



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

SUCCESSION CAUSE NO. 222 OF 2015

IN THE MATTER OF THE ESTATE OF IVULI KINYILI DECEASED)

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT KITUI IN PROBATE & ADMINISTRATION CAUSE NO. 121 OF 2004

FREDRICK NZOKA MUASYA.....APPLICANT

VERSUS

KAVINYA IVULI.....RESPONDENT

RULING

1. **Fredrick Nzoka Muasya**, the Applicant in an application dated the **9th** day of **April, 2015** seeks revocation of the grant of Letters of Administration (Grant) issued to **Kavinya Ivuli**, the Respondent herein on the **26th** day of **January, 2005** and subsequently confirmed on the **17th** **June, 2014**.
2. The application is premised on the grounds that the grant was obtained fraudulently by concealment from Court of something material in respect of the Estate; and that in distributing the Estate of the Deceased, the Respondent completely left out the Applicant, a Creditor to the Estate who was denied his lawful share of the Estate having purchased **0.34 Ha** in respect of land **Kyangwithya/Kaveta/622** sold to him by the Deceased during his lifetime.
3. The application is supported by an affidavit deposed by the Applicant where he stated *inter alia* that in sharing the Estate of the Deceased the Respondent left him out although he is entitled to a share of the Estate of the Deceased in respect of Land Parcel No. **Kyangwithya/Kaveta/622** therefore she did not faithfully administer the Estate.
4. The Respondent was granted time by the Court to file a response to the application but she never did so. In the interest of justice, directions were given in the matter to have the same proceed by way of *viva voce* evidence.
5. Evidence tendered was that the Applicant was a Creditor to the Estate of the Deceased in respect of Land Parcel No. **Kyangwithya/Kaveta/622** to an extent of **0.34 Ha**. The Deceased excised **0.34 Ha** from the parcel. The Applicant took possession of the land and developed it by constructing a house thereon and continues to occupy it.
6. The Deceased died on the **10th** **November, 1994**. On the **13th** **October, 1992** prior to his demise he made an application to the Land Control Board to transfer **0.34 Ha** to the Applicant. (See Annexure 'FNM2'). The Land Officer approved the application. (See Annexure 'FNM1').
7. In her testimony the Respondent admitted the sale transaction that took place between the Deceased and the Applicant during his lifetime. She expressed her willingness to transfer the portion of land to the Applicant but argued that she did not understand the process that the Applicant resorted to.
8. Circumstances in which a grant can be revoked or annulled are stated in **Section 76** of the **Law of Succession Act** that provides thus:

“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.’

9. At the point of petitioning for the Grant it was within the Respondent’s knowledge that the Applicant was a Creditor to the Estate of the Deceased. She was fully aware that the Deceased had liabilities at the time of his demise. But, when swearing the affidavit in support of the Petition for the Grant (**See Form P&A 5**) she concealed the fact that Deceased had liabilities. When she applied for Confirmation of Grant she identified the mode of distribution of the Estate of the Deceased thus:

“The identification and shares of all persons beneficiaries entitled to the said Estate have been ascertained and determined as follows:

Kyangwithya/Kaveta/622 & 667 to Kavinya Ivuli.” (See Paragraph 5 of the Affidavit in Support of the Confirmation of Grant).

10. **Roselyn Kimanzi, Eunice Ndanu Peter, Dennis Joseph Nzunga, Francis Muema Nzunga** filed affidavits in protest. At the point of confirmation of the grant interests of some protesters were taken into consideration but others were not. According to the Certificate of Confirmation dated the 19th day of **June, 2014** the Estate of the Deceased was distributed as follows:

“1. Kavinya Ivuli – Kyangwithya/Kaveta/667 (Whole).

2. Assumpta Mwangangi – Kyangwithya/Kaveta/622 – 0.522 Ha.

3. Roselyne Kimanzi – Kyangwithya/Kaveta 622 – 0.078 Ha.

4. Eunice Ndanu Peter Kithuka – Kyangwithya/Kaveta 622 – 0.016 Ha.

5. Kavinya Ivuli – Kyangwithya/Kaveta 622 – Remaining Shares.”

11. I do note that the Applicant not only concealed from the Court material facts but also failed to consider interests of important Creditors to the Estate of the Deceased like the Applicant herein. In the matter of the Estate of **Doto Owino, Anor vs. Kennedy Otieno Odeni (2014) eKLR Majanja J.** stated:

“The identities of beneficiaries and their interests in the Estate are material facts and once it is established their interests were concealed, the grant of representation is flawed. The Petitioner did not disclose the fact that The deceased had heirs”

12. In this matter, it is apparent that the Respondent concealed important information from the Court which calls for revocation of the grant.

13. However in its discretion of considering people who should administer the Estate of the Deceased the Court is obligated to consider the surviving spouse first. The Respondent petitioned for the grant in her capacity as the wife of the Deceased (**See Section 66 of the Law of Succession Act**). Family members have not objected to her being the Administratrix of the Estate. the Applicant has not asked the Court to consider appointing him as one of the persons who should administer the Estate of the Deceased.

14. In the result I make orders as follows:

(i) The order confirming the grant be and is hereby set aside.

(ii) The Certificate of Confirmation of the Grant be and is hereby cancelled.

(iii) The Administratrix of the Estate is granted **30 days** within which to file summons for confirmation of grant to include all beneficiaries of the Estate, Creditors to the Estate inclusive.

15. The matter shall be mentioned on the **12th June, 2018** to ascertain compliance of the order and further directions.

16. It is so ordered.

Dated, Signed and Delivered at Kitui this 17th day of April, 2018.

L. N. MUTENDE

JUDGE