



**REPUBLIC OF KENYA**

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

**MISC. SUCC APPLICATION NO. 29 OF 2013**

**IN THE ESTATE OF THE ESTATE OF THE LATE KARIUKI MUREITHI - DECEASED**

**BMK.....APPLICANT**

**V E R S U S**

**MARY KARIUKI MURIITHI.....RESPONDENT**

**RULING**

1. The application dated 1/2/2013 by BMK seeks an order that the grant issued to the respondent Mary Kariuki Muriithi in Succession Cause No 104/1989 at Kerugoya Magistrate's Court and confirmed twice on 31/7/1990 and 2008 be annulled. The application is based on the grounds that the proceedings to obtain the grant were defective in substance and the grant was fraudulently obtained by making false statement and by concealment from court of something material to the case.

2. The application is supported by the affidavit of the BMK sworn on 1/2/2013. The gist of contention is that the deceased in this proceedings is his father and he had two wives. The respondent who is the younger wife of the deceased filed the succession cause secretly and listed herself and her daughter SWK as the only survivors of the deceased. The respondent deliberately concealed the fact that the deceased had another wife and children and at that particular time the applicant and his siblings were living with her (respondent).

3. The applicant further depones that the proceedings were defective in substance as it omitted some beneficiaries as of whom were minors necessitating a co-administrator. That the respondent disinherited him and it is only fair that the grant be revoked.

4. The respondent filed a replying affidavit sworn on 26/6/2013. She depones that the applicant is her stepson. That she is the 2<sup>nd</sup> wife of the deceased while Esther Nyaguthii is the 1<sup>st</sup> wife and mother of the applicant. It is her contention that the applicant and his mother live at Mathira where they were allocated land at Ihwagi by the deceased as per deceased's written will. That she was allocated land parcel No. Kiine/Thigirichi/715 and the applicant was given land at Ihwagi. That she omitted the applicant in succession cause No. 104/1989 because of the written will. That the applicant's mother had no interest with Parcel No. Kiine/Thigirichi/715 because she was aware of the deceased's will and its contents. The applicant has no claim over the land parcel. That the application of revocation of grant is an afterthought and should be dismissed.

5. The applicant submits the respondent concealed something material from the court. The grant was obtained fraudulently by the applicant by stating that she was the only survivor with her daughter while she knew there were other children and a wife.

6. It is further submitted that the allegation that the deceased had will cannot stand as the respondent filed an intestate succession. That whether or not there was a will she ought to have informed other survivors of the proceedings and for the will to be proved in court. It is further submitted some properties of the deceased were left out and she filed application of rectification of grant during the pendency of this application.

The applicant relies on **Rule 26(1) of the Probate and Administration Rules** which provides that:-

***“Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”***

7. It is submitted that the applicant's mother ranked I equal priority with the respondent and her consent was never sought. The other beneficiaries did not sign a consent to allow the respondent to get Letters of Administration solely.

8. That since the grant has been confirmed, there is no other option other than to annul it so that the applicants can have a chance to lay their claim for the left out assets.

9. For the respondent it is submitted that the proceedings were regular and were taken with the full consent of the parties including the applicant. It is further submitted that the respondent was the only wife of the deceased under Kikuyu customary law and later solemnized under African Christian Marriage and Divorce Act. The applicant's mother's marriage had terminated when she left the deceased to live on her own. The respondent was not required to obtain consent of any person. That the respondent did not have proof of ownership for some of the omitted properties and others had been distributed among the beneficiaries including the applicant. The land parcel No. Iriani/Kairia/559 belonged to the deceased's father and he was entitled to half share. The applicant occupies the portion which belongs to the deceased. The respondent further submits that failure to include some of the properties which should be rectified without annulling the grant.

10. I have considered the application, the averments in the affidavits and the submissions. The issue which arises for determination is whether the grant issued to the respondent should be revoked. Revocation of grant is provided for under **Section 76 of the Law of Succession Act (Cap 160 Laws of Kenya)** to be referred to as the Act. It provides:-

***“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-“***

11. This court will consider the grounds which the applicant is relying on to determine whether they are within the provisions of **Section 76 of the Act** to warrant this court to annul or revoke the grant.

12. From the averments in the affidavits the facts are not in dispute. The respondent has admitted that the applicant and his siblings are children of the deceased and that the deceased had another wife. Despite this the respondent listed herself and her daughter as the only survivors of the deceased. It is therefore clear that she deliberately concealed material facts from the court, she therefore contravened **Rule 26(1) of the Probate and Administration Rules** which I have quoted above by filing the cause without notice to every other person entitled in the same degree as or in priority to the applicant.

13. The respondent in her affidavit deposes that she filed the successions in the manner that she did as the deceased had distributed his estate in a written will. This makes the matter worse for the respondent as she concealed the will from the court as she filed the cause as an intestate succession. The will only serviced after the application for revocation of grant as her annexure MKM-1-. The validity of the said will has not been determined. Be thus as it may whether or not there was a will the Probate and Administration rules requires that a list of all the survivors be filed in court. There can be no basis for failing to disclose the beneficiaries other than a deliberate intention to mislead the court and deny them their rightful shares. Concealment from court of something material to the case is one of the grounds under **Section 76 of the Act** upon which the court will annul or revoke the grant.

14. The respondent by concealing material facts from court obtained the grant fraudulently. After obtaining the grant, the respondent has been filing applications one after the other for the rectification of grant to include properties which she had not disclosed in court when she filed the cause. Despite, this she did not involve the applicant and his siblings. This again can only be in furtherance of the fraudulent acts because a grant cannot be rectified to include properties which had not been listed in the application for letters of administration. **Section 74 of the Act** provides:-

***“Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”***

15. It is clear from the Section that it is only errors in names and description or in setting out the time and place of deceased's death or the purpose of a limited. This constitutes the jurisdiction of the court to rectify the grant which only involves corrections of errors. Any other application which may affect the substance of the grant must be filed under other relevant provisions in the Act.

16. The applicant has deposed that the applicant to rectify to include a property in Thika without informing them which she later sold. This is not denied. It shows that the respondent was dealing with the estate fraudulently.

17. The claim by the respondent that the applicant's mother had no claim in the estate as her marriage terminated when she and deceased contracted a Christian marriage which is monogamous cannot hold **Section 3(5) of the Act** provides:-

***“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”***

18. In the respondent's admission in her Replying Affidavit his wife was alive when she filed the succession and was entitled to the estate in equal degree and she ought to have included her in the proceedings.

19. There is no doubt that the proceedings were defective in substance for failing to disclose that the deceased had other survivors. Paragraph 15 of the respondent's affidavit which has not been denied shows that the proceedings were defective as the respondent's daughter S and himself were minors necessitating Co-administrators. The grant violated **Section 58 of the Act** in the circumstances.

20. The respondent has deposed in her affidavit and also in her submissions alleged that the deceased had a share in land parcel No. Iriani/Karia/599 and that the applicant occupies a portion belonging to the deceased. Land not registered in the name of deceased does not form his estate. The respondent further deposes that the applicants were granted land at Ihwagi where the applicant lives. The particulars of the land parcel Number has not been given. It is not proved that they live on land owned by the deceased.

21. The respondent has filed an application for rectification of grant to include properties of the deceased which were not included in the grant. She has not indicated how she intends to distribute the properties. There is a possibility that the respondent will distribute the properties as she wishes and disinherit the applicant and his siblings. To prevent such occurrence the grant ought to be annulled to enable the applicant join the cause and make his voice heard with regard to the properties which are yet to be included in the grant.

**In Conclusion:-**

The applicant has established the threshold required for revocation of grant as he has proved that material facts were concealed from court, the grant was obtained fraudulently and the proceedings were defective in substance.

22. I find that the application has merits. I order that:-

- 1) The grant issued to the respondent Mary Kariuki Mureithi in Succession Cause No. 104/1990 and confirmed on 31/7/1990 after rectification is also revoked.
- 2) I appoint the applicant as Co-administrator with the respondent.
- 3) Cost to the applicant.

**Dated at Kerugoya this 29<sup>th</sup> day of November 2019.**

**L. W. GITARI**

**JUDGE**