



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 474 OF 2014**

**IN THE MATTER OF THE ESTATE OF DONISIO WAWIRE KILEU alias DONISIO WAWIRE (DECEASED)**

**JUDGMENT**

1. This matter relates to the estate of Donisio Wawire Kileu, who died on 23<sup>rd</sup> November 1992. According to the letter from the Chief of Bunyala West Location, dated 10<sup>th</sup> June 2014, the deceased had been survived by a widow, Josephine Omuronji Wawire, four sons, Nicholas Wawire Donisio, Alexander Nyongesa Donisio, Cornel Wawire and Augustine Watindi Donisio, and a grandson, Kennedy Wawire Donisio. He was said to have had owned a property known as Bunyala/Budonga/283.
2. Representation to his estate was sought vide a petition lodged herein on 17<sup>th</sup> June 2014, by Josephine Omuronji Wawire and Nicholas Wawire Donisio, in their capacities as widow and son, respectively, of the deceased. They expressed the deceased to have had died possessed of Bunyala/Budonga/283, and to have been survived by the individuals mentioned in the Chief's letter that I have mentioned above. Letters of administration intestate were made to them on 25<sup>th</sup> August 2014, and a grant was duly issued, dated 5<sup>th</sup> September 2014. I shall consequently refer to the two as the administrators. The said grant is yet to be confirmed.
3. What I am tasked with determining is a Motion dated 26<sup>th</sup> November 2014, and which was lodged herein on even date, by Teresa Nekesa Eliesa, to be hereinafter referred to as the applicant. The grounds upon which the application was premised are set out on the face of the application, while the factual background is given in the affidavit in support of the application, sworn by the applicant on 26<sup>th</sup> November 2014. She seeks that the grant made to the administrators be revoked. She complains that the grant was obtained without her being consulted or without her knowledge. She discloses that the deceased had married three wives, two of whom had died. She states that the first wife had three children, the second wife one child and the third wife four children and one grandson. She accuses the administrators of colluding with the Acting Assistant Chief of Lusumu Sub-Location, who is the substantive Assistant Chief of Budonga Sub-Location, to write a letter that excluded all the other beneficiaries.
4. The applicant has attached to her affidavit a letter written by the Chief of Bunyala West Location, dated 17<sup>th</sup> November 2014, in which she has listed the persons that she says are the actual survivors of the deceased. According to the letter, the deceased had married Cicilia Wawire, Mwanarabu Namasaya and Josephine Omuronji Wawire. Cicilia Wawire was said to have had three children, being Nicholas Wawire Donisio, Alexander Nyongesa and Rosa Donisio. Mwanarabu Namasaya was said to be the mother of Theresa Nekesa Eliesa; while Josephine Omuronji Wawire was said to be the mother of Cornel Wawire, Augustine Watindi Donisio, Omukiti Donisio and Nasiminyu Donisio, and a grandson, Kennedy Wawire Donisio.
5. There is no evidence on record that the Motion was ever served on the administrators, but it would appear that they were in served. The record reflects that the said application came up on 23<sup>rd</sup> February 2015, and both the applicant and the administrators were in attendance. They both stated that they were ready with two witnesses each. Directions were given that the application would be disposed of by way of *viva voce* evidence. The administrators were directed to file affidavits, and the matter was given a date for hearing.
6. I have scoured through the file of papers before me and I have not come across any response to the application by the administrators.
7. The application was placed before me for hearing on 5<sup>th</sup> November 2019. Only the applicant was in attendance on that day. She informed me that she had served a hearing notice on the administrators. I perused the court file, and noted that there was an affidavit of service on record, sworn by a process server known as Anthony Masyongo, on 30<sup>th</sup> October 2019, and filed in court on 1<sup>st</sup> November 2019. It indicated that the administrators had been served at their homestead at Lusumu Village, Malaha Sub-Location, Navakholo, with a hearing notice on 28<sup>th</sup> October 2019, which they accepted but refused to sign to acknowledge receipt.
8. Being satisfied that there had been proper service of the hearing notice, I allowed the applicant to testify. She took to the witness stand. She stated that the deceased was her father, while the first administrator was her stepmother and the other administrator her stepbrother from the house of the first administrator. She stated that she wanted to be included in the sharing of the estate of the deceased. She asserted that she was not informed when the cause was initiated in 2014. She said that she was not given any papers to sign regarding the cause. She stated that her father had married three times, and named his three wives. She stated that all three wives had children with the deceased, whom she named. She stated that one child from the third house was dead. She gave his name as Indongole, saying that he had married, and was survived by about five children, whose names she could not remember. She said that although the administrators had said that they would

provide for her she could not trust them.

9. The Law of Succession Act provides for revocation of grants under section 76, which states 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.”*

10. Under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining the grant was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties could include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his mind or is adjudged bankrupt.

11. In the instant case, the applicant anchors her case on the first general ground, that there were issues with the manner the grant was obtained. She has raised arguments about the process of obtaining the grant having had challenges. She has not complained about anything that would bring the case within the second general ground, nor the third general ground. My understanding of her case is that the process of obtaining the grant was defective, as the administrators used fraud, misrepresentation and concealed matter from the court. Her principal argument is that her consent was not obtained before the grant herein was sought. She is also asserting that the administrators did not disclose to the court the existence of the first and second houses of the deceased, as well as existence of some survivors in the third house.

12. The framework for applications for grants of representation is set out in section 51 of the Law of Succession Act. The most relevant portions, for the purpose of this application, are in subsection (2)(g), which state as follows:

*“Application for Grant*

*51. (1) ...*

*(2) Every application shall include information as to—*

*(a) ...*

*(b) ...*

*(c) ...*

*(d) ...*

*(e) ...*

(f) ...

(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)..."

13. My understanding of section 51(2) (g) is that the petitioner is required to disclose all the surviving spouses and children of the deceased, and any grandchild of the deceased whose own parent is dead. The provision is in mandatory terms. The administrators herein only disclosed a section of survivors from the third house. They created an impression to the court that these individuals were the sole survivors of the deceased. The deceased had other children with his first and second wives, and grandchildren with his deceased son, Indongole, from the third house. This information came from the affidavit of the applicant in support of the Motion, as well as from her testimony at the oral hearing. The children of the first two wives of the deceased and the children of the late Indongole were not disclosed to the court. Therefore, there was no compliance with section 51(2) (g).

14. To my mind the above indicates procedural defects in the manner the grant was obtained to the extent that the administrators did not comply fully with the requirements of section 51(2) (g). There was fraud and misrepresentation to the extent that they did not disclose all the persons who survived the deceased. They misled the court into believing that the deceased did not have two other families and that there were no other survivors from the third house apart from the ones they had disclosed. There was concealment of important matter from the court, to the extent that they did not disclose the said individuals. That meant that a fairly large number of survivors of the deceased was locked out of the succession process. The motive of that act is unknown but it would suggest fraud.

15. From what I have stated so far I can safely conclude that the process of obtaining the grant herein was defective and was attended by misrepresentation and concealment of matter from the court to the extent that the administrators did not disclose to the court the existence of all the persons who had survived the deceased. The applicant has, therefore, made a case for revocation of the grant herein.

16. Upon revoking the grant I ought to proceed to make fresh appointments. The deceased died a polygamist. It is only democratic that all the houses be represented in administration. Surviving spouses have priority to administration over the children, according to section 66 of the Law of Succession Act. Only one of the three wives is alive. The other two, who have since died, were survived by children. The applicant is from the second house. None of the children from the first house have come forward. I do not know whether they would be interested in taking up administration.

17. In the end, the final orders that I shall make in this matter are as follows:

**(a) That I hereby revoke the grant that was made herein on 25<sup>th</sup> August 2014 to Josephine Omuronji Wawire and Nicholas Wawire Donisio;**

**(b) That I hereby appoint Nicholas Wawire Donisio, Theresa Nekesa Eliesa and Josephine Omuronji Wawire, administrators of the estate of the deceased, representing each of the three houses of the deceased, and I direct that a grant of letters of administration intestate be made to them;**

**(c) That I hereby direct the administrators appointed in (b) above, whether jointly or severally, to apply for confirmation of their grant within the next forty-five (45) days;**

**(d) That in the application to be filed under (c) above, the administrators shall disclose all the children of the deceased, whether dead or alive, whether they be sons or daughters and whether they be married or unmarried, and shall provide for them in accordance with Part V of the Law of Succession Act;**

**(e) That any child of the deceased, or any of the grandchildren in (d) above, who shall be unwilling to take their share in the estate shall file an affidavit renouncing that interest or attend court at the oral hearing of the confirmation application to state their position;**

**(f) That any survivor of the deceased and any other interested person who shall not be in agreement with the distribution to be proposed in the confirmation application shall be at liberty to file an affidavit of protest to the proposed distribution;**

**(g) That the matter shall be mentioned after forty-five days on a date to be given at the delivery of this judgement for compliance and further directions; and**

**(h) That any of the parties who is aggrieved by the orders made herein shall have twenty-eight (28) days to file an appeal at the Court of Appeal.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS .....24<sup>th</sup> ..... DAY OF .....January..... 2020**

**W. MUSYOKA**

**JUDGE**