



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**SUCCESSION CAUSE NO. 442 OF 2013**  
**IN THE MATTER OF THE ESTATE OF DIXON STANLEY OKUMU**  
**JOHN OHANGA.....1ST APPLICANT**  
**NICHOLAS MWESHA AMUKOWA.....2ND APPLICANT**  
**MAURICE AGINA GUMBA.....3RD APPLICANT**  
**SIMEON OKWARA.....4TH APPLICANT**  
**SAM NYAWALO.....5TH APPLICANT**  
**VERSUS**  
**JULIUS OMONDI ODENY..... RESPONDENT**  
**RULING**

By a notice of motion dated 16th July 2013, brought under section 76 of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules; the applicants herein pray for orders that:-

1. The grant of letters of administration made to Julius Omondi on 7.2.13 by Senior Principal Magistrates Court at Maseno be annulled
2. The record of Petition Maseno SPMCC Succession Cause No. 91 of 2012 be called into the High Court
3. In the alternative to prayer 2 above, all proceedings in Maseno SPMCC Succession Cause No. 91 of 2012 be stayed
4. Pending the hearing and determination of this application, the court be moved to order JulisOmondi to deposit the original title documents in respect of land parcel No. Ramula Market Plot 20 for purposes of distribution
5. Any other orders the court may deem fit to grant
6. Costs be borne by the respondent

The application is based on the grounds among others that:-

- a. There was no proper service of the application for gran of letters of administration on all persons

who were entitled in equality or with priority to the petitioner as required under Rule 26 of the Probate and Administration Rules

b. The consent of persons with equality rights was not obtained

c. Vital material were not disclosed to court

d. The signature of John Ohaga was forged

The application is supported by an affidavit sworn by John Ohaga on 16th July 2013. He avers that he is a son of the late Walter Odeny Agina and that the respondent is his brother. He reiterates the grounds on the face of the application and adds that the respondent did not disclose the true assets and liabilities of the deceased's estate.

The application is opposed on the basis of a replying affidavit sworn by the respondent on 30th August 2013. He avers that the 1st applicant is his younger brother and that the 2nd to 5th applicants who are not their relatives are strangers to the deceased's estate. He denies that the 1st applicant's signature on Form 38 was forged. He avers that revocation of the letters of administration will affect Kisumu HCCC No. 74 of 2013 against the County Clerk County Council of Siaya & 2 Others and ELCC No. 44 of 2013 against the applicants herein which he has filed to safeguard the deceased's estate.

### **The issues for determination**

I have considered the notice of motion in the light of the supporting affidavits. Prayer 2 has already been spent and what remains for determination are prayers 1, 3 and 4.

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.

A grant may also be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate. (See - **Matheka and another v Matheka [2005] 1 KLR pg 456**). It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.

The issues for determinations are as set out hereunder.

#### **a. Locus of the applicants**

In *Musa Nyaribari Gekone & 3 Others v Peter Miyiinda & Another Civil Appeal No. 2 of 2014* the Court of Appeal stated:-

The relevant part of section 76 of the Law of Succession Act 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**

(a)....

The court further stated:-

**“The expression “any interested party” as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate”.**

While there is evidence that the 1st applicant is a son of the Walter Odeny Agina (deceased), no effort has been made to disclose who the 2nd to 5th applicants are and/or their interest in this case. The respondent’s averment that the 2nd to 5th applicants are using ELCC No. 44 of 2013 to infiltrate this succession cause has not been controverted.

From the foregoing; I find that the 2nd to 5th applicants have no *locus standi* to present this application for revocation of the grant.

#### **b. Fraud**

Rule 26 of Probate and Administration Rules provides as follows:

***(1) 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.***

***(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 renunciation, 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.***

As stated herein above, the 1st applicant is one of the sons of the deceased and is therefore entitled in the same degree as or in priority to the applicant. Although the 1st applicant alleges that his signature on Form 38 was forged, this application was filed close to 4 years ago and no steps have been taken to have the alleged fraud investigated. This court therefore rejects the 1st applicant allegation that his signature on Form 38 was forged and finds that he renounced his right to apply to grant of representation in favor of the respondent.

#### **c. Untrue allegation or concealment from the court of something material to the case**

The 1st applicant has not placed before the court any material to demonstrate that the respondent made any false statement or concealed from the court something material to the case when he applied for the grant of representation. The applicant has similarly not proved that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

#### **d. Title documents in respect of land parcel No. Ramula Market Plot 20**

The applicant has not made out a case for depositing of the original Title documents in respect of land parcel No. Ramula Market Plot 20 with the court and since court orders are not made in vain, the prayer is rejected.

#### **e. Disclosure of assets and liabilities**

Section 7 of the Probate and Administration Rules provides as follows:

***(1) Subject to the provisions of subrule (9), where an applicant seeks a grant of representation to the estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition in the appropriate Form supported by an affidavit in one of Forms 3 to 6 as appropriate containing, so far as they may be within the knowledge of the applicant, the following particulars—***

**(a) the full names of the deceased;**

**(b) the date and place of his death, his last known place of residence, and his domicile at date of death;**

**(c) whether he died testate or intestate and, if testate, whether his last will was written or oral, and the place where and the date upon which it was made;**

**(d) a full inventory of all his assets and liabilities at the date of his death (including such, if any, as may have arisen or become known since that date) together with an estimate of the value of his assets movable and immovable and his liabilities;**

I note that the respondent has disclosed the name of the deceased and the fact that he died intestate. He has also filed a letter from the chief which lists the beneficiaries of the deceased who include the 1st applicant. He however did not file a full inventory of deceased's assets and liabilities at the date of his death, together with an estimate of the value of his assets movable and immovable and his liabilities.

The failure to file the list of assets and liabilities has however not been shown to be willful or intended to conceal them and I therefore find that it is not a good ground for revocation of the grant of letters of administration.

In the end; I have come to the conclusion that the notice of motion dated 16th July 2013 has no merit and it is disallowed. The respondent is however hereby ordered to within 30 days from today's date, file a full inventory of deceased's assets and liabilities at the date of his death together with an estimate of the value of his assets movable and immovable and his liabilities. Each party shall bear its own costs

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF APRIL 2017**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Clerk Felix

Applicants N/A

Respondent Mr. Oguso holding brief for Mr. Odeny