



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 41 OF 2016

IN THE MATTER OF THE ESTATE OF MAGANGI OBUKI (DECEASED)

AND

IN THE MATTER OF REVOCATION OF GRANT OF LETTERS OF ADMINISTRATION

AND

IN THE MATTER OF THE SECTION 76 OF THE LAW OF SUCCESSION ACT CAP 160 LAWS OF KENYA

BETWEEN

PATRICK ARASA MAGANGI.....APPLICANT

AND

JOHNS GATI BOKE.....RESPONDENT

JUDGMENT

## Introduction

The dispute herein relates to the estate of **Magangi Obuki** who died intestate. His estate comprised of **L.R No. Bugembe/Masaba/111** (hereinafter '**The Suit property**'). The Objector, **Patrick Arasa Magangi**, through a Summons for Revocation of Grant dated **9/06/2016** and filed in Court on **10/06/2016** sought to have the Grant that was issued to **John Gati Boke**, the Respondent herein, revoked.

The impugned grant was issued in **Succession Cause No. 408 of 2005** (hereinafter '**The Succession Cause**') where the Respondent transferred and registered the suit property in his name.

The Objector seeks the following Orders;

**1. Spent**

**2. Spent**

**3. The Grant of Letters of administration issued to the Respondent on 25<sup>th</sup> November 2005 and confirmed on 8<sup>th</sup> September 2006 be revoked and annulled;**

**4. That the transfer of the estate land parcel No. LR. NO. Bugembe/Masaba/111 into the Respondent's name be cancelled;**

**5. That the title to L.R No. Bugembe/Masaba/111 currently under the Respondent's name be reverted to the deceased's name;**

**6. That the grant of letters of Administration of the deceased estate be issued to the Applicant;**

**7. That the costs of this Application be provided for.**

### **The Objector's Case**

The Objector supported his case with an affidavit sworn on **9/06/2016** and filed in Court on **10/06/2016** and a Further Affidavit sworn on **14/05/2019** and filed in court on **22/05/2019**. He deposed that the Grant of letters of administration were obtained through fraud, misrepresentation and concealment of material facts by the Respondent.

He asserted that he was, among six other siblings, the biological son of **Magangi Obuki** (hereinafter '**The Deceased**'); that the Respondent is not a son of the deceased but vide The Succession Cause No. 408 of 2005, he **fraudulently** acquired letters of administration in respect of the suit property and subsequently transferred it to himself.

The Applicant referred the court to various annexures in the Affidavit that ultimately led to the issuance of the Certificate for Confirmation of Grant to the Respondent.

At the hearing of the case, the Objector testified that he was from Kisii County in Mwamsiama sub-location in Kathenga village; that the deceased was his father and died on 05/11/1999 at Kisii Central Hospital and was buried in Kithenga village Kisii. That his father was the owner of the suit property.

He further testified that he had lived on the suit property and never knew the Respondent until he instituted the Succession Cause; that the Respondent did not involve him when he instituted the Succession Cause. To buttress his case, he produced the death certificate used in the Succession Cause that indicated that it was issued on 19/08/2005 and that the deceased died in the year 1980 yet the deceased died on the year 1999.

The Objector stated that the Respondent was not a son of the deceased. To prove that, he produced the Chiefs letter, P.exhibit 4.

In his written submissions dated 07/08/2020 and evenly filed, the Objector reiterated his position in the Summons. He stated that the Respondent does not share any blood relationship with the deceased; that he was issued with the Grant upon misrepresenting himself as a son to the deceased; that the respondent forged a letter from the Assistant chief dated 24/08/2005 when such letter could only be issued by the chief of the location.

The Objector further submitted that the Respondent procured the death certificate by fraudulently getting late registration of death forms allegedly filled and signed by the acting chief of Central Kanyamkago Location, which was not the deceased's place of residence.

The Respondent was charged in Migori CRC 387 OF 2016 for the offence of forgery of the deceased's death certificate but was acquitted because the court was not convinced whether or not the Respondent was the deceased's son.

In asserting the claim that the Respondent was not the son of the deceased, the Objector drew the court's attention to the fact that the Respondent registered the deceased's death even before he actually died; that he further went ahead and obtained a fake death certificate in order to lodge the Petition for grant of letters of administration.

He submitted that the true biological father of the Respondent was one **Joseph Masegeso Mangare** (deceased); that the Respondent used the chief's letter to obtain both his own father's letters of administration and the deceased's herein.

To demonstrate that Joseph Masegeso was indeed the Respondent's father, the Objector referred the Court to **Migori SRM Succession Cause No. 375** of 2005 through which the Respondent Petitioned for letters of Administration; in the estate of the late Masegeso who was his father .

In further proof of fraud, the Objector submitted that the Respondent instituted **Migori SRM Succession Cause No. 408 of 2005** in which he claimed he was yet again the son of the deceased; that the Respondent obtained two confirmations of grant from the same court on the same day in two different succession causes; that in both cases, he claimed to be the son of the deceased persons. As a result, the Respondent acquired two titles LR Bugumbe/Masaba /109 belonging to his actual father Joseph Masegeso and LR Bugumbe/Masaba/111 belonging to the deceased.

It was also submitted that only the chief is mandated to issue introductory letters, the Objector referred to the decision in Re Estate of Shem Kitanga (Deceased) where justice Njagi ruled that;

**“A succession cause starts with an introduction letter from the chief of the area where the intended Petitiopner hails from. Though it is not a legal requirement, it is presumed the chief is well familiar with the family of the deceased person and can inform the court of the beneficiaries left behind by the deceased.”**

In a bid to emphasize the importance of the chief's input, the Objector stated that in the case of **In Re Estate of Ambutu Mbogori (2018) eKLR** Gikonyo J. observed as follows;

***“the Petitioner committed other sins; he initiated these proceedings without a letter of introduction from the chief. This letter serves an important purpose in the ascertainment of the deceased, the dependants as well as properties of the deceased”***

The objector further submitted that the acquittal in the criminal case on fraud did not mean that the Respondent was at liberty to disinherit the

beneficiaries of the deceased; that the acquittal was a result of lack of proper diligence in the manner in which the prosecution conducted its case.

He urged the court to revoke the Grant and to that end relied on the decision in **Re Estate of Julius Ndubi Javan (2018) eKLR (Deceased)** where Gikonyo J stated the importance of parties bringing forth truthful information to court.

The objector brought this application within the provisions of The Law of Succession Act in section 76 that allows revocation or annulment of grant based on fraud, misrepresentation or concealment of material facts.

### **The Respondent's Case**

In opposing the Summons for Revocation of Grant, the Respondent filed his Replying Affidavit sworn on **20/03/2019** and filed in Court on **21/03/2019**.

He deposed that he also was a son of the deceased and the allegation by the applicant that he was a fraudster was false. He referred the court to his acquittal in **Migori Chief Magistrate's Criminal Case 387 of 2016** (hereinafter '**The criminal case**') where he had been charged with forgery in respect of the suit property.

It was the Respondent's case that that the deceased was polygamous and had set up different homes for each of his wives and their children. He deposed that the Objector's mother's home had been set up in Kisii while his mother's home was in Masaba Kuria.

The Respondent did not dispute the fact that he instituted the Succession Cause. He deposed that he excluded the Objector in the belief that their father had left them property in Kisii therefore disentitling them from laying claim in the suit property.

The Respondent deposed that it would be in the interests of the family that they remain with the suit property whereas the Objector remains with the property in Kisii as that is how the deceased intended.

The Respondent made reference to various exhibits being, letter from the chief of Masaba, judgment and proceedings of the criminal case and an introduction letter from the chief.

From the foregoing, it is this Court's assessment that the following issues if resolved would conclusively settle the dispute herein;

**i. Whether the Objector has beneficial interest in the estate of the deceased and resultantly, whether he has legal standing to apply for revocation.**

**ii. Whether the grounds for revocation of grant under Section 76 of Succession Act exist.**

### **Analysis & Determinations**

Who can apply to administer a deceased persons' estate?

The first question I need to consider is whether the Respondent had the right to apply for Letters of Administration. Section 66 of the Laws of Succession Act provides that preference has to be given to certain persons to administer a deceased's estate where the deceased died intestate and further that the court shall save as otherwise expressly provided, the final discretion as to the persons and person to whom a grant of letters of administration shall, in the best interests of all parties concerned, be made. It will however accept as a general guide the order of preference as set out in Section 66(a) – (d). Section 66 provides as follows:-

**“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 interest as provided by Part v;**

**c) the Public Trustee; and**

**d) Creditors:**

**Provided that, where there is [atrial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”**

Further, guidelines on making of grants are found in Part VII Rule 26(1) and 2 of the Probate and Administration Rules which provides as follows:-

**Rule 26 (1) Letters of Administration shall not be granted to any applicant without notice to any other person entitled in the**

same degree as or in priority of the applicant.

**2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of communication, or written consent in Form 38 or 39, by all persons so entitled in equality or priority be supported by an affidavit of the applicant and such other evidence as the court may require.”**

From a reading of Section 66 of Law of Succession Act the person given priority over an intestate is the surviving spouse and children. In this case, since the spouse was not alive, the children of the deceased had priority to petition the court for letters of administration. The objector has denied that the Respondent is his brother but to the contrary the respondent contents that he is a son to the deceased and hence the objector is his brother. The question is, is the respondent the deceased’s son?.

From the evidence on record, the respondent has actually successfully distributed two estates on account of being son of both Magangi Obuki in **Succession cause 408 of 2005** relating to this matter and in Migori Succession Cause No. 375 of 2005 where the respondent claimed to be the son of one Joseph Masegeso Mangera and distributed LR Bugembe/Masaba/109. The subject of this application is Bugembe / Masaba / 111. In Succession case 375 of 2005 the Respondent presented himself to the Chief as the son of Masegeso Mangera as a result of which he was issued with an introductory letter dated 11/08/2005.

“...The office is also confirming to you that he (The Respondent) is the elder son of Joseph Masegeso Mangare who passed away some few years back...”

Further to the above, the evidence of **Elijah Ongera** who testified as PW1 corroborated the Objectors position regarding his paternity and at the same time fortified the fact that the Respondent was not truthful in obtaining the Grant. He was the Chief Mwamisioma Town Location and knew the Objector’s family. It was his testimony that the deceased was the objector’s father and that he died in the year 1999 at Kisii Central Hospital. The evidence of **Kennedy Nyanduri PW2** reinforced PW1’s position. It is not possible for one to be sired by two fathers. While the respondent in his Replying Affidavit has not put forth any evidence in form of an exhibit to rebut the allegation that the deceased is not his father, the Objector has referred to many documents to disprove that the deceased was not the father to the Respondent. In the end, I am satisfied that whereas the objector has proved that he is the deceased’s son, the respondent has not demonstrated that he was a son to the deceased, Magangi Obuki.

The burden to disprove the Objector’s case shifted to the Respondent at the point where the Objector brought forth his evidence. The Respondent did not call any evidence. In absence of an explanation by the Respondent of having two fathers and having two parallel estates to distribute as a son of both fathers, is in this Court’s assessment, irregular and a defect in the distribution of the estate of the **Magangi Obuki** that warrants revocation.

Having settled the issue above, I now turn to address whether the grant issued to and confirmed to the respondent should be revoked. Section 76 of Laws 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 making of a false statement or by 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;***

The Respondent’s justification for excluding the objector from the proceedings in Succession Cause 408 of 2005 is that the deceased left the objector and his mother a piece of land in Kisii. However, that notwithstanding the respondent should have complied with Rule 26 of P & A Rules set out above, to get consent from all the beneficiaries of the deceased’s estate before filing the petition. The objector had not renounced his rights to the estate. He should have been notified of the filing of the cause. That is the first irregularity noted in the petition by the Respondent.

In the case of **Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR** the court discussed circumstances when a grant can be revoked. The court observed:

***“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.” (emphasis added.)***

In the case of **Albert Imbuga Kisigwa v Recho Kawai Kisigwa, Succession Cause No.158 OF 2000**, Mwita J. made remarks on the guiding principles for the revocation of a grant. He stated;

***“[13] Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not***

*discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice."*

This Court has painstakingly studied **Succession Cause No. 408 of 2005** which forms the crux of this dispute. There is no doubt the impugned Petition for Letters of Administration was done by the Respondent herein. The Respondent filed the Petition for Letters of Administration on 1/09/2005. Claiming to be a son to the late Magangi Obuki which I have found to be untrue. He stated that the deceased died in the year 1980. He named Mangare Boke and Makorre Boke as beneficiaries. He listed the suit property as the only property the deceased left.

On **1/09/2006**, the Respondent applied for the Confirmation of Grant. He with one **Samwel Marwa Mangiti** gave guarantee that they would administer the estate faithfully. He knew these facts to be untrue.

Further, there are two death certificates in respect of one person, namely, **Magangi Obuki**, the deceased herein. One indicates that he died in the year 1980 at the age of 66 years while the other shows that he died in the year 1999. It was the Objector's case that the Respondent used the former, which is fake to obtain Letters of Administration that were consequently confirmed.

This court has carefully studied the two Death Certificates and it is indeed true that both relate to the death of Magangi Obuki. What is intriguing is the fact that the Respondent has successfully distributed two estates on account of being the son of both the **Mangani Obuki** and **Masegeso Mangere**. That is clear evidence of fraud.

The bid by the Respondent to rely on his acquittal in **Criminal Case No. 387 of 2016**, in which he faced the charges of forgery, false swearing and that of obtaining registration certificate based on false pretence, is not helpful.

This court has duly considered the entire criminal proceedings and the judgment. It is abundantly clear for purposes of this case, that the court did not say anything on the propriety of the grant issued to the accused (Respondent herein) in Succession Cause 408. The acquittal is not proof that there was no fraud. On whether the accused forged the death certificate and misrepresented himself to obtain the grant in Succession 408 of 2005, the court observed as hereunder;

"I have considered the evidence on record and none of the issues raised above can be answered conclusively either way.

*...the upshot is that sufficient doubt has been raised in my mind which doubt I will resolve in favour of the accused.*

It must be recalled that in criminal cases, proof is beyond reasonable doubt while in Civil cases, proof is on a balance of probabilities. From all the foregoing it is proved on a balance of probabilities that the Respondent misrepresented facts, acted fraudulently and withheld material facts.

In **Re Estate of Moses Wachira Kimotho (Deceased) Succession Cause 122 of 2002 [2009] Eklr**, the court made pronouncements on the importance of disclosing all material facts before a court of Law while seeking letters of administration and confirmation thereof. It observed;

*"I am certain that had the applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The respondent knew of the applicants' interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant.*

I also wish to echo the sentiments of my brother J. Gikonyo in **Re Estate of Julius Ndubi (supra)** when he said:-

*"...in any judicial proceedings, parties must make full disclosures to the court of all material facts to the case including succession cases.*

*...non-disclosure of material facts undermines justices and introduces festering waters into pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.*

I am satisfied that, there is ample evidence that the Respondent did more than just conceal material facts. He went further and misrepresented facts to the court in order to defraud the Objector of their inheritance. The objector has demonstrated within the purview of Section 76 that the grant was fraudulently obtained and there was concealment of material facts and misrepresentation.

It is therefore this court's finding, that the Grant issued to the Respondent is a proper candidate for revocation. In the premises, the following final orders do issue;

**a. The Grant of Letters of Administration issued to the Respondent herein on 25<sup>th</sup> November 2005 and confirmed on 8<sup>th</sup>**

September 2006 are hereby revoked.

b. The Registrar of Lands is hereby directed to cancel the transfer of land parcel No. LR. NO. Bugembe/Masaba/111 to the name of Johnes Boke and the same to revert to the name of Magangi Obuki (deceased).

c. The Objector in conjunction with all the other beneficiaries are at liberty to apply for fresh Grant of letters of Administration of the deceased estate.

d. The objector and other beneficiaries must agree or apply for grant within sixty (60) days hereof.

e. Costs of this Application will be borne by the Respondent.

f. Mention on 29/4/2021 to confirm compliance.

DATED, SIGNED and DELIVERED at MIGORI this 16<sup>th</sup> day of December 2020

R. WENDOH

JUDGE

Judgment delivered in open court and in the presence of: -

Ms. Okota for Applicant

Ms. Nyauke & Josephine Court Assistant