



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCCESSION CAUSE NO. 692 OF 2012**

**IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH MWANGI MAINA-DECEASED**

**ANGELAS MAINA .....APPLICANT**

**VERSUS**

**REBECCA WAIYEGO MWANGI.....1<sup>ST</sup> RESPONDENT**

**PETER KAMAU MWANGI.....2<sup>ND</sup>RESPONDENT**

**RULING**

**Joseph Mwangi Maina** (herein after referred to as the deceased) died intestate on 30<sup>th</sup> March 2005 at the age of 80 years. On 9<sup>th</sup> July 2012, **Peter Kamau Mwangi** and **Rebecca Waiyego Mwangi** (hereinafter referred to as the petitioners) being son and wife to the deceased petitioned for letters of administration intestate to the deceased's estate in this cause. In the affidavit in support of the said petition, the following persons were listed as persons surviving the deceased:-

- i. Rebecca Waiyego Mwangi-----Wife*
- ii. Peter Kamau Mwangi-----Son*
- iii. Angelus Maina Mwangi-----Son*
- iv. Stephen Githaiga Mwangi-----Son*
- v. Paul Kariuki Mwangi-----Son*
- vi. Francis Murage Muraya-----Son*
- vi. Ann Wanjiru Mwangi-----?*

The same names appear in the letter dated 7<sup>th</sup> July 2012 from the chief only that in the said letter the last person is shown as a daughter to the deceased, a status that was not indicated in the in the affidavit in support of the petition.

The deceased's properties were listed as title numbers **Tetu/Muthuaini/582** and **LR No 9464** and **Share Certificate Mathari Self Help Project No. 556**.

There is a form **38** pursuant to Rule **26 (2)** of the Probate and Administration Rules signed by all the

above persons consenting to the Respondents herein petitioning for the grant.

The petition was gazetted on 27<sup>th</sup> July 2012 and the grant was issued on 5<sup>th</sup> September 2012 to the Petitioners and on 26<sup>th</sup> June 2013 the petitioners applied for the said grant to be confirmed and indeed the same was confirmed on 13<sup>th</sup> February 2014. Attached to the application for confirmation is a consent to confirmation. On 2<sup>nd</sup> March 2014, the petitioners herein applied for an order that the Land Registrar dispenses with the production of the original title number **Tetu/Muthuaini/582** which application was allowed on 4<sup>th</sup> March 2014.

By a summons for revocation of grant dated 20<sup>th</sup> January 2015, **Angelus Maina** (hereinafter referred to as the applicant) moved this court seeking orders *inter alia* that the grant issued to the petitioners herein be revoked and a fresh grant be issued to the applicant and the same be confirmed before the expiry of 6 months.

The application is expressed under the provisions of Section 76 of the Law of Succession Act<sup>[1]</sup> and Rule 44 of the Probate and Administration Rules. The grounds relied upon are that the proceedings were defective in substance, that the grant was obtained fraudulently by making a false statement and concealment of the deceased's wishes, that the second Respondent has been using the grant for fraud and other ulterior purposes not envisaged by the grant.

The applicant avers in the affidavit that he was present and participated in the initial lodging of the petition, that the petitioners are his aged mother and a brother, that he has four siblings whom he has named in paragraph 4 of the said affidavit, that he never participated in the proceedings leading to the confirmation of the grant, that he never executed the consent to confirmation nor was he aware of the date for confirmation, that his purported signature in the said consent is forged, that prior to the deceased's death he had expressed his wishes regarding the disposition of his properties and annexed a document purporting to have been written by the deceased in support of the said averment, and that there was no reason as to why the wishes were not followed. He also annexed a document entitled '*consent to the alteration /revocation of grant*' allegedly signed by four of the beneficiaries.

The second Respondent filed a replying affidavit on 6<sup>th</sup> March 2015 and averred *inter alia* that the applicant did in fact sign the consent to petition for letters of administration and also consent to confirmation, and that the applicant did participate in the proceedings leading to the confirmation of the grant, and that the applicant is deliberately misleading the court, that his application is an afterthought calculated to delay the finalization of the distribution of the estate, that the respondent will seek leave to refer the signatures to the DCIO Nyeri for ascertaining their authenticity, that the applicant was aware of the confirmation proceedings.

The parties agreed to file written submissions on the said application which they did, hence this ruling. Both counsels' written submissions are essentially a repeat of the contents of their clients respective affidavits.

I have carefully considered the proceedings in this cause, the application before me, the supporting affidavits and the affidavit in reply and the submissions filed by the parties and in my view, the following is the issue for determination, namely:-

*i. Has the applicant has demonstrated sufficient grounds for the revocation of the grant as provided for under Section 76 of the Law of Succession Act.*

Section 76 of the Law of Succession Act<sup>[2]</sup> provides as follows:-

*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;*

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 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 two categories:- the first two deal mainly with the propriety of the grant making process; the other grounds deal mainly with mal-administration i.e personal representatives have not been effective in administration.

The proceedings to obtain a grant are considered defective in substance under several circumstances. For example where there is a will, which is the basis of the petition, and the same is found to be invalid.<sup>[3]</sup> In the matter of the state of *Mwaura Mutungi alias Mwaura Gichichio Mbura alias Mwaura Mbura-deceased*<sup>[4]</sup> a grant was revoked because the applicant had failed to notify the applicant of the petition and obtain his consent. In *Musa vs Musa*<sup>[5]</sup> the grant was revoked for contravening Section 58 of the Law of Succession Act. Similarly, In *the matter of the Estate of Karanja Gikonyo Mwaniki-deceased*<sup>[6]</sup> where the court issuing the grant had no jurisdiction, the proceedings were declared to be defective and the grant was revoked.

The Supreme Court of India in *Anil Behari Ghosh vs SMT. Latika Bla Dassi & Others*<sup>[7]</sup> interpreting their equivalent of Section 76 (a) had this to say:-

*"the expression "defective in substance" ....means that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings"*

A grant can also be revoked on account of false statements and concealment of vital matters. In *Samuel Wafula Wasike vs Hudson Simiyu Wafula*<sup>[8]</sup> it was alleged that the appellant had deceived the court when he stated in his petition that he was a grandson of the deceased. The deceased was in fact not his grandmother, but a sister to his grandmother. The persons who had prior right to the grant had not given the consent. It was held that the grant had been obtained fraudulently by the making of a false statement.

In *the matter of the Estate of Robert Napunyi Wangila*<sup>[9]</sup> the sister of the deceased applied for and obtained letters of administration. She did not disclose in her petition that the deceased had died testate and that a grant of probate had already been issued to the executors. Her grant was revoked on application of the executors.

A grant can also be revoked for lack of diligence in administering the estate or for becoming inoperative or useless. (See *In the matter of the estate of Mohamed Mussa*<sup>[10]</sup> and *in the matter of the estate of Elizabeth Wamaitha Ngaruiya-deceased*.<sup>[11]</sup>)

In *the matter of the Estate of Murathe Mwaria-deceased*<sup>[12]</sup> **Koome J** summarised the grounds for revocation of a grant under Section 76 as follows:-

- i. when the procedure followed in obtaining the grant is defective in substance.*
- ii. when the grant is obtained fraudulently by making a false statement.*
- iii. making an untrue allegation of fact essential in point of law to justify the grant.*
- iv. or when the person who has the grant has failed to proceed diligently with the administration of the estate.*

Under Section 76, the court has discretionary power when faced with application for revocation. It can make such orders as it considers fit in the circumstances. The court is not bound to issue revocation even where the case has been set out under Section 76. In *Kipkurgat arap Chepsiror and Others vs Kisugut arap Chepsior*,<sup>[13]</sup> the court declined to grant the prayer for revocation, but instead entered the names of the applicants in the grant as beneficiaries. In *the matter of the estate of Jonathan Mutua Misi-deceased*<sup>[14]</sup> the applicant sought revocation on grounds that it had been obtained on false statements. He was a son of the deceased and his name had been omitted from the list of survivors and instead of ordering a revocation, the court directed that his name be included in the list.

Turning to the facts of this case, the applicant admits that he participated in the initial process, signed the consent to petition but denies signing the consent to confirmation. A casual look at the applicants' signature in form 38 which is admitted, and the signature in the consent to confirmation which is disputed and the signature in the affidavit in support of the application now under consideration reveals a striking similarity raising a possibility that they were done by one hand. The assertion by the applicant that he was not aware of the confirmation proceedings is highly suspect and most probably an afterthought and in this regard I am more persuaded by the explanation offered by the Respondent in his affidavit which I find to be more candid, logical and probable. My conclusion is that there is nothing to show that the proceedings were defective in substance.

The applicant has exhibited a document dated 2<sup>nd</sup> March 2005 entitled "my will" purporting to be a will written by the deceased. It's not clear why the applicant who admits to have been involved in the initial filing of the petition never raised this issue at the earliest opportunity possible if at all the deceased left a will. It is perplexing that he kept quiet and waited for the distribution then raised it. I am persuaded that the deceased died intestate, hence these proceedings and that if at all there was a will or any document written by the deceased as alleged, the applicant could have produced it much earlier since he admits he participated in the filing of this petition. Further the alleged witnesses who are purported to have attested the alleged will did not state that they were present and saw the testator sign the alleged "will".

Further, much as the applicant wants this court to take the said document as communicating the deceased wishes, in my view, it was extremely necessary for the applicant to elaborate in his affidavit the circumstances under which the document was written, the mental state of the deceased, whether he did it freely, whether he had the requisite capacity, who had the custody of the document and any other relevant information that could help the court to interrogate the credibility and validity of the said document and whether the petitioner knew of its existence because for him to be fairly accused of concealment of material information, it must be shown that the information was within his knowledge and that he concealed it from the court. Further, it's not clear why no other member of the family raised it earlier. The alleged witnesses never swore an affidavit to enlighten the court on the circumstances surrounding the writing on the alleged "will". I am not persuaded that the applicant concealed any information from the court.

Looking at the distribution in the grant whereby each of the deceased's children got two acres and their mother one acre, and the alleged document which purports to state that the applicants mother will hold one share in trust for the applicant, its evidently clear that the said document is a clever scheme by the applicant targeting the one acre given to their mother in the confirmed grant. Thus, the present application is a clever scheme to use the court process to obtain the extra one acre.

The applicant states that the Respondent has been using the grant for "*fraud and other ulterior purposes not envisaged by the grant.*" No particulars have been given to support the said allegation. There is nothing to support the alleged fraud and the law is very clear that he who alleges fraud must prove fraud. Further, the alleged ulterior motives have not been disclosed or substantiated nor has it been shown that the Respondent has committed acts of mal-administering the estate to warrant the court to revoke the grant.

Once confirmed, a grant can only be revoked on the grounds enumerated under Section 76 of the Act, and the alleged consent to annulment or revocation annexed to the application, though highly suspect, is not provided for under the law nor is it a ground under the said section.

I find nothing in this application to demonstrate that the applicant has established any of the grounds stated in section 76 of the Act. Accordingly, my answer to the issue stated above is in the negative.

Having answered the above issues as aforesaid, I find that the application dated 20<sup>th</sup> January 2015 has no merits and I hereby dismiss it with costs to the Petitioner/Respondent.

Right of appeal 30 days

Dated at Nyeri this 29<sup>th</sup> day of January 2016

**John M. Mativo**

**Judge**

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[1] Cap

[2] Cap 160, Laws of Kenya

[3] See Mwathi vs Mwathi & Another {1995-1998} 1 EA 229

[4] NBI HC Succ No 935 of 2003

[5] {2002} 1 EA 182

[6] Nakuru Mic 245 of 1988

[7] {1955} AIR 566, [1955} SCR (2) 270

[8] CA No 161 of 1993

[9] HC SUCC No 2203 OF 1999

[10] {1997}

[11] HC Succ No 2499 of 2001

[12]

[13] CA No. 24 of 1991

[14] HC P & A 95 of 1995