



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
SUCCESSION CAUSE NO.710 OF 2012

IN THE MATTER OF THE ESTATE OF **KAVINI MAVUTI MUKWATE (DECEASED)**

JOYCE ANTHONY MBITHI.....APPLICANT/OBJECTOR

VERSUS

ANNASTACIA NDUKU NZIOKA

JANET KAVINI.....RESPONDENTS/PETITIONERS

RULING OF THE COURT

1. The Objector/Applicant has filed a summons for revocation of grant dated 21st January, 2013 and seeks for the following reliefs namely:-

1. The Respondents be restrained from administering the estate by using the grant and in particular accessing the fund held by the Public Trustee in Cause Number 159 of 2011 pending the determination of this Application.

2. The grant of letters of administration made on 27/09/2012 be revoked and or annulled on the following grounds:-

a. The proceedings to obtain the grant were fraudulent in substance.

b. The grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case. The Public Trustee is administering the estate vide Succession Cause No.159 of 2011 and therefore this Petition is Res judicata. This fact was intentionally and fraudulently not disclosed.

c. The grant was obtained by means of untrue allegations of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. The Petitioners omitted the name of Joyce Anthony Mbithi in the Petition who is her sister with an intention to defraud the estate. Anastasia introduced Janet Mueni Kavini as a beneficiary fraudulently.

2. The Objector's case is that the 1st Petitioner who is her elder sister had filed this Petition secretly and left out the Objector yet the Objector is the 1st Petitioner's younger sister and entitled to benefit from the estate of their late mother. It is further the Objector's case that the 1st Petitioner has fraudulently brought

on the 2nd Petitioner yet she is a stranger to the Estate and a person unknown. The Objector doubts the 2nd Petitioner's claim of having been married by the deceased yet no ceremonies were performed and thus as far as the Objector is concerned the 2nd Petitioner is a stranger to the estate. The objector finally averred that there is already a **Succession Cause No. 159 of 2011** being handled by the Public Trustee and in which she and the 1st Petitioner are named as the only surviving children of the deceased. The 1st Petitioner failed to disclose the pendency of the said Cause before the Public Trustee and hence her conduct was fraudulent and warrants the revocation.

3. The Application is opposed by the 1st Petitioner who averred that the 2nd Petitioner had been a concubine to the deceased and ought to benefit from the estate. The 1st Petitioner denied obtaining the grant fraudulently and maintained that she had followed the laid down procedures under the law of Succession Act.

4. Parties agreed to dispose of the Application by way of written submissions and opted not to present viva voce evidence. It was submitted for the Objector that the 1st Petitioner had deliberately omitted the Objector when seeking the Chief's letter and instituting the Petition yet the Objector is her blood sister and ranked in equality as required under Section 29 of the Law of Succession Act. It was also submitted that the Petitioner's did not reveal to the court the existence of **Public Trustee Cause No.159 of 2011** involving the estate of the deceased herein and in which the Public Trustee is administering and therefore the Petitioner's should be restrained from running a parallel administration of the estate. Finally it was submitted for the Objector that the Petitioner's conduct in concealing material facts from the court warrants an order of revocation of grant.

5. It was submitted for the Petitioners that the 2nd Petitioner had been married lawfully under Kamba Customary law by the deceased and thus entitled to a share of the estate. It was further submitted that despite the existence of another **Succession Cause No.159 of 2011** handled by the Public Trustee, the Petitioners filed the present Cause as they needed the Public trustee to release all monies for the school fees of children of 2nd Petitioner. Finally it was submitted that the Objector has not proved any fraud on the part of the Petitioners and thus Application herein should be dismissed with costs.

6. I have considered the Objector's Application plus affidavit and annexures in support. I have also considered the Replying affidavit of the 1st Petitioner. I have also considered the submissions of the learned counsels. The only issue for determination is whether or not the grant issued on 27/09/2012 should be revoked and/or annulled. Under the provisions of Section 76 of the law of Succession Act, a grant may be revoked if 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 or that the grant was obtained by the 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.

7. A perusal of the documents relied upon by the Petitioners during the filing of this Petition appear to reveal that the Petitioners had withheld some vital information namely the existence of the Objector herein as a daughter of the deceased. The Chief's letter dated 21/06/2012 has completely left out the Objector as a daughter of the deceased. The Petitioners herein left out the Objector as a co-administrator. At the time of filing this Petition there was in existence **Succession Cause No.159 of 2011** and in which the Petitioners and more particularly the 1st Petitioner was aware of. Again clan deliberations held on 19/2/2011 confirmed that the 1st Petitioner and the Objector were to share the assets of the deceased. At that time the 2nd Petitioner was not in existence since the clan only deliberated upon the daughters of the deceased. Again another letter dated 20/07/2011 by the DC Mbooni West District forwarded the names of Objector and 1st Petitioner to the Public Trustee and confirmed the two as the only surviving children of the deceased and who were the rightful heirs to the estate. As to how the 2nd Petitioner appeared on the scene appeared to be a mystery to the Objector herein. The Public Trustee had already instituted **Succession Cause Number 159 of 2011** in which the 1st Petitioner had been aware of. Hence for the 1st Petitioner to join hands with 2nd Petitioner and leave out the Objector and also fail to reveal to the court of the existence of **Succession Cause Number 159 of 2011** is a clear sign that it was a deliberate act to

not only circumvent the role of the Public Trustee but also to lock out the Objector from benefiting from the estate of the deceased. This was a dishonest conduct on the part of the Petitioners. The Petitioners counsel's submission that this cause was filed so as to obtain an order to compel the Public Trustee to release all the monies for the benefit of the sons for the 2nd Petitioners is not tenable in law because there was nothing wrong in the Petitioner s making their request vide **Succession Cause No.159 of 2011** and the Public Trustee could have addressed its mind appropriately. It is therefore obvious that the filing of this parallel cause was meant to lock out the objector and disinherit her from the estate of her late mother. Another issue of note is the participation of the 2nd Petitioner in these proceedings. The 1st Petitioner and some witnesses claim that the 2nd Petitioner had been married by the deceased in a woman to woman marriage and was thus a concubine. The Objector denies the claim maintaining that her late mother was a staunch Catholic and did not marry the 2nd Petitioner as alleged and further the same had not even been raised earlier when the **Succession Cause 159 of 2011** was being lodged. It was incumbent upon the 2nd Petitioner to establish or prove her marriage with the deceased. She did not swear an affidavit or even presented oral evidence. In the absence of an affidavit or oral evidence, I find the status of the 2nd Petitioner had not been properly and/or explained. It was improper for the 1st Petitioner to explain 2nd Petitioner's status yet it was the 2nd Petitioner to explain how she got marriage to the deceased. It would appear that the 2nd Petitioner opted to hide behind the 1st Petitioner and not reveal herself. This stratagem in my view seems to have been part of the Petitioners concealment of material facts from the court. The conduct of the Petitioners was therefore fraudulent as they intended to access the money held by the Public Trustee in **Succession Number 159 of 2011** and keep the Objector in the dark. This court will not countenance such conduct. Hence the Petitioner's failure to involve the Objector clearly implied that they had obtained the grant fraudulently.

8. In the result I find the grant was obtained by concealment of material facts and consequently the grant made on 27/09/2012 and issued on 19/10/2012 to the Petitioners is hereby revoked. As has been found that there was no basis for instituting this cause, parties are directed to proceed with **Succession Cause No.159 of 2011** which is being handled by the Public Trustee.

The costs of the Application to the Objector/Applicant.

Dated, signed and delivered at **MACHAKOS** this **29TH** day of **MAY**, 2017.

D. K. KEMEI

JUDGE

In the Presence:-

Mrs Nyaata for Kisongoa for Objector

Odhiambo for Musyimi for Petitioner

C/A: Kituva