



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 637 OF 2009

IN THE MATTER OF THE ESTATE OF ZABETH WANZA MUTUA – (DECEASED)

ANNA SYOKAU MUTUA.....2ND ADMINSTRATRIX/ APPLICANT

VERSUS

JACINTA WAYUA MUTUA.....1ST ADMINSTRATRIX/1ST RESPONDENT

MARY NGEWA MUTUA.....2ND RESPONDENT

LOICE KABURA NTHENGE.....3RD RESPONDENT

RULING

1. Before me is a summons for revocation of grant filed by Anna Syokau Mutua who is the 2nd Administratrix/Applicant dated 1st September, 2020 pursuant to section 76 of the Law of Succession Act (Cap 160) and Rule 44 of the Probate & Administration Rules. It seeks principally an order that the grant of letters of administration issued to Mbula Mutua and Syokau Mutua in respect of the Estate of Zabeth Wanza Mutua issued on 19th November 2009 and confirmed on 15th October 2010 be revoked and a fresh grant do issue jointly to **Anna Syokua Mutua, Loice Kabura Nthenge and Mary Ngewa Mutua.**

2. The grounds of the application are that: -

- i. The 1st Administratrix to the Estate died on 15th April, 2013 rendering the grant useless and inoperative;***
- ii. The proceedings to obtain the Certificate of Confirmation of grant were defective in substance;***
- iii. The Certificate of confirmation of grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***
- iv. 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.***

3. It was deponed in the affidavit in support, inter alia, that the applicant together with Mbula Mutua were issued with grant of letters of administration intestate of the estate of the late Zabeth Wanza Mutua on 19th November, 2009 and that following the death of Mbula Mutua, the 1st and 2nd Respondents sought to replace her as administratrixes through an application dated 7th June, 2013 which was allowed on 19th October, 2015. It was averred that the certificate only reflected the 1st Administratrix and left out the applicant (2nd Administratrix) and the 2nd Respondent. That the 3rd Respondent was left out in the distribution despite being a lawful beneficiary in the estate. That in order to ensure that the estate is properly administered, the grant issued for the estate together with the certificate of confirmation of grant be revoked and a fresh grant do issue jointly to the Applicant and the respondents and that the name of the deceased be amended to include the aliases to read as 'Estate of Zabeth Wanza Mutua also known as Isavethi Wanza Mutua also known as Wanza Mutua (Deceased)'.

4. The application is opposed. A replying affidavit sworn on 8th February, 2021 by Jacinta Wayua Mutua (1st Administratrix/Respondent) was filed. It was deponed that the court had issued a rectified certificate of confirmation of grant to the late Mbula Mutua and Syokau Mutua. It was averred that Mbula Mutua passed on leaving the 2nd Respondent herein as her beneficiary to the estate of the deceased in this matter had been left out on the distribution. It was further averred that through an application dated 7th June, 2013 they approached the court seeking for rectification of the confirmation of grant issued to the late Mbula Mutua and Syokau Mutua(Applicant) herein. It was further averred that

the application was allowed and that they were issued with a rectified certificate of confirmation of grant dated 26th October, 2015. It was deponed that the 3rd Respondent is a stranger to the estate and is not a beneficiary as alleged.

5. Through the directions dated 9th February, 2021 this court directed that the application be canvassed by way of written submissions. Both parties filed and exchanged submissions.

6. The Applicant submitted that on the death of one of the administrators the grant becomes inoperative and is rendered useless by death. The applicant further submitted that the appointment of the 1st Respondent as a sole administrator was defective. Counsel relied on the case of *In re Estate of Muroko Kimitu- (DCD) (2019) eKLR and Andrea Ruithibu R. Kanyiri v. Teresia Njoki Mbugu (2016) eKLR*.

7. The 1st Respondent submitted that there was no evidence presented before the court by the applicant to prove the allegation that the proceedings to obtain the certification of confirmation of grant were defective in substance and that the same was attained fraudulently. The 1st Respondent further submitted that since the grant was rectified and the deceased administrator substituted then the grant was not rendered useless and in operative as the 1st administrator was substituted procedurally and legally by this court since the application for rectification was duly served upon her but she failed to file a response thereto. It was finally submitted that the application is an abuse of the court process.

8. Having considered the different positions taken, my decision is in the following terms.

9. Under section 76 of the Law of Succession Act (Cap 160), this court has wide discretion to revoke or annul a grant issued by the court, even when the said grant has been confirmed. It appears that there is no statutory limitation of time for the filing of an application for revocation or nullification of grant. Under section 76 of the Act it specifically provided as follows: -

76. A grant of presentation, 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: -

i. That the proceedings to obtain the grant were defective in substance;

ii. 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;

iii. 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;

iv. 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 has ordered or allowed; 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

v. That the grant has become useless and inoperative through subsequent circumstances.

10. There are therefore several statutory grounds on which a grant may be revoked or annulled. The Applicant has relied on fraud, false statements, and concealment of material facts. She has also contended that the proceedings were defective. She also relies on the ground of untrue allegations.

11. Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the person applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of a matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.

12. From the facts of this case, it is quite clear that the estate of Zabeth Wanza Mutua initially had two (2) Administratrix and one later died. The 1st Respondent a beneficiary to the late Administratrix together with another beneficiary, the 3rd Respondent, filed an application dated 7th June 2013 seeking for rectification of the confirmation of grant and grant issued. The same application was allowed and the 1st Respondent

was issued with a rectified certificate of confirmation of grant issued on 19th October, 2015.

13. I have perused closely the court record, and noted that the rectified certificate of confirmation of grant issued on 19th October, 2015 and dated 26th October, 2015 clearly shows the 1st Respondent as the only administrator of the estate. This is a clear mistake on the document as the 1st Respondent did not move the honourable court to have the Applicant removed as an Administratrix. The Two (2) Administratrices should have simply approached this court or the Deputy Registrar to amend the same. It is obvious that the basis for the application dated 7/6/2013 was to replace the deceased administratrix Mbula Mutua with two members of her family who were then to join the surviving administrator. However, this was not the case since only one member of the deceased administrator was made the sole administratrix thereby elbowing the applicant herein yet no such prayer for her removal had been made or even intimated. Hence, there was an error and that the rectified grant as well as the certificate of confirmation of grant that did not contain the applicant's name was quite irregular as the same was obtained by the making of a false statement of fact or concealment from the court of something material to the case. Indeed, upon the demise of an administrator the grant becomes inoperative and useless and thus the grant cannot be rectified but ought to be revoked and a fresh one issued. As this was not done then the entire process pursued by the 1st respondent herein was clearly flawed. The situation was further worsened by the said 1st respondent when she purported to make herself the sole administratrix leaving out the applicant herein who was the surviving administrator yet no application for her removal had been made. It seems to me that the 1st respondent and the 2nd respondent who hail from the family of the deceased administratrix had a secret agenda to throw the applicant herein who is the surviving administratrix under the bus and proceed to administer the estate without the input of the applicant. The court cannot allow such a state of affairs to be perpetuated by the 1st respondent. In fact, the 1st respondent's application dated 7/6/2013 had sought for inclusion of the 1st and 2nd respondent as administratrices but the eventual outcome is that it is only the 1st respondent who came out as a sole administratrix thereby showing that the process was flawed warranting the court to interfere with the purported rectified grant and certificate of confirmation of grant. Those facts as revealed herein lead the court to find that the applicant's assertions have merit and hence the rectified grant and certificate of confirmation of grant must be revoked and fresh ones issued so as to allow the three administratrix to proceed to administer the estate of the deceased. The 1st respondent's counsel's submissions that the applicant did not bother to apply to set aside orders made pursuant to the 1st respondent's application dated 7/6/2013 is not convincing because the record shows that the 1st respondent literally left the applicant yet she was the surviving administrator yet no prayer for her removal had been made. In such a scenario, the 1st respondent cannot be permitted to purport to carry out matters of the administration of the estate when the truth is that the process leading to her appointment is flawed. It matters not whether the applicant took a long time to raise her objections to the process and hence the 1st administrator's activities conducted under a flawed grant must be reversed so that the right process is done. Even if the applicant might not have sought for setting aside previous orders, the court has inherent powers under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to make such orders as are necessary to meet the ends of justice and prevent abuse of the court process.

14. The applicant has also claimed that the 3rd respondent has been left out in the distribution of the assets yet the said 3rd respondent did not swear an affidavit in support of her application. The said 3rd respondent if she has been left out must make her case before the court for consideration but should not use the applicant to pursue her claims. As the 1st respondent has claimed that the 3rd respondent is a stranger, it was incumbent upon the said 3rd respondent to file an affidavit in rejoinder stating her claim to the estate. In the absence of any averment from the said 3rd respondent, the applicant's request that the said 3rd respondent be made an administratrix as well as be included in the schedule of distribution of the estate must be rejected.

15. The applicant has also sought to have the name of the deceased rectified to capture the full names including aliases. It is noted that the same was not made as one of the applicant's prayers. However, from the copy of search certificate availed by the applicant, it is clear that the deceased had several names. It is therefore proper to have these names captured so as not to pose problems to the administratrices while executing their mandate. There will be no prejudice suffered by the 1st and 2nd respondents as none has been raised.

16. Finally, the 1st respondent has claimed that she has already gone ahead with administration of the estate and even had some of the properties transmitted into her name. Indeed, that might be the position but in view of the foregoing observation that the rectified grant and certificate of confirmation of grant had been obtained through a flawed process, the eventual activities therefrom must be stopped so as to pave way for a clean and proper process. As the applicant has not indicated that she is not satisfied by the distribution as per the certificate of confirmation of grant then the same will not be disturbed. In any case the applicant's earlier application objecting to the mode of distribution was dismissed. The new titles must be cancelled and to revert in the name of the deceased for distribution among the beneficiaries as per the confirmed grant.

17. In the upshot, the Applicant's application dated 1/9/2020 is allowed in the following terms; -

- i. The grant made to the 1st Administrator issued on the 19th October 2015 and dated 26th October 2015 be and is hereby revoked.*
- ii. The rectified certificate of confirmation of grant issued on 19th October 2015 and dated 26th October 2015 is hereby cancelled.*
- iii. A fresh grant and a rectified certificate of confirmation of grant be issued in the names of Jacinta Wayua Mutua, Anna Syokau Mutua, and Mary Ngewa Mutua.*
- iv. The names of the deceased be rectified to reflect as Zabeth Wanza Mutua alias Isavethi Wanza Mutua alias Wanza Mutua.*
- v. All titles that had been issued in the name of Jacinta Wayua Mutua by way of transmission herein are hereby cancelled and the same to revert in the name of the deceased forthwith.*
- vi. The Administratrices are directed to finalize the exercise of distribution of the estate as per the fresh rectified certificate of confirmation of grant.*

vii. Each party to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER,2021.

D. K. Kemei

Judge