



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 86 OF 1984**

**IN THE MATTER OF THE ESTATE OF PETER MUKWEYI SORE (DECEASED)**

**JUDGMENT**

1. This matter relates to the intestate estate of Peter Mukweyi Sore, who, according to certificate of death, serial number 105317, dated 8<sup>th</sup> November 1983, died on 7<sup>th</sup> March 1982. Representation to his estate was sought in this cause, vide a petition lodged herein on 11<sup>st</sup> April 1984, by Wilson Andala Peter, in his capacity as eldest son of the deceased. He expressed the deceased to have been survived by the Wilson Andala Peter, Richard Kenyatta, Evans Peter, Josephat Shiboko and Habil Khabochi, and to have died possessed of Butso/Indangalasia/104. Letters of administration intestate were made to him on 8<sup>nd</sup> August 1984, and a grant was duly issued, on even date. I shall refer to Wilson Andala Peter, as the administrator. The grant was confirmed on 4<sup>th</sup> October 1985, on an application filed herein on 9<sup>th</sup> September 1985.

2. What I am called upon to determine is a summons dated 13<sup>rd</sup> June 2017, which seeks revocation of the said grant. It is brought at the instance of Lucia Busolo Mukweyi. I shall hereafter refer to her as the applicant. She is a widow of a son of the deceased, and complains that the administrator obtained representation to the estate without obtaining the consent of the other beneficiaries, and that he did not list or include all the children of the deceased in his petition. She avers that she married the deceased in 1973, and had 4 children with him. She states that she and the deceased established a matrimonial home at Butso/Indangalasia/104, which has since subdivided into 5 subtitles. She avers that she resided on the subject land prior and after the demise of the deceased. She states that the deceased was a polygamist who had married twice. She was the one wife, while the other was Naomi Busolo Mukweyi. She says that he was survived by 13 children, being Beatrice Wekaya Mukweyi, Dorcas Khasandi Mukweyi, Wilson Andala Peter, Josephat Mukweyi Sore, Nora Mukweyi Sore, Richard Mukweyi Sore, Mary Manyasi Mukweyi, Habil Nyongesa Mukweyi, Sarah Marble Mukweyi, Evans Juma Mukweyi, Joyce Khakuya Mukweyi, Catherine Mukani Mukweyi and Roseline Muhenje Mukweyi. She states that the deceased had not apportioned his property amongst his children before he died. She complains that the grant was confirmed without her knowledge, and that her existence as a widow of the deceased was concealed. She fears that she could be rendered destitute and suffer loss.

3. In his reply to the application, the administrator avers that the applicant never married a son of the deceased in 1973, and that she lost her rights to inheritance by virtue of marriage. He states that the applicant married the deceased in 1973, after his mother died in 1971, and bore 4 children with the deceased. He has named the 4 children as Evans Juma Mukweyi, Joyce Khakuya Mukweyi, Catherine Makani Mukweyi and Roseline Muhenje Mukweyi. He states that his own mother was survived by Beatrice Wekaya Mukweyi, Dorcas Khasandi Mukweyi, Wilson Andala Mukweyi, Josephat Mukweyi Sore, Norah Mukweyi Sore, Richard Mukweyi Sore, Mary Munyasi Mukweyi, Habil Nyongesa Mukweyi and Sarah Marble Mukweyi. After the deceased died, the applicant is said to have gone back to her first marriage, where she got more children, being Julius, Linnet, Wycliffe, Anne, and others. She had gone back with the 4 children she had gotten with the deceased, but the administrator followed, and retrieved 2 of them, Evans Juma Mukweyi and Joyce Khakuya Mukweyi, so that they could continue with education. The other 2 remained with her as they were still young. He avers that by her remarrying, the applicant lost her right to inheritance. He avers that all the daughters of the deceased were married, and that was why he did not provide for them.

4. Directions were given on 17<sup>th</sup> July 2018, for disposal of the application by way of oral evidence.

5. The oral hearing commenced on 27<sup>th</sup> November 2019. The first on the stand was Lucia Mukweyi, the applicant. She testified that the deceased had two wives, he got 8 children with the first wife, and 4 with her. She stated that the deceased had built for her a house within the estate. When he died, she said, she was chased away by the administrator, after they started raising questions about how the deceased died. She said that she was the one who was taking care of the deceased during his illness, while the administrator was away in Nairobi, coming back home only after he died. She returned to her parents, and denied moving back to the home of her first husband. She asserted that she was living on the land where she had buried the deceased, after she was returned by her son Evans Mukweyi. She complained that she was not informed when the cause was initiated. She explained that she could not go back to her first husband, because he had died, before he married the deceased. She explained that the other children, that is to say Julius, Linnet, Wycliffe and Anne, were children she had gotten earlier with her first husband before she married the deceased. She said that they were raised in Kabras, which was their home. She asserted that the administrator did not raise her children since he was in Nairobi. She testified that her son, Evans, was not given his share of the land, for he did not have a title deed. She explained that the deceased had three wives, the third one being the mother of Beatrice.

6. Wifuzi Bandi Lunalo, a brother of the applicant, testified next. He identified the deceased as his brother-in-law, on account of having married his sister. He explained that she had been previously married in Kabras, but her husband died. She was harassed after his death,

hence she came back to her parents' home, from where she met the deceased, and they got married. They got 4 children. After the deceased passed on, the children of the deceased harassed her, and she was forced to go back to her parents' home. She accused the administrator, and one other son of the deceased. She moved back to the property of the deceased after her son Evans was injured in an accident, and required someone to take care of him. He said that she had children with her first husband, who he said was the first to die. She left those children at that home. He said that when she went back to her parents' home, she had brought the children she got with the deceased with her, but the administrator took care of them. He stated that he had heard that Evans had refused to take his share of the land because he had not been involved in the succession process.

7. Evans Juma Mukweyu followed. He explained that the deceased had 3 wives. He stated that the land had been subdivided without their knowledge, and he could not explain how that happened. He said that there were no boundaries on the land. He said that he was not aware whether succession was done, as the administrator never informed him about the process. He said that he and the applicant were not informed nor involved. He said that he did not agree with the distribution, as he they never sat as a family to agree on the matter. He said he did not live within the property allocated to him, Butsotso/Indangalasi/5931. He said that the administrator supported him after the traffic accident, and stood with him throughout. He said that he was 11 years old when the deceased died, and the administrator helped raise him. He said that he learnt that his name was in the petition at the hearing, and said he did not know that the property had been shared out equally amongst the sons. He said that he was not aware that Butsotso/Indangalasi/5931 was meant for him. He asserted that he was not willing to take Butsotso/Indangalasi/5931, for he did not want land, and that it was the applicant claiming, as the application was hers not his.

8. The administrator testified on 6<sup>th</sup> October 2020. He testified that the applicant was his stepmother. He stated that after the deceased died, the applicant went back to her first husband. He said that he gave Evans Butsotso/Indangalasi/5931, which he said was unoccupied. He said that the same was registered in his name as administrator, and that he was waiting for Evans to give him documents to facilitate transfer. He said that he had disclosed all the children of the deceased when he sought representation. He said he caused the property to be transferred to his name to protect it. He said that he had called Evans so that they could subdivide the land, but he became violent. He refused to release his identification papers to facilitate transfer. He said that the land should have been distributed between the 3 houses, because the deceased had 3 wives.

9. Richard Mukweyi testified as the witness for the administrator. He identified the applicant as having been a wife of the deceased before she went back to her first husband after the deceased died. He said that it was difficult to involve her in the matter after she had gone back to her former husband. He confirmed that the property was divided into 5 equal portions, but Evans had declined to take his share. He denied that they had chased the applicant away. He said that the deceased died before the first husband of the applicant. He also stated that the deceased did not pay dowry for the applicant, saying that he only gave out sugar for the children. He said that when the succession cause was filed he was informed, but Evans was not, because he was of young age then. He said that he got his land from the administrator, and so should Evans. He stated that the daughters were not provided for because then the law did not allow it.

10. At the close of the oral hearing, the parties filed written submissions. I have read through them and noted the arguments made.

11. What is for determination is an application for revocation of grant. Revocation of grants is provided for under section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, which says as follows:

*“76. Revocation or annulment of grant*

*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; or*

*(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.”*

12. Under section 76 of the Law of Succession Act, grants of representation are liable to revocation on three general grounds. The first is that the process of obtaining the grant was fraught with problems. It could be that there were defects in the process or that the court was misled in some way. Such would include where the grant was sought by a person who was not qualified to obtain representation to the estate of the deceased, or where certain facts as were required under the law have not been disclosed or were concealed from the court or were

misrepresented. The second general ground is where the grant was obtained procedurally and properly, but subsequently the grant holder encountered challenges with administration, such as where they failed to apply for confirmation of grant within the period allowed in law or failed to proceed diligently with the administration of the estate, or failed to render accounts as and when required. The last general ground is where the grant subsequently became useless or inoperative, usually in cases where the sole administrator died or became of unsound mind or was adjudged bankrupt.

13. In the instant case, the applicant raises issues that point to the first general ground, that the process of obtaining the grant herein was attended by challenges. Her principal arguments are that the administrator did not disclose some of the survivors of the deceased, distorted facts, did not involve all the survivors in the process, among others.

14. Applications for grants of representation, which include a grant of letters of administration intestate, are governed by section 51 of the Law of Succession Act. Section 51(2) states the details of what ought to be disclosed, as follows:

“(1) ...

(2) Every application shall include information as to—

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.”

15. The deceased herein died intestate. The provision in section 51(2)(g), requires that all the persons listed or mentioned in there be disclosed, whether or not they will take a share in the estate. That list includes spouses, children, parents, brothers and sisters of the deceased. The deceased herein was survived by 3 daughters. In the petition, the administrator herein disclosed only the sons of the deceased. the deceased had married 3 times, and gotten 13 children with his wives. Under section 51(2)(g) all the 13 ought to have been disclosed. Secondly, the administrator did not disclose the applicant as a surviving widow. The administrator has asserted that although she had been a wife of the deceased, prior to his death, she had left the home, after his death to reunite with her former husband. The applicant has contested that, and called her own brother to testify to the fact that she moved back to her parents’ home, and not back to her former husband. The administrator did not call any independent witness to attest to what he was asserting. I find the version of events given by the applicant more plausible, and I shall take it that she did not remarry after the deceased died, and that she had gone back to her parents’ home after harassment by the administrator. Consequently, she ought to have been disclosed and involved in the process of obtaining the grant, and the distribution of the estate. It was not disclosed that the deceased died a polygamist, having married more than once. These nondisclosures and lack of involvement of so many survivors of the deceased amounted to concealing matter from the court, and misrepresenting facts. The court was misled to believe that the deceased had only 5 children, instead of 13, and had not been survived by a spouse.

16. These disclosures that the law requires are necessary, in the sense that distribution is dependent on the persons who survived the deceased, their number and how they related to the deceased. The mode of distribution varies depending on whether the deceased was survived by a spouse and children, or by spouse but no children, or children but no spouse, or other relatives but no spouse nor children, or died a polygamist. Failure to disclose survivors distorts the whole picture, and affects the distribution that the court eventually does.

17. Should that be a good enough reason for the court to revoke the grant? Was such non-disclosure fatal to the petition? I do think so. The purpose of petitioning for representation is appointment of personal representatives. The categories of the persons not disclosed herein are those who have prior right to administration, so that their omission resulted in persons who had inferior right to administration or no right at all to administration being appointed. The persons who qualify to apply for administration in intestacy are set out in section 66, which provision gives an order of priority to guide the court in exercising discretion in the matter of appointment of administrators. The provision states as follows:

“66. Preference to be given to certain persons to administer where deceased died intestate

*When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*

*(a) surviving spouse or spouses, with or without association of other beneficiaries;*

*(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*

*(c) the Public Trustee; and*

*(d) creditors: Provided that, where there is partial intestacy, letters of administration in respect.”*

18. Section 76 grants the court a discretionary power to revoke the grant. So should I exercise that power and revoke the grant? I think I should not. The deceased herein died in 1982. The estate was distributed in 1984. It is true that the daughters of the deceased were not factored in the distribution. I am alive to the fact that marriage does not disentitle them to a share, but they have not come forward to claim one. I am alive to the fact that they do not have to, for they are entitled as a matter of right. However, given the considerable lapse of time, I feel it should not disturb the *status quo*. The estate was distributed equally amongst the sons, and that should remain so. What should be done is to make provision for the surviving widow. She shall enjoy life interest over the property meant for her son, Evans Juma Mukweyi. Butsoto/Indangalasi/5931 shall be devolved upon the surviving widow, Lucia Mukweyi, during her life time and thereafter to Evans Juma Mukweyi absolutely. The administrator shall facilitate the same. In the event, of lack of cooperation, there is liberty to the administrator to apply. Each party shall bear their own costs. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6<sup>th</sup> DAY OF AUGUST 2021**

**W MUSYOKA**

**JUDGE**