



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 113 OF 1998**

**IN THE MATTER OF THE ESTATE OF SAKAYO WAMBUA NDOLO (DECEASED)**

PHILIP MUSEMBI WAMBUA

LOISE KIVAA WAMBUA

SAMUEL WAMBUA KITUKU.....PETITIONERS/RESPONDENTS

**VERSUS**

RAPHAEL NDIKU KATUNGA

ALICE M. NDOLO

DORCAS M. NDOLO .....OBJECTORS/APPLICANTS

**RULING**

1. The application dated 25<sup>th</sup> May, 2007 seeks orders that the grant confirmed on 16<sup>th</sup> May, 2001 be revoked or annulled. The grounds are that the same was obtained fraudulently by the making of false statements or by the concealment of material facts and through defective proceedings.
2. The application is supported by the affidavit in support sworn by one John Mutua Nthatu, a son to the 2<sup>nd</sup> Objector and by the further affidavits sworn by Raphael Ndiku Katunga the 1<sup>st</sup> Objector and the further affidavit sworn by Dorcas M. Ndolo the 3<sup>rd</sup> Objector.
3. The thrust of the said affidavit evidence is that the land the subject matter of these proceedings was held by the deceased in trust for himself and two of his late brothers, Alphonse Katunga and the late Nathan Muema Ndolo. The Applicants claim to be beneficiaries in the estate of the late Alphonse Katunga and the late Nathan Muema Ndolo. To support their claim the Applicants have exhibited the proceedings of the Makueni Land Disputes Tribunal, Tulimani Division Case No. 37 of 2006 (*annexture "DMN1"*).
4. The application is opposed. According to the replying affidavit sworn by the Respondents, no material facts were concealed from the court as the Applicants are not beneficiaries in the estate of the late Sakayo Wambua Ndolo, the deceased herein. It is further deponed that the grant was obtained regularly without any objections. That following the confirmation of the grant, the land in question was subdivided and sold to third parties.
5. The application was canvassed by way of written submissions which I have duly considered.

6. Both parties have raised issues of technicalities. The Respondents have contended that the affidavit in support of the application and the further affidavits are defective in that the deponent of the affidavit in support is not the Applicant and that the further affidavits were filed without the leave of the court. On the other hand, the Applicants have asserted that Loise Kivaa Wambua was irregularly substituted as the 2<sup>nd</sup> Petitioner to replace her late husband, Jonathan Kivaa. In my view, the technicalities of procedure raised do not go into matters of substance and can be regularized if need be. Be as it may, this court is enjoined by Article 159 of the Constitution to administer justice without undue regard to technicalities of procedure.

7. Going to the merits of the case, it is not in dispute that the property in question is in the name of the deceased. It is also clear from the proceedings from the Land Disputes Tribunal that there has been a dispute over whether the property belonged to the deceased herein alone or whether he held it in trust. The Land Disputes Tribunal's decision agreed with the Applicants and made orders for the said land to be subdivided between the three brothers. The Land Disputes Tribunal's decision was adopted as a decision of the court. According to the Respondents' submissions, the Land Disputes Tribunal's decision was made after the confirmation of the grant herein and without jurisdiction and is the subject of a Judicial Review in Miscellaneous Application, Machakos High Court No. 24 of 2008 which is pending determination.

8. From the foregoing, it has been established that the parties have a civil dispute which is yet to be resolved. There is therefore no clear case of fraud or concealment of material facts when the grant was obtained made out. The issue whether the Applicants are dependants of the deceased or not is hinged on the question of the trust alluded to.

9. In the premises, I find no reason to revoke or annul the grant. However, I note that there are unsubstantiated averments that the property the subject of these proceedings has been sold. Due to the peculiar circumstances of this case, I stay the proceedings and make orders that there should be no sale or disposal or the carrying out of any other transactions relating to the suit property until the parties resolve the civil disputes related to the said land.

Each party to meet own costs.

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**B. THURANIRA JADEN**

**Dated and delivered** at Machakos this 7<sup>th</sup> day of October, 2015

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**B. THURANIRA JADEN**

**JUDGE**