



**REPUBLIC OF KENYA**

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

**SUCCESSION MISC. APPLICATION NO. 6 OF 2015**

**IN THE MATTER OF THE ESTATE OF MUKUA KITONGA KIIMBI (DECEASED)**

**MUKUA NGUMI.....APPLICANT**

**VERSUS**

**ENOCK NGUMI MUKUA.....RESPONDENT**

**R U L I N G**

- 1. Mukua Ngumi**, the Applicant, by way of an application dated **8<sup>th</sup> October, 2015** filed herein on **12<sup>th</sup> October, 2015** seeks revocation of a grant of Letters of Administration intestate (grant) issued herein.
- The application is premised on grounds that: there was non-disclosure of material facts; no consent was given by all beneficiaries; the purported consent was a forgery and the distribution of the Estate was not equitable.
- The application is supported by an affidavit deposed by the Applicant where he deposed *inter alia* that he is a son of the Deceased, the Respondent applied for confirmation of the grant without his consent. The consent presented was a forgery as other beneficiaries did not sign it. The Respondent failed to disclose material facts concerning the Petition.
- The Respondent filed grounds of opposition stating that all facts were disclosed to the Court; the Applicant signed the consent, he got his lawful share of the Estate just like other beneficiaries; dependants and creditors. He also filed a replying affidavit reiterating what was stated in the grounds of opposition.
- The application was canvassed by way of written submissions. **Mr. D. M. Mutinda** Counsel for the Applicant submitted that the grant was applied secretly and when it came to distribution of the Estate the Respondent introduced names that were unknown to other beneficiaries. That the Respondent concealed material facts from the Court by not disclosing that some beneficiaries were not aware and there is no proof to that effect. He concluded by stating that the Respondent should account for the Estate as required by law.
- In response, **Mr. Kalili**, Counsel for the Respondent submitted that a copy of the grant that the Applicant seeks to revoke was not attached. He faulted the Applicant for filing a replying affidavit in his own cause and called upon the Court to strike it out. That the Deceased had three wives. The Respondent's mother being Deceased he worked with his two (2) stepmothers and filed the Petition. All beneficiaries except the Applicant signed the consent. To ensure he participated in the Succession Cause he was served with the application for confirmation of the grant. There were creditors to the Estate of the Deceased. The grant was confirmed after other beneficiaries, the Applicant's mother inclusive having consented to the mode of distribution of the Estate that each household gets **1.065 Ha. Mutile Mukua** the

mother of the Applicant got their share, the Respondent got a share of **1.06 Ha** to represent his mother's house while **Nzambi Kimanzi** got **1.06 Ha** to represent the house of **Wanzila Mukua**.

7. I have considered rival submissions of both Counsels.

8. **Section 76** of the **Law of Succession Act** 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.”*

The Applicant herein did not attach the grant to the application but the Respondent in response to the application had it as one of the annexures to the replying affidavit. Secondly, pursuant to this Court's order the Lower Court file was availed for perusal.

9. Looking at **Form P&A 5**, the affidavit in support of the Petition or Letters of Administration Intestate filed by the Respondent herein, the Deceased was survived by the following beneficiaries:

**1. Mutile Mukua – 1<sup>st</sup> wife.**

**2. Regina Wambua.**

**3. Mary Mukai Kavithi.**

**4. Mwikya Musingi.**

**5. Enock Ngumi Mukua.**

**6. Joseph Mukua.**

**7. Mwaniki Mukua.**

**8. Kavutha Mutukaa.**

9. *Vaati Mwova.*

10. *Nzambi Kimanzi.*

11. *Ngina Mukua – 2<sup>nd</sup> wife (Deceased).*

12. *Wanzila Mukua – 3<sup>rd</sup> wife (Deceased).*

The only asset that formed the Estate of the Deceased was **Land Parcel Mulungo/Itoleka/425** measuring **92 Hectares**. He had no liabilities.

10. A grant of Letters of Administration Intestate of the Estate was issued to the Respondent on the **23<sup>rd</sup> July, 2012**.

11. When the Respondent filed summons for Confirmation of Grant, according to Paragraph 5 of the affidavit persons that were entitled to benefit from the Estate were indicated as follows:

1. *Mutile Mukua.*

2. *Enock Ngumi.*

3. *Nzambi Kimanzi.*

4. *Kamukwa Kiema.*

5. *Kiama Kitonga.*

6. *Kilungya Malela.*

7. *Muthoka Mutema.*

8. *Samson Musyoka Kawengi.*

9. *Margaret Juma.*

10. *Kamukwa Kiema.*

Only three of the beneficiaries did benefit. I have looked at the consent to the mode of distribution signed. Three of the beneficiaries namely **Mwaniki Mukua** (Applicant) and **Mary Mukai Kavithi** did not append signatures. There are thumbprints purported to be for **Mutile Mukua**, **Vaati Mwova** and **Nzambi Kimanzi**. The only signature appearing is for **Joseph Mukua**. There are names written for **Kavutha**, **Mwikya** and **Kavithi**. Whether or not they did write themselves is a matter to be desired because none of the beneficiaries appeared before Court on the date of hearing of the application for Confirmation of Grant. On the **6<sup>th</sup> May, 2014** only Counsel for the Administrator was present. His application was granted. There is an affidavit of service that was filed where it was deponed that the Applicant was served with the hearing notice. It is however not indicated if **Mary Mukai** was notified.

12. The Deceased herein was polygamous. In the case of **Mbaluka Maingi vs. Veronica Nthemba (2015) eKLR** it was held that:

*“Where there are more than one (1) family or one household, the Administrator of the deceased’s estate cannot be a single person but rather representative from each house. This is to ensure that each representative acts as trustee for the other members of that house or family that he or she represents.”*

13. In his replying affidavit the Respondent explained that the Applicant was provided for in distribution of the Estate equitably with other beneficiaries/dependants and creditors to the Estate. At the point confirmation of the grant there was no indication of existence of any creditors to the Estate. Names of persons were given and their respective shares without any indication of their relationship with the Deceased. Looking at the persons and shares identified in the Certificate of Confirmation of Grant there is absolutely no indication that the beneficiaries whose names appear were to hold the property in trust for other beneficiaries.

**Section 40 of the Law of Succession Act** provides thus:

***“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.***

***(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”***

The Respondent herein’s action of dividing part of the Estate of the Deceased among three individuals and leaving out their siblings was contrary to the law.

14. From the foregoing it is apparent that the grant was obtained and subsequently confirmed following untrue allegations of fact to justify the distribution of the Estate of the Deceased. In the premises I hereby revoke the grant of Letters of Administration Intestate issued herein and direct the beneficiaries of the Estate of the Deceased to apply for a fresh grant in the Lower Court that has jurisdiction to deal with the matter.

15. Each party to bear their costs.

16. It is so ordered.

**Dated, Signed and Delivered at Kitui this 23<sup>rd</sup> day of August, 2017.**

**L. N. MUTENDE**

**JUDGE**