



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 165 OF 2014**

**IN THE MATTER OF THE ESTATE OF JOEL MBITHI GEDION NDUMBU (DECEASED)**

**DOROTHY MONTHÉ NDUMBU.....1<sup>ST</sup> APPLICANT**

**SUSAN KATUNGWA NDUMBU.....2<sup>ND</sup> APPLICANT**

**THOMAS RENE NDUMBU.....3<sup>RD</sup> APPLICANT**

**MATHEW BENJAMIN NDUMBU.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**MARY P. MBITHI.....RESPONDENT**

**RULING**

1. A grant of letters of administration intestate (grant) of the Estate of **Joel Mbithi Gedion Ndumbu** (deceased) was issued to **Mary P. Mbithi Ndumbu** and confirmed on the **9<sup>th</sup> October, 2012**.
2. On the **3<sup>rd</sup> day of March, 2014**, the Applicants filed summons for revocation or annulment of the grant on the ground, *inter alia* that the grant was made without any notice or consent of the Applicants who are a daughter of the deceased's first wife **Ruth Katungwa** and Children of the late **Arnold Ndumbu**, the deceased's son who is deceased.
3. On the **24<sup>th</sup> September, 2014**, the Respondent filed an application seeking the mental status of the 1<sup>st</sup> Applicant to be inquired into by the court and depending on the outcome, the summon for revocation of the grant dated **3<sup>rd</sup> March, 2014** be dismissed, which would pave way for lifting of the cautions lodged at the land registry on **Land Reference Numbers Mulango/Wikililye/1369, Mulango Kyangunga/1436** and **Nzambani Kyanika/7** forming the Estate of the deceased.
4. Filed with the application was Notice of Preliminary Objection on points of law that: the 1<sup>st</sup> Applicant has filed the application in express and flagrant breach of the mandatory provisions of the law relating to suits by persons of unsound mind. That the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants were not dependants of the deceased immediately prior to his death and as such have no legal capacity to bring the present application/summons.
5. The Applicants filed grounds of opposition to the Respondent's Notice of Preliminary Objection, that: the issue in controversy is whether the grant was obtained properly; the 1<sup>st</sup> Applicant is not of unsound mind absolutely as she has lucid moments and has infact executed the affidavit in support of the application for revocation; and her state of mind does not negate the fact that the deceased was her father, if the suit is sustained the application shall be amended.

6. That, the court has power to make a judgment call to determine the first Applicant's mental condition thereafter give directions; The Law of Succession Act succinctly provides for any interested party in the Estate of the deceased having the right to file an application for revocation of the grant which justifies all parties to be on record and there is no valid suit before court for removal of the caution registered.
7. The application was canvassed by way of written submissions that have been considered.
8. The grant issued herein was made following an application by the Respondent who deponed an affidavit stipulating the status of the Estate of the deceased. Her averments are being challenged on the grounds of non-disclosure of some survivors who were entitled by law to benefit from the Estate of the deceased.
9. The basis of the Preliminary Objection raised is that one of the Applicants, the 1<sup>st</sup> Applicant in particular is of unsound mind therefore the application is filed in express breach of the mandatory provisions of the law.
10. It is not denied that the 1<sup>st</sup> Applicant is of unsound mind, although it is argued that she has lucid moments. As correctly argued, the court can only tell if the Applicant goes through a period of normality between periods of insanity if it inquires into unsoundness of her mind. This would ordinarily be done pursuant to the provisions of the Mental Health Act. If found to be incapable of protecting his/her interest, such a person would lack the legal capacity to institute any proceedings. It would behoove such an individual to act through a guardian.
11. The application herein has been brought pursuant to **Rule 73 of the Probate and Administration Rules** that provides thus:

***“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

12. This court in deciding this matter should consider substantial justice so as not to violate the rights of the Applicant to benefit from the Estate of the deceased if established. The application has been brought by three other Applicants who claim to have been dependants of the deceased. In order for this court to do justice it must give them a hearing. Striking out an application prior to hearing it would amount to dismissal of the same on a technicality. In the case of the Estate of **Kibata Wamukuu Gachuki – Lucy Wanjiru Kibaba vs. Lucy Wanjiru Mucheke (2013)eKLR** it was stated thus:

***“..... technicalities of procedure in succession matters are treated less seriously than in civil matters because of the nature of succession proceedings and the great need to focus on substance with a view to do justice for the parties.”***

13. For justice to be seen to have been done we must consider reasons for revoking and/or annulling a grant.
14. According to **Section 76 of the Law of Succession Act**, a grant may be revoked and/or annulled on grounds inter alia that:

***Proceedings adopted in granting the same were defective in substance; non disclosure or concealment of important matters, reliance on false statements and where the grant becomes useless and inoperative.***

15. To establish the aforesaid grounds the court must hear parties. The action taken by the court is discretionary. The court can act *suo moto* or having heard an interested party. If the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants are interested parties there is no reason why they should not be heard.
16. From the foregoing, the Preliminary Objection raised fails. Accordingly, it is dismissed with no orders as to costs.
17. It is so ordered.

**Dated at Kitui this 16<sup>TH</sup> day of NOVEMBER, 2015.**

**L. N. MUTENDE**

**JUDGE**

**Dated, Signed and Delivered at Machakos this 2<sup>nd</sup> day of December, 2015.**

**P. NYAMWEYA**

**JUDGE**