



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**MISC. SUCCESSION CAUSE NO. 57 OF 2008**

**IN THE MATTER OF THE ESTATE OF MUGO KANYOTU (DECEASED)**

JANE MUTHONI KAGAI.....APPLICANT

VERSUS

DORIS MUTHONI KAGAI.....NOW DECEASED

LUCY KARIMI MUGO (Legal Representative of

DORIS MUTHONI KAGAI).....RESPONDENT

**R U L I N G**

**A. Introduction**

1. The petitioner was issued with the grant which was confirmed on 21<sup>st</sup> February 2012. The respondent herein took over from the deceased petitioner as the administrator, filed the summons for revocation of grant of representation dated 14<sup>th</sup> May 2008 in opposition to the confirmed grant of representation issued to the respondent's mother on the 10<sup>th</sup> April 1996.

2. The summons was based on the following grounds;

*a) That the grant was obtained and confirmed by fraudulently making a false statement and concealment from the court of matters material to court.*

*b) That the proceedings to confirm the grant were defective in law and in substance.*

*c) That the grant was obtained by means of untrue allegation of facts essential in point of law to justify the grant.*

*d) That the respondent's mother failed to notify the applicant of the proceedings or to provide for her during confirmation of the grant*

3. The parties agreed that the application for revocation of grant be determined on the affidavit.

**B. Applicant's Case**

4. In their affidavit in support of the summons for revocation of grant, the applicant deposed that she and **Doris Muthoni Kagai** were co-wives to the deceased. She further deposed that the respondent herein is a daughter of **Doris Muthoni Kagai** and that the respondent had been granted letters of administration ad litem in **HCC Cause No. 114 of 2007**.

5. The applicant further deposed that her daughter **Lucy Wawira Kagai** was omitted from the list of beneficiaries to the estate of the deceased.

6. She further deposed that prior to the confirmation of grant she had filed a cross petition to safeguard the interest of her children however before her objection was heard, the respondent's mother was awarded the grant. She thus alleged that the proceedings in **Succession Cause No. 252 of 1995** before the Senior Principal Magistrate were conducted without her knowledge.

7. She further deposed that the Senior Principal Magistrate lacked jurisdiction to entertain the succession proceedings.

8. **Jamlick Ndathi**, a son of the applicant also swore an affidavit in support of the applicant's summons for revocation. He further deposed that the respondent's mother solely inherited the estate of the deceased and proceeded to share the deceased's estate among her daughters leading to acrimony in the family.

9. **Peterson Kamunge Kagai**, a brother to the respondent deposed that he supported the application for revocation of grant as the same was obtained fraudulently. He cited reasons among them that he was not notified of the Succession proceedings in the Magistrate's court, that the estate was distributed unlawfully and that the magistrate's court lacked jurisdiction to entertain the proceedings as the same was worth more than Kshs. 100,000/=.

10. **Maureen Muthoni**, a granddaughter of the deceased deposed that her mother, a sister to the respondent, had died in the lifetime of the deceased after which the deceased took her in alongside her brother and took care of them till his death. She deposed that the sub-division of the deceased estate was fraudulent.

### **C. Respondent's Case**

11. In her replying affidavit date 5<sup>th</sup> August 2014, the respondent deposed that the applicant had failed to disclose the existence of her earlier summons for revocation in **Embu High Court Succession Cause No. 32 of 1998** which concluded with her withdrawal of the case.

12. The respondent further submitted that Doris Muthoni Kagai, her deceased mother, died before completing her duties as an administrator of the deceased's estate. She deposed that the following properties were open for distribution: -

a) Ngariama/Thirikwa/751: plot number 3B Muthingiini

b) Ngariama/Thirikwa/751: plot number 26 Wang'uru

c) Plot number 33, Kiamutugu

d) Datsun Pickup KQC 183

13. The respondent further deposed that the application for revocation was a non-starter as the estate of the deceased is yet to be distributed.

14. Antony Gachoki Machere, a purchaser of 2.124 hectares out of land parcel number Kabare/Nyangati/1965 supported the respondent's claim and sought dismissal of the applicant's application.

### **The Determination**

15. I have carefully considered the affidavit and evidence by both parties and also the relevant law and authorities and in my view, the issues for determination are **(i) whether or not the applicants have demonstrated sufficient grounds for court to revoke the grant as provided for under Section 76 of the Law of Succession Act** which provides that: -

***"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an 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 the concealment from the court of something material to the case;***

***c. that the grant was obtained by means of 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. .... "***

16. The above provision was construed by the court of appeal in the case of **Matheka and Another vs Matheka {2005} 2KLR 455** where the court of appeal laid down the following guiding principles.

***"i. A grant may be revoked either by application by an interested party or by the court on its own motion.***

***ii. Even when revocation is by the court upon its 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 the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate."***

17. The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds. A close look at **Section 76** shows that the grounds can be divided into the following categories: - *the propriety of the grant making process; mal-administration or where the grant has become inoperative due to subsequent circumstances.*

18. It is trite law that if a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled. The law permits the court to revoke a grant on its own motion or on application by an interested person.

19. A perusal of the court record reveals that the respondent's mother, the deceased **Doris Muthoni Kagai** at all times involved the applicants in the proceedings as She sought confirmation of grant. Further it is on court record that during the confirmation proceedings, all applicants were given due notice as this court had directed.

20. I note from the court record in **Embu S.P.M.C.C. No. 252 of 1995** that indeed the applicant herein was an objector in the probate proceedings therein however on the 4<sup>th</sup> July 1996, the applicant's advocate did not object when his application was "kept aside" after it emerged that the applicant herein had been formally divorced by the deceased. The court record further revealed that the applicant and her children were included in the P & A 5. My conclusion is that the proceedings leading to the issuance of the grant were not defective in substance and that material information was disclosed to the court. I am persuaded that the Respondent did not conceal any crucial information to the court, information which could have influenced the court in issuing the grant to him.

21. The applicant has further failed to produce any evidence of mal administration of the deceased's estate.

22. I take note of the fact that the administrator of the deceased's estate has passed away. The Law of Succession Act does not expressly provide for substitution of personal representatives who die in office, particularly in cases where the estate is left without one. The closest provision is section 81 of the Act, which provides for vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representative. The provision provides as follows –

***“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them:***

***Provided that, where there has been a grant of letters of administration which involve any continuing trust a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.”***

23. It appears to me that once all the holders of a grant die, section 81 of the Act would be of no application. Indeed, the said grant becomes useless and inoperative, and liable to revocation under section 76(e) of the Law of Succession Act, to pave way for appointment of new administrators. The appointment of fresh administrators to take the place of the previous ones following their death is subject to the provisions of sections 51 through to section 66 of the Act.

24. The administrator of the estate of the deceased in this case has died. The circumstances arising therefrom cannot be addressed through Section 81 of the Law of Succession Act. The grant made to the dead administrator has to be revoked to pave way for appointment of new administrators. There is no application before me, premised on section 76(e), for revocation of the grant herein on account of its having become useless and inoperative. However, **Section 76** gives the court discretion to revoke any grant of representation on its own motion. This should be a classic case where this court can exercise such discretion.

25. In view of the foregoing, I find no merit in this application. In the interests of justice, I make the following orders: -

***1) That this court on its own motion annuls/revokes the grant issued to Doris Muthoni Kagai now deceased.***

***2) That two of the surviving beneficiaries one representing each house of the deceased on consultation with all the beneficiaries do apply to be appointed co-administrators of the estate within thirty (30) days.***

***3) That each party meets her own costs of this application.***

***4) Mention on 18/02/2019.***

26. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF DECEMBER 2018.**

**F. MUCHEMI**

**J U D G E**

**In the presence of: -**

**Mr. E.K. Njagi for Jamlick Ndathi – beneficiary**

**Mr. Mugambi for Nige Gachoya for respondent**

**Mr. Abubakar for interested parties**