



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 936 OF 2011**

**IN THE MATTER OF THE ESTATE OF THE LATE THOMAS MUNYAO KITHOME**

**FLORENCE KASWII THOMAS**

**JULIUS WAMBUA KITHOME.....PETITIONERS**

**VERSUS**

**CHARLES MUNYAO KITHOME.....OBJECTORS**

**RULING**

**The Summons**

The Objector herein has moved this Court through a summons dated 17<sup>th</sup> April 2015, where she prays that the grant of letters of Administration issued herein to Florence Kaswii and Julius Wambua Kithome, and certificate of the said confirmation of the said grant issued on 22<sup>nd</sup> August, 2012 be revoked or annulled. The application is based on the grounds that the proceedings to obtain the grant were defective in substance and it was obtained fraudulently by making of false statements or by the concealment from the court of things material to the case.

The Objector in an affidavit in support of the summons sworn on 17<sup>th</sup> April 2015 averred that Petitioner did not comply with the relevant provisions of the Law of Succession Act and the Probate and Administration Rules. In addition that the Petitioners had concealed a number of facts: firstly that the Objector, despite being a beneficiary had contributed to the purchase of the land parcel Mbiuni/Kabaa/699; secondly, that a son of the Objector, Joseph Munyao Kithome, by way of a written agreement dated 8th June 2002 had purchased land parcel number Mbiuni/Kabaa/65 from the deceased Thomas Munyao Kithome; and thirdly, that the 1st Petitioner being a co-administrator of the estate of Thomas Munyao Kithome and who was to hold in trust for herself and on behalf of other beneficiaries title number Mbiuni/Kabaa/699, had wrongfully and in breach of trust registered the said property in her name and thus defrauded the rightful beneficiaries.

The Objector further stated that he had been born in the said parcels of land and had substantially developed the two parcels of land together with his family, but were not issued with any proceedings leading to the issuance of the grant. He averred that the Petitioner did not obtain the consent of the Objector despite recognizing him as a beneficiary of the estate of the deceased.

The Objector in a supplementary affidavit dated 21st October 2015 added that he had never attended court, nor had he signed any documents leading to obtaining of the grant, and his alleged signatures were forgeries. He stated that he had further written to the document examiner in the CID headquarters through

his advocate requesting an examination of the said signatures with a view of establishing the authenticity. Further, that the said forensic examination was done and it confirmed that the signature of the consent to confirmation of grant as compared to his specimen signatures and known signatures were made by different authors. He attached documents in evidence.

### **The Response**

The Petitioners in response filed a replying affidavit sworn by the 1<sup>st</sup> Petitioner on 16th July 2015. It was averred therein that the grant was confirmed on 22nd August 2012 in the presence of all the beneficiaries including the Objector. The deponent stated that the court noted in its records that indeed all the beneficiaries were present and there was consent by all beneficiaries including the Objector. She added the Objector who was her son did not file an affidavit against the confirmation of grant. She denied that the grant had been improperly and fraudulently obtained by making false statements and untrue allegations.

The deponent contended that the Petitioners had complied with the necessary provisions of the Law of Succession Act. She further stated that the Objector did not contribute any money in purchase of the land parcel number Mbiuni/Kibaa/699, and that the documents produced do not specify that the sale agreement was for land Parcel Mbiuni/Kabaa/65 as was alleged by the Objector.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made by the Petitioner. The issue to be decided is whether the Respondents' grant of letters of administration should be revoked. The parties were directed to canvass the application and this issue by written submissions. The Objector's Advocate, s F.M. Mulwa Advocates filed submissions dated 26th October 2015 where it was stated that the Objector was challenging the documents presented in court during the succession proceedings in that the purported signatures by him were a forgery. It was submitted that according to the evidence his consent was not sought in obtaining the grant and his alleged participation in court was also a lie.

It was further argued that the 1st Petitioner having transferred land parcel No. Mbiuni/Kabaa/699 solely to her name, can no longer be trusted that she would be faithful in administering and protecting the interests of other beneficiaries of the deceased. It was argued that the Objector having been born in the said land and having substantially developed the two parcels together with his family and being the beneficiaries of the estate of the deceased, it was just they be allowed to remain on the same. It was opined that this would be achieved by first revoking the grant after which the rights can be ascertained.

The Objector relied on the decisions in **Rusa Rufas Ntwiga vs Jane Gachunku (2014) e KLR** and **Re The Estate of Kamuyu Nganga Waweru (2008) e KLR** and the provisions of Rule 26(1) of the Probate and Administration Rules.

The Respondent's Advocates M.M. Uvyu & Company Advocates filed submissions dated 26<sup>th</sup> January 2016, wherein it was contended that the Objector had failed to prove that the proceedings to obtain the grant was defective and that the alleged forgery is not true because it was recorded by the Judge on 22<sup>nd</sup> August 2012 that all the beneficiaries were in Court and that there was a consent signed by all the beneficiaries including the Objector.

Further, that the certificate of confirmation of grant was clear that the Petitioners were to hold the properties as trustees on behalf of the other beneficiaries, and therefore that the registration of the property known as Mbiuni/Kaba/699 in the name of the 1<sup>st</sup> Petitioner did not mean she had breached the trust or defrauded the beneficiaries.

Reliance was placed on Rule 26 of the Probate and Administration Rules for the submission that the Petitioners gave notice to all beneficiaries of the estate including the Objector who signed the consent. The decisions relied on by the Objector were distinguished by the Respondent on the basis of that the

facts in those cases were different from those in the present application. Lastly, it was submitted by the Respondent that the Objector had not brought any evidence to show that Petitioners cannot be entrusted with the administration of the estate, that the grant had become useless, or that Joseph Munyao Kithome purchased land parcel number Mbiuni/Kabaa/65 from the deceased.

This court has jurisdiction to revoke or annul the grant as is clearly set out in section 76 of the Law of Succession Act (Chapter 160 of the Laws of Kenya) which 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 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 has ordered or allowed; 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.”**

In the present application the Petitioners’ have denied the Objector’s averment that he did not consent to the administration of estate. I have perused the record of the court proceedings during the confirmation process, and note that although on 22<sup>nd</sup> August 2012 the record shows that all beneficiaries were present when the grant was confirmed, the names and identity of the said beneficiaries are not indicated.

In addition, the Objector has brought evidence by a forensic document examiner that suggests that his signature in the consent to the petition for grant of letters of administration was a forgery. Lastly, there is a dispute as to whether or not the properties known as Mbiuni/Kibaa/699 and Mbiuni/Kibaa/65 are free properties of the deceased that can be subjected to administration. This dispute can only be resolved upon more detailed examination of the evidence relied upon by the Objector in this regard.

I therefore find arising from the foregoing facts, that there is a possibility of untrue allegations made by the Petitioners in their application for the grant of letters of administration, and the Objector’s application is therefore merited. In order to enable the administration of the deceased’s estate to proceed without further delay, I order as follows:

1. The grant of letters of administration intestate issued to Florence Kaswii Thomas and Julius Wambua Kithome on 30<sup>th</sup> April 2012, and the certificate of confirmation of grant issued to the said administrators on 22<sup>nd</sup> August 2012 be and are hereby revoked.
2. Florence Kaswii Thomas and Julius Wambua Kithome shall petition for a new grant of letters of administration, and the Objector shall be at liberty to thereafter file an Objection and/or Cross Petition.
3. Thereafter the matter shall be fixed for directions before the relevant judicial officer.

4. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 23<sup>rd</sup> day of February 2016.

**P. NYAMWEYA**

**JUDGE**