



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 105 OF 2011**

**IN THE MATTER OF THE ESTATE OF FRANCIS MASANGANJILA ANDALA, DECEASED**

**JUDGMENT**

1. According to the certificate of death, serial number 284141, dated 4<sup>th</sup> November 2008, the deceased herein died on 14<sup>th</sup> September 2008. The letter by the Chief of East Butso Location, dated 20<sup>th</sup> January 2010, indicates the deceased was survived that by a widow, a daughter and five sons, being Nareya Mukoya, Esther Anyoso Andala, Charles Khayinga, Martin Mukavana, Marko Andala Mukoma, Noah Odhiambo, Dornard Reexan and Gabriel Akwata Oduongo. Representation to the estate of the deceased was sought herein by Anereya Mukoya, in her capacity as widow of the deceased. She listed herself and the persons identified as daughter and sons of the deceased. He was said to have died possessed of a property known as Butso/552. Letters of administration were accordingly made to the petitioner on 11<sup>th</sup> September 2012, and a grant was issued on 29<sup>th</sup> October 2012. The grant was amended in May 2013 to introduce an additional administrator, Dornard Reckani Masanganjila, in order to comply with section 58 of the Law of Succession Act, Cap 160, Laws of Kenya, as some of the survivors were minors.

2. The administrators then lodged, on 19<sup>th</sup> May 2014, a summons at the registry, dated 5<sup>th</sup> May 2014, for confirmation of their grant, where they proposed distribution of the estate of the deceased amongst all the eight individuals named as the survivors of the deceased.

3. Before the summons for confirmation of grant could be heard, a summons, dated 23<sup>rd</sup> September 2014, was lodged at the registry on 26<sup>th</sup> September 2014, for revocation of grant, by Charles K. Masakachila. He complained that the grant was obtained secretly without his being consulted and that it had not been disclosed that the deceased had distributed his property before he died. He also argued that the administrators had encroached upon his share of the property. He points out that some of the persons listed as survivors of the deceased were not in fact his children. One of them is stated to be a purchaser of estate property, that is to say Gabriel Akwata Oduong, and that some were in fact grandchildren of the deceased, that is to say Martin Mukavana and Marko Andala Mukoma, being sons of two dead children of the deceased. He also avers that some beneficiaries had also been left out, being Margaret Musavi and her children, being the daughters of the late Nashon Andala a dead son of the deceased. It emerges that Esther Anyoso Andala was not a daughter of the deceased, but a daughter thereof. He has made proposals on how he would have liked to have the estate distributed.

4. There is a reply to the application by Anereya Mukoya Masanganjira. She is a widow of the deceased. She states that the applicant is her stepson being a child of the deceased by her co-wife, Roselyda Akhetesheli Masanganjila. She mentions that the deceased had a third wife from whom he was divorced and therefore she was not a claimant to the estate, her name was Margaret Mwavi. She concedes that Esther Anyoso was a daughter, while Gabriel Agwata Oduong had bought a portion of the land from the deceased in 2007. She concedes that Martin Mukavana and Marko Andala Mukoma were grandchildren of the deceased who were to take the shares that accrued to their late fathers.

5. The application was disposed of orally. Both the applicant and one of the administrators testified, together with their witnesses. It emerged that the deceased had married more than once, yet that did not come out clearly in the petition and the application for confirmation of grant. It also emerged that some of the children of the deceased had died, and it was being proposed that they take the shares from the estate that accrued to their late parents, the children of the deceased. Again, this is material that was not disclosed in the petition and the summons for confirmation of grant. It also emerged that one of the persons listed as a daughter of the deceased was in fact a daughter-in-law whose husband, a child of the deceased, had died. It also transpired that one of the persons listed as a son of the deceased was in fact a creditor, that is a person who had bought an asset from the deceased during his lifetime.

6. The application is mounted on the allegation that there was misinformation and concealment of matter from the court. From what I have stated paragraph 5 here above, it is clear that the grant herein was obtained on inaccurate information. Some beneficiaries were mis-described, while others were left out altogether. On the face of it that would suggest fraud or mischief or some ulterior motive. The court being fed with misinformation something that should be frowned upon.

7. The application before me is for revocation of the grant on record. The law on revocation of grants is section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. Under that law a grant of representation may be revoked on account of three general grounds. The first is where the process of obtaining the grant was fraught with challenges, such a defects in the process, fraud and misrepresentation, and concealment of information from the court. The second is where there are challenges with the administration of the estate in cases where the grant had been obtained validly. This would be the case where the administrators fail to apply for confirmation of their grant within one year of the making of the grant, or where they fail to proceed diligently with the administration of the estate, or where they fail to render accounts as and when required of them by the law. The third ground is where a grant has become useless and inoperative on account of prevailing circumstances, such as the death of a sole administrator.

8. From the foregoing there should be no doubt that the administrators did not approach the court in elegant fashion. They concealed information and misrepresented facts. That is a ground for revocation of a grant. It suggests that the process of obtaining grant was defective, and was founded on misrepresentation and concealment of facts. It does not matter that the concealment or misrepresentation was deliberate or innocent. No doubt a case has been made out for revocation of grant.

9. The problem is compounded by the application for confirmation of grant. In that application, the administrators make no effort to make proper disclosure with regard to who the right survivors of the deceased are. It ought to be disclosed how many times the deceased married, and the status of those marriages as at the date of the deceased's death. It should also be disclosed how many children the deceased had with his many wives, whether all the said children survived the deceased, and if some did not or died after him, whether such children were survived by any children of their own or by spouses. If the deceased owed anything to anyone, there ought to be disclosure of such creditors. The creditors should be identified as such instead of being camouflaged as children of the deceased. This information should come out clearly in the confirmation application. It is critical information as it determines whether the estate is to be dealt with under section 35 or 38 or 40 of the Law of Succession Act. Unless there is proper disclosure the court would be misled into misapplying the law. The disclosure would also assist the court in making decisions on appointment of administrators, for where the deceased died a polygamist an effort should be made to ensure that all his houses are represented in the administration of the estate.

10. There was an issue raised about the deceased having distributed his property before he died. From what I can see from the record the deceased had not subdivided his property and transferred the resultant portions to the beneficiaries. The allegation is, if I understand it, that the subdivision was on the ground, otherwise the property remained in the deceased's name. A subdivision on the ground does not preclude the filing of an application for confirmation of grant, for the state land authorities would not allow subdivision of the land and its transmission to the survivors without the court first confirming the grant. The administrators are therefore not on the wrong when they seek confirmation even if the deceased had subdivided the land on the ground. Whether in fact the subdivision and distribution on the ground had happened is disputed, the issues relating to it can only be canvassed at the hearing of a confirmation application, but not in an application for revocation of grant.

11. I need not say more on this matter. There is merit in the application dated 23<sup>rd</sup> September 2014. I shall, and I do hereby, allow it with no orders as to costs. The grant on record is hereby revoked. To move the matter forward I do hereby appoint Anereya Mukoya Masanganjira and Charles Khayinga Masakachila as administrators of the estate of the deceased. A grant of letters of administration intestate shall issue to them accordingly. The two administrators, or anyone of them, shall apply for confirmation of their grant within thirty days of date hereof, where they shall pay attention to the issues that I have addressed in paragraph 9 of this ruling. Whoever is unhappy with the proposals to be made in the said application shall be at liberty to file affidavits of protest stating their case. The matter shall be mentioned thereafter for compliance. It is so ordered.

12. Any party aggrieved by the orders made herein is at liberty to challenge the same at the Court of Appeal within twenty-eight (28) days of the date of this order.

**PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 10<sup>th</sup> DAY OF April, 2019**

**W. MUSYOKA**

**JUDGE**