirmation of grant before the grant of 16th February 2008 is revoked and she is appointed administrator of the estate.

21. The proceedings recorded in this cause after 31st July 2013 are a nullity for they were based on a wrong premise. I will say nothing of the proceedings recorded in **HCSC No. 304 of 1997** after 20th February 2013. The application dated 18th April 2013 is obviously incompetent and an abuse of the court process, and I do hereby strike it out. If the parties intended to resolve the dispute in **HCSC No. 436 of 2008** in terms of the orders recorded on 20th February 2013 in **HCSC No. 304 of 1997** then they are at liberty to move the court appropriately in that respect. There shall be no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 2ND DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE