



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 293 OF 2004**  
**IN THE MATTER OF THE ESTATE OF**  
**JOSEPH MUNYAO KELLI (DECEASED)**

AGNES MUTINDI KITHUSI.....1<sup>ST</sup> RESPONDENT

MARDSEN KELLI.....2<sup>ND</sup> RESPONDENT

KELVIN MUTINDA KELLI.....3<sup>RD</sup> RESPONDENT

SYLVIA MWENDE KELLI.....4<sup>TH</sup> RESPONDENT

JACINTA WANZA MAKENZIE.....5<sup>TH</sup> RESPONDENT/PETITIONER

-VS-

PETER MUTINDA MUNYAO.....APPLICANT/OBJECTOR

**RULING**

1. In the application dated 22<sup>nd</sup> July 2009, the objector/applicant PETER MUTINDA MUNYAO sought under **section 76** of the **Law of Succession Act (Cap 160)** and **rule 44** of the **Probate and Administration Rules** to have the grant issued to JACINTA WANZA MAKENZI and KEVIN MUTINDA KELLI on 3<sup>rd</sup> May 2005 and confirmed on 19<sup>th</sup> September 2008 revoked, and the distribution set aside. Pending the hearing and determination of the application, he asked that the administrators be restrained from interfering with, transferring or in any way executing the confirmed grant. The application was on the grounds that the administrators had failed to proceed diligently with the administration of the estate; the grant had been obtained by means of untrue allegations of facts; material facts were concealed; the grant was useless and could not facilitate effective administration of the estate; the distribution was not fair and did not take care of his interests; the distribution did not take care of the liabilities of the estate; and that the administrators want to sell the estate without consent or consultation. In the affidavit sworn in support of the application, the applicant stated that although he was one of the beneficiaries of the estate he had not at all been consulted over the distribution and neither had his consent been sought in the proceedings. He averred that some of the properties that were distributed did

not belong to the deceased, and the administrators had failed to include the liabilities of the deceased in the petition. Lastly, that the administrators were in the process of selling the estate without reference to him, and that the administrators had failed to administer the estate.

2. The 5<sup>th</sup> respondent JACINTA WANZA MAKENZI swore a replying affidavit. She is one of the administrators of the estate, the other being KELVIN MUTINDA KELLI (3<sup>rd</sup> respondent). She stated that the failure to share the estate was due to uncooperative conduct of the 3<sup>rd</sup> respondent. The applicant is her son and she agrees with him that the liabilities of the estate were not being considered; that the 3<sup>rd</sup> respondent was unilaterally selling some of the properties of the estate; and he was not at all making reference to other beneficiaries. She supported the application.

3. On 13<sup>th</sup> September 2011 AGNES MUTINDI KITHUSI, MARDSEN KELLI, KELVIN MUTINDA KELLI and SYLVIA MWENDE KELLI filed a chamber application under **section 47** of the **Law of Succession Act** and **rule 49** of the **Probate and Administration Rules** against JACINTA WANZA MAKENZIE seeking that the Chief Registrar or the Deputy Registrar do execute all the necessary documents in respect of the transfer of LR NO. NAIROBI/BLOCK 77/20 BuruBuru in favour of HOSEA MUCHUNGU MUTHOGA. From the grounds and the sworn affidavit, the applicants belonged to one of the two houses of the deceased, the other house belonging to JACINTA WANZA MAKENZIE. They claimed that JACINTA had secretly petitioned for, and obtained, letters of administration in the estate. They had been forced to seek revocation which had been granted. On 3<sup>rd</sup> May 2005 a consent had been recorded to have JACINTA WANZA MAKENZIE and KEVIN MUTINDA KELLI appointed as joint administrators of the estate. Negotiations begun on the identification of beneficiaries and their respective shares. On 19<sup>th</sup> September 2008 the court ordered that this property that belonged to the deceased be registered and transferred into the joint names of KEVIN MUTINDA KELLI and the respondent JACINTA WANZA MAKENZIE to hold in trust for themselves and other beneficiaries who were MARDSEN KELLI, SYLVIA MWENDE KELLI and PETER MUTINDA MUNYAO, in equal shares. The respondent was dissatisfied with the order and filed a Notice of Appeal. She also filed an application for review of the decision. She withdrew the application and the applicants obtained a certificate of confirmation. It was impossible for the parties to agree on the mode of distribution of the estate. The two parties were not on talking terms. The applicants filed an application following which on 11<sup>th</sup> November 2010 the court ordered that the property be sold and the proceeds be shared as indicated in the certificate of confirmation. The applicants instructed MUHATIA PALA Auctioneers to sell the property by public auction. A notification of sale was served on the respondent. The property was sold to HOSEA MUCHUNGU MUTHOGA whose bid was the highest at Ksh.5,500,000/=. He paid 25% deposit. The sale was not without problems as the respondent had moved the court to stop it but without success. She had then filed **HC ELC NO. 85 of 2011**. The respondent filed a notice of preliminary objection raising issue with the way the applicants had conducted themselves in the matter; the fact that all these things had happened without her participation, etc. She stated that in **ELC 85 of 2011** the Court had issued interim stay orders relating to the further dealing in the property. She filed a replying affidavit challenging all that had happened in the case. She stated that the orders made reference to had been misinterpreted by the applicants to their disadvantage; that the estate property had been intermeddled with; the 3<sup>rd</sup> applicant had been uncooperative in the administration of the estate; the auction was null and void; and that the applicants had no legal or equitable right to the remedy sought in the application.

4. On 2<sup>nd</sup> April 2012 JACINTA WANZA MAKENZIE came under **sections 47, 79, 81, 82, 83** and **84** of the **Law of Succession Act** and **rule 73 of the Probate and Administration Rules** to have KELVIN MUTINDA KELLI removed and replaced as a co-administrator by any other beneficiary or dependant whom the Court may appoint. The application was made on account of alleged non-cooperation in the administration of the estate. KEVIN swore a replying affidavit, once again outlining the history of the dispute. His case was that it was JACINTA, her step mother, who was uncooperative by refusing to call or talk to her about the matter, or at all. He stated that she had been changing advocates, the present one being the 8<sup>th</sup> one, in bid to arrest the situation in which the courts have consistently ruled against her. JACINTA did a further affidavit.

5. The parties' counsel agreed to have the court consider all these three applications and make a decision thereon based on the affidavits and the written submissions. MR KIPTOO appeared for the interested party PETER MUTINDA MUNYAO, MR MUTUA appeared for KELVIN, AGNES, MARSDEN, and SYLVIA (all referred to as objectors) and MR MUIGAI appeared for JACINTA (referred to as the petitioner). Henceforth I will refer to the parties as such. The application dated 22<sup>nd</sup> July 2009 was, however, filed by the interested party who is the son of the petitioner. It was supported by the petitioner. However, it is clear that since that application, the estate has been distributed and the property in question sold by public auction; and all the time the petitioner took part. The decision to have the petitioner and KELVIN to be co-administrators was by consent. Ideally, such consent bound the parties to it and can only be set aside, and/or reviewed, by consent. In **FLORA N. WASIKE V DESTINO WAMBOKO [1988]KLR 429** it was held that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. If a consent is to be set aside, it can only really be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons. No sufficient cause has been made to warrant the setting aside of the consent to have joint administration.

6. The interested party and his mother (the petitioner) have all along been in this dispute. The interested party was a beneficiary in the order that sought the registration and transfer of BuruBuru property into the names of the petitioner and KELVIN for their benefit and the benefit of the children of the two houses of the deceased. In the distribution of the rest of the estate the petitioner and the interested party got KANGUNDO/KIKAMBUANI/448. He cannot say, therefore, that he did not benefit from the estate, or that he has been kept out of the transactions relating to the estate.

7. It should be recalled that the Court ordered the registration of the BuruBuru property in the four names on 19<sup>th</sup> September 2008. A Notice of Appeal was filed but abandoned. Same for application for review. On 16<sup>th</sup> November 2010 the Court ordered that the property be sold and the proceeds shared. This is what led to the public auction. There was no appeal to challenge that. On 5<sup>th</sup> August 2011 the Court declined to grant the application by the petitioner to restrain the sale of this property. It was ordered that the sale does proceed. The alleged interim orders issued in **ELC 85 of 2011** were not annexed to the affidavit sworn on 21<sup>st</sup> April 2012 by the petitioner.

8. In conclusion, I dismiss the applications dated 22<sup>nd</sup> July 2009 and 2<sup>nd</sup> April 2012 with costs, and allow the application dated 13<sup>th</sup> September 2011 with costs.

**DATED and DELIVERED at NAIROBI this 6<sup>th</sup> October, 2014.**

**A.O. MUCHELULE**

**JUDGE**