



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO E041 OF 2021

IN THE MATTER OF THE ESTATE OF JAMES MUTHAMA
ALIAS MUTHAMA MUNEENE (DECEASED)

REUBEN NGILA KITONYIAPPLICANT

VERSUS

ANCENT MUTUA MUTHAMA

RESPONDENT

JUDGMENT

1. Before this Court is a Summons dated 15th June 2023 which seeks orders as follows;

" a. *Spent*

b. *Spent*

a. That the Honourable Court be pleased to revoke the Grant of letters of Administration issued to Acent Mutua Muthama on 3rd November 2021 and confirmed through Certificate of Confirmation of Grant issued on 23rd June 2022.

b. That in the alternative to prayer d, this honourable court be pleased to order that the applicant, being the child of one of the

beneficiaries be granted authority to go and subdivide the land to the beneficiaries as he knows the property very well.

c.That the Applicant is the one who surveyed the land with surveyors and he is the one who fixed the boundaries with members of the Machakos District Land Control Board when there was a dispute over the boundaries.

d.That the costs of the application be provided for.”

2.The Summons are supported by an affidavit deposed by Reuben Ngila Kitonyi on 15/06/2023 in which he stated that the deceased herein was survived by the later James Muthama Muneene, the late David Kiilu Muneene, the late Isaac Kitonyi Muneene, the late Obed Kitheka Muneene, the late Luke Kimeu Muneene and the late John Ndambuki Muneene. That the trusted of the estate one Lazarus Muneene also died on 27/12/2003.

3.It was deposed that the Respondent is a grandson of the estate herein and failed disclose that there were other grandchildren to the estate and this being non-disclosure of a material fact then the confirmed grant of letters of administration should be revoked and annulled. He told the court that he was best suited to re distribute the property since he has been a secretary to the sons of the late Lazarus Muneene Ngila for more than 15 years and he went with the surveyor and Machakos District Land Control Board member to survey the land and fix boundaries. He indicted that he would be assisted by his

aunties Agnes Kanyilu Kitheka , Alice Ndululu Nambuki and Ann Wanza Ndambuki who are daughters in law of the later Lazarus Muneene Ngila and know the history well.

4. In opposition of the Summons, the Respondent filed an affidavit dated 20/07/2023 and stated that the Applicant is neither a son nor a beneficiary to the estate of his father James Muthama Alias Muthama and the beneficiaries of the estate are listed in the Chief's letter dated 22nd June 2021. That these proceedings relate to James Muthama alias Muthama Mune (deceased) and not his grandfather Lazarus Muneene Ngila (deceased). He stated that the property Machakos/ Nguluni/791 is registered in the name of James Muthama Mune as the absolute and sole proprietor therefore the issue of the property being held in trust cannot arise. That his father lived on the suit property for more than 50 years and to the exclusion of his late grandfather Lazarus Muthama Muneene. It was alleged that the application is strange, malicious and geared towards disinherit the rightful beneficiaries of the estate of his later father.

5. Veronicah Kalewa Munyao filed an affidavit on 02.12.2023 who stated that the suit property was bought by the late Lazarus Muneene Ngila and was registered in the name of the late James Muthama Muneene, her father-in-law to hold in trust for the family. It was alleged that while the family was in the process of identifying their portions, the Respondent was re-aligning his father's name to read

James Muthama Munee and has in the process lied to the court.

6. Felista Kitile Munlu filed an affidavit on 01/12/2023 and stated that the suit was held in trust by the late James Muthama Muneene and when she got married in 1967, the suit property was sub divided into six portions according to the number of sons of the late grandfather. In 2021 they went to identify the portions. At which time, it is alleged the Respondent was realigning the name of Muthama Munee to read James Muthama Munee so that he can claim that the land belongs to his father.

7. Agnes Kanyilu Kitheka also filed an affidavit on 01/12/2023 wherein it was deposed that the suit land was bought by her father-in-law and is not the property of James Muthama Muneene. That the land was subdivided into 6 portions in 1967 and placed under the custody of the late James Muthama Munee who was to hold it in trust for the entire family until 2021 when families went to identify their portions. At which time, it is alleged the Respondent was realigning the name of Muthama Munee to read James Muthama Munee so that he can claim that the land belongs to his father.

8. The Applicant filed a response to the Replying affidavit on 01/12/2023 and stated that the Respondent was never appointed as the administrator of the estate of James Muthama Munee; that the person left in charge was his late brother Peter Kioki (Muthoka) Muthama who died in

2020. Immediately after his funeral service, a family meeting was held where the Respondent told them that the land was subdivided and each of Lazarus Muneene Ngila's son would be shown his portion. That in 2021 when they went to the land, only the Applicant knew where the boundaries were.

9. The matter proceeded via viva voce evidence.

10. PW.1 was Reuben Ngila Kitonyi who stated that the subject property is Nguluni/Machakos/791 and it is ancestral land as it belonged his grandfather, Lazarus Muneene Ngila who died in 1974. He stated that the grandfather had 2 wives who are deceased; he had 6 sons and 2 daughters - 8 children who died. He stated that Ancent Mutua Muthama was his cousin son of my uncle grandson of grandfather Lazarus Muneene Ngila. The property Machakos/Nguluni/791 does not have a title deed but has a survey number and is slightly over 100 acres. He stated that the letter from the chief of 22/06/2021 did not disclose all persons who survived James Muthama (deceased).

11. While referring to the letter of 27/11/2023, he stated that James Muthama Muneene had 3 wives/houses; 1st widow - Kalondu Muthama had 3 children, 2nd widow Elizabeth Nguma had 4 children and the 3rd widow, Rebecca Mutete had 4 children. He contended that the Ancent Mutua Muthama was not an administrator of the estate and that the 6 houses/families were to benefit for

the property Machakos/Nguluni/791 including James Muthama Muneene. He stated that he was not a son, step son or grandson of the deceased herein. He told the court that he had not proven that Machakos/Nguluni/791 belonged to his grandfather; that he did not have a Title Deed, Green card or allotment letter or survey. He stated that his father was the 3rd born of the family of ten, 8 sons and 2 daughters. He stated that his parents are deceased and are buried Kikuyuni location/village. It was his testimony that his parents did not live on Machakos/Nguluni/791, that his mother would go to the land work and leave but did not live there. He was born in 1955 and his grandfather died in 1974 while he was in high school in Machakos at 19 years.

12. He stated that the 1st and 2nd wife of James Muthama Muneene stayed at Kwawethei while the 3rd wife was at the market and she was at Machakos/Nguluni/791 on her late husband's portion and other wives buried at kwethei and the 3rd wife was buried where her husband was allocated. He further stated that Daniel Muia Muthama is older brother to Ament Muthama, a step brother son of the deceased's 1st wife/widow but was not included in the summons for confirmation of grant.

13. PW2 was AGNES KANYILU KITHEKA who stated that she was born in 1942 and she knew that the suit property belonged to Lazarus Muneene Ngila (her father in law) as he was the father to her husband Kitheka Muneene son of

Lazarus Muneene Ngila. She stated that Acent Mutua Muthama is her son as his father Muthama is a brother to her husband. She told the court that the only child of Lazarus that was alive was Sammy and James Muthama Muneene was the last son to die. She stated that Lazarus had 6 sons and 2 daughters and that the suit property was to be divided among 6 children.

14. It was her testimony that Reuben Ngila Kitonyi is not son of the deceased herein but a son of Isaac Kitonyi son of Lazarus Muneene Ngila - (deceased). She stated that the children of the deceased herein have built on the suit property but Reuben has not. That when Lazarus Muneene Ngila was weak in health he called all of them and showed each of the children where they were to live/build/settle. She clarified that she was not interested in the property of James Muthama alias Muthama (deceased) herein and only want property of Lazarus our father - my father-in-law.

15. PW3, Daniel Muya Muthama stated that he was born in 1944 and was a son to James Muthama Muneene son of the deceased herein. It was his position that Machakos/Nguluni 791 belonged to their grandfather. He stated that his father had 3 wives; Kalondu Muthama (my mother), Elizabeth Ngina Muthama and Rebecca Mutete Muthama. Acent Mutua Muthama Respondent/administrator is her step brother. The response to the Respondents replying affidavit of

1/12/2023 by Reuben Ngila Kitonyi letter by Office of the President of 27/11/2023. That Mbithe Muthama daughter of deceased and mother Rebecca Mutete Muthama. Mbithe, she is alive but married hence cannot inherit. He testified that Reuben Ngila is not son of James Muthama or grandchild of deceased. He is not a beneficiary of deceased's estate.

16. He stated that his mother Kalondu was wife of deceased and was built for at Kawethei and she was buried at Kawethei and he lived in Kawethei. Ancient's mother was in Nguluni upon her death she was buried at Nguluni. That no one has objected to the distribution of the property.

17. RW.1 was Ancient Mutua Muthama stated that he is the son of James Muthama Muneene the registered proprietor of the land in question and that is where his mother and siblings were buried. Reuben is his cousin and is not a child of James Muthama. He cannot administer the estate of my father while I am still here. He stated that his father had other properties to other sons ,all my step brothers and that he gave this particular land to his mother. He stated that he had a certificate of search and a letter from the registrar of settlement but he had not filed them in court. He indicated that in his summons for confirmation of grant, he had annexed a letter from the chief where he stated that his father only had one wife. That he only had

one wife on this plot 791 but he had other wives in other plots.

18. It was his testimony that his father had 3 wives but Rebecca Mutuli Muthama is the one settled in 791. His father had many sons namely:- Samson Maingi Muthama, Timothy Muli Muthama, Daniel Muia Muthama, Wanyua Muthama, Joseph Munyao Muthama, Sarah Wanza Muthama, Mueni Muthama, Ament Mutua Muthama, Robert Kioko Muthama, Mbithe Muthama and Kyalo Muthama. He stated that there was no will but my father had indicated the place of each one of them. He stated that his father died in 2003 when he was about 51 years old, he bought the land from several people before it was surveyed. He indicated that the search that was annexed to the Summons for confirmation indicates that the land belongs to James Muthama. That None of those listed in the chief's letter has tried to revoke this grant and none of the children in the houses of the other wives have objected. He contended that they were aware of these proceedings.

19. RW2, Samuel Katumbo Munene stated that James Muthama was his brother and father to Ament while Reuben is a son of his elder brother. He was the only surviving uncle. He stated that from 1980 he has been the secretary of the entire family but when his elder brother became old, he was made the chairman. He stated that Reuben was usurping the power of the family;

that Joseph Musyimi Kitonyi was given the mantle and the family wrote to the DCC to that effect. That the Applicant wanted to chase out the family including his own brothers and there are several eviction letters written by his advocates to that effect. It was alleged that Reuben has a hidden agenda to frustrate the family of James. No other child of James Muthama has contested the wishes of their father. One of them came here and he said he can only allow Reuben over his own body.

20. Muthama had settled his properties while alive and only 791 remained and that is because it had not been demarcated. The other children of James Muthama had no problem at all. He told the court that Ancent should administer the estate of James Muthama as he is the son of James Muthama. That they placed a caution just in case Mutua turned against me.

21. In addition, he told the court that he is Saul Katumo Muneene and he was to get six hectares after subdivision. He was there to stand for the others so there was no need to list their names in the court papers. He stated that the people in the chief's letter dated 22/06/2021 are not the only wives and children of James Muthama. He referred to the letter from the chief dated 27/11/2023 and stated that those were all the wives of James Muthama Muneene. He knew Daniel Muya Muthama as the son to James Muthama. He testified that Ancent left out Daniel

Muthama in his petition because Daniel's mother's house had been allocated their own land.

22.RW3, Joseph Musyimi Kitonyi stated that James Muthama Muneene is his uncle as he was the elder brother of his father, the late Isaack Kitonyi Muneene. The Applicant is his elder brother and the Respondent was his cousin. He stated that a search was done on the suit property and it indicates that the same is registered in the name of James Muthama Muneene. He stated that James had only one surviving sister called Magaret Mbithe Musau who is married; he also had two brothers who are deceased that is Peter Kioko Muthama and Kyalo Muthama. That the father of Ancent had three wives; Ngina had three children, one son who is deceased and three daughters, Mueni, Wayua and Serah Wanza. The second wife Kalondu had three sons; Samson Maingi (deceased), Timothy Mulu and Daniel Muya Muthama.

23. He referred to the chief's letter and stated that it only indicated the children of Mutete's house. He contended that the suit property did not belong to his grandfather. He also stated that the title deed had not been collected from the lands registry but it was registered. He stated that the issue of survey was not material to the case and that none of the widows has raised an objection to the case.

24. Parties proceeded to file submissions with the Applicant filing submissions dated 14/05/2025 wherein he reiterated

his contentions in the affidavit and stated that he had made out a case to warrant the revocation of the grant. That the title to the property had not been annexed and that the certificate of official search that was presented to court was fake.

25. In submissions dated 03/09/2025, the Respondent submitted that the applicant has no beneficial interest in the deceased's Estate lacks the locus standi to bring the revocation application and the court should dismiss the summons for revocation and allow the current administrator to finalize with the process of administration. In support of its submissions, reliance was placed on the ***Estate of George Karegwa Gitau (deceased) Nairobi High Court succession cause number 959 of 2001, the Matter of the Estate of Joseph Muchoki Muriuki (deceased) Nyeri HCSC No. 396 of 1999 and re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR.***

Analysis and determination

26. The cause herein relates to the estate of James Muthama alias Muthama Munee who died on 27/12/2003 as per the death certificate on record and not the estate of Lazarus Munee Ngila. Having considered the summons, the affidavits on record, the evidence and the law; I find that the issues for determination are;

i. Whether Land Parcel Nguluni/Machakos 791 was held in trust by the deceased

herein on behalf of the family of Lazarus Muneene Ngila

ii. Whether the grant issued on 23/06/2022 should be annulled and/or revoked

27. The Applicant's case is that the suit property was registered in the name of the deceased herein to be held in trust for the whole family. It is therefore incumbent upon him to prove that such trust exists. The nature of a family trust was discussed extensively **In re Estate of Susan Mwelu Mutia (Deceased) (Probate & Administration 36 of 2017) [2025] KEHC 2202 (KLR)** where the court rendered itself as follows;

"A family trust provides a solution with guaranteed outcomes which secures the family property as well as the proprietary interest of the beneficiaries for posterity.

33. Family trust is more appropriate vehicle in succession cases as the trust form is not strange to the law of succession Act. Family trust is also part of trust law having been introduced in 2021 through section 3D of the Trustee (Perpetual Succession) Act in 2021, providing for registration or incorporation of a Family Trust by any person or persons, whether jointly or as an individual, for the purposes of planning or managing their personal estate.

34. Family trust, is, therefore, the big and revolutionary idea serving as a vehicle for preservation or creation of wealth for generations; an element of, and premised upon the logic of sustainable development of using the family assets to meet 'the needs of the

present without compromising the ability of future generations to meet their own needs'. The thinking is intra-generational equity, which implies fairness to coming generations of the family members. This idea of family trust and sustainable development is not far removed from the African tradition that aimed at keeping families within and the clan together and preserving their wealth. But, the tradition and practice was affected by other developments such as individual ownership of land.(The 1987 report, Our Common Future, of the United Nations World Commission on Environment and Development (WCED)

35.The beneficiaries of a family trust may be living or not; a provision which partly feeds the idea of sustainable development and incorporates the principle of representation in respect of the share of a deceased dependant or beneficiary by his or her dependants or children under the Law of Succession Act. Section 38 and 41 of the Law of Succession Act.

36.Be that the purport of family trust, perhaps it also helps to avoid fragmentation of family wealth into small units which may not be economically viable or which literally diminish or 'dissipate' economic opportunities that may become available to the family if the wealth remained a single mass.

37.A family trust may be set up by the testator in his lifetime or in a will or by the beneficiaries by having the administrator as a trustee for their respective shares as determined by the court forming the trust property.

38.In a family trust, the trustee may also be a beneficiary. Section 38 of the Law of Succession

Act is a perfect example upon which a family trust may be anchored. The individual and beneficial ownership of the property by the beneficiaries of the estate as defined by the court is maintained in the trust.

39. This understanding, forms the functional foundation for how the court should assist parties to realize sustainable use, preservation and creation of family properties or wealth in succession causes.”

28. From the record, the Applicant contended that he was the secretary of the larger Mune family and was the only one who knew how the properties were divided, however, he did not present any map or drawings or evidence at all of this contention. As it is, there is no evidence that a trust existed other than allegations from the Applicant. Moreover, as was stated by Musyoka J in **Re Estate of Mbai Wainaina (Deceased) [2015] eKLR:**

“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate Court. The mandate of the probate Court under the law of succession Act is limited. It does not extend to determining issues of ownership of property and determination of trusts. It is not a matter of the probate Court being incompetent to deal with such issues but the provisions of the law of succession and the relevant subsidiary legislation do not provide a convenient mechanism for determination of some issues. A party who

wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court. Consequently, and for the reasons above stated, I wish to find and hold that this Court has no mandate to resolve the proprietary interest on land based on the alleged trust."

29. Similarly, In **re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR** the court expressed itself as follows;

"...The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation."

30. Having found that the issue of trust has not been established. We now move to the issue of revocation of the grant. **Section 76 of the Law of Succession Act** provides as follows;

"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on

application by any interested party or of its own motion—

(a)that the proceedings to obtain the grant were defective in substance;

(b)that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c)that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d)that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i)to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii)to proceed diligently with the administration of the estate; o

r(iii)to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such

inventory or account which is false in any material particular; or
(e)that the grant has become useless and inoperative through subsequent circumstances.

31. The court has been urged to revoke the grant grounds of concealment of material information from the court and for misrepresentation. According to the Summons for Confirmation of grant, he was survived by Ancent Mutua Muthama ,the consent dated 11/08/2021 is signed by the wives to the deceased's sons namely; Nerissa Karambu Muthoka and Magdalene Mwikali Muli but from the evidence on record, there were three houses and that information was not disclosed to the court. The letter from the chief which is dated 22/06/2021 makes reference to one wife and three children. The information that should be contained in the petition for grant is set out in **Section 51(2) of the Law of Succession Act** which provides as follows:-

“51(2)An application shall include information as to -(g)in cases of total or partial intestacy, the names and addresses of all previous spouses, children, parents, brothers and sisters of the deceased and of the children of any child of his or hers then deceased;...”

32.**Rule 7(1) (e) (i) of the Probate and Administration Rules** states as follows:-

“... where an applicant seeks a grant of representation to the estate of a deceased person ... the application shall be by a petition... containing... the following particulars-(e)in cases of total or partial intestacy -(i)the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with Section 39(1) of the Act.”

33. It is therefore clear that the Administrator obtained the grant herein without disclosing all the material facts. As the Petitioner he ought to have disclosed that the deceased had two other wives and children. For that reason and that reason only the grant is revoked so that he can bring on board the children of the deceased's other houses. Should they have no interest in the estate then they shall tell the court as much and should there be any contestation between the three houses then it shall be determined by the court. The grant and the confirmed grant be and is hereby revoked and the asset comprising the estate shall revert to the name of the deceased. Liberty is granted to apply for a fresh grant.

34. In his submissions the Applicant alleges that the certificate of official search dated 25th February 2020 it is not genuine. It is trite law that submissions are not

pleadings. This matter ought to have been raised and strictly proved during the hearing but it was not. That allegation cannot therefore stand.

35. This being a family matter and the Applicant's claim having not succeeded, each party shall bear its own costs. Orders accordingly.

Judgment signed, dated and delivered virtually on this 25th day of September 2025.

E N MAINA
JUDGE

IN PRESENCE OF:

Mr Wachira, Advocate for the Applicant.

Mr Mutava, Advocate for the Administrator/ Respondent.

Geoffrey Court Assistant/Interpreter.