REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.288 OF 2011

IN THE MATTER OF THE ESTATE OFJ. M. A. ..... DECEASED

G.A.A.M..... PETITIONER

M.M.A..... PETITIONER

AND

M. O. A. ..... APPLICANT

RULING

By summons dated 4th March, 2015 brought under *sections 76* and *83* of the law of Succession Act (Cap 160) of the Laws of Kenya (the Act) and *Rules 44(1), 49, 59* and *73* of the Probate and Administration rules (The Rules) and filed in court on 19th March, 2015, **M. O. A. O.** (the applicant) moved this Court for revocation of the Grant of administration intestate made **to G. A. A. M.** and **M. M. A**. (the petitioners) on 28th September, 2011 and confirmed on 30th October, 2013. The applicant also sought an order that the petitioners produce to court a full and accurate account of all sums of money received by the petitioners from any accounts of the deceased, including but not limited to Kakamega Teachers Sacco, Dependants Pension, Widows and Children's Pension Scheme and/or death gratuity from the Pensions Department of the Ministry of Finance relating to the deceased's estate. The applicant also prayed that a joint Grant of letters of administration intestate of the deceased's estate be made in the names of the petitioners and herself.

The application is based on various grounds, including those that the administrators have not administered the estate diligently, that the petitioners did not make correct, honest and truthful representation as to who the true beneficiaries of the deceased's estate were and how their interests were secured, and that the Grant of administration was obtained by means of fraud. The applicant also swore an affidavit on 4th March 2015 to supplement those grounds filed together with the summons, and a supplementary affidavit sworn on 15th December, 2015.

Upon being served, the petitioners filed a replying affidavit through the 1st petitioner, sworn on 16th October, 2015 and filed on 27th October, 2015. Parties sought to dispose of the summons for revocation by way of oral evidence and directions were given to that effect.

PW1, M. O. A. O., a sister to the deceased, told the court that her late brother was husband to the 1st petitioner and one **E. N. A**. and had a child with another woman known as **B. I. K**. The deceased had 5

children with the 1st petitioner all above 18 years. The child with **E. N. A**. known as **B. M. A**. is also over 18 years while the child with **B. I. K.,** one **A.N.A.** (the minor), is below 18 years. The applicant who is the legal guardian to the minor, told the court that she was forced to apply for revocation of the Grant because the petitioners did not disclose all the amount due to the deceased estate, that the petitioners did not disclose the mothers to the other children of the deceased, and that the 1st petitioner lied to court that she was the biological mother to the minor, using a fraudulent birth certificate.

The witness further testified that although she was staying with the minor at the time the petitioner applied for a Grant of Letters of Administration, she was not herself involved. The witness faulted the 1st petitioner for indicating that she was the biological mother of all the children of the deceased. The witness told the court that she did not have a personal interest in the estate of her late brother, but wanted to ensure that interests of the minor are well taken care of. She produced annextures a, b and c in her affidavit sworn on 4th March, 2015 as **PEx1** and annextures D-H in the affidavit sworn on 1st December, 2015 as PEx2.

The witness told the court that she had seen how the money was to be distributed and the fact that the minor was to get the largest share, but she was not sure whether that was fair given that the other children are of majority age. In cross examination, the witness said that she is married with her own family. She testified that the deceased had 3 wives namely **E. N.A**., **G.A.A.M**. and **B. I. K. E. N.A**., according to the witness, was married in 1997 and lived with the deceased until his demise. She admitted that both **E.N.A**. and **B.I.K.** are aware of the death of the deceased who was a teacher, thus entitled to death benefits but does not know whether any of them filed an objection in this cause. The witness told the court that she moved to court because some of the deceased's assets were not disclosed. She admitted that according to the schedule of distribution, none of the children was left out but maintained that what was being distributed was not the total amount that was due to the estate. She also conceded that **E.N.I**. and **B.I.K.** are now married elsewhere. She denied that her relationship and that of the 1st petitioner was strained.

DW1, G. A. M., testified that she is the first petitioner and widow to the deceased and sister-in-law to the applicant. She told the court that she had five (5) children with the deceased all of whom are named in the petition for grant of letters of administration. **B. M. A**. and the minor have their own mothers. She told the court that **B.M.A.'s** mother was known as **E.N.A.** but she did not know the minor's mother. According to the witness, when she got married in 1992, the deceased told her that he had a child with another woman but she did not find **B. M.A's** mother. She also told the court that she did not see the minor's mother until when she took the minor to attend the funeral of Father to the minor's mother. The witness maintained that she had disclosed everything about the deceased's estate. There were share and gratuity and that she did not have preference for her children in distributing the estate but that all children got equal shares except the minor who got bigger share of Kshs.424,846/- because he was a minor. She admitted that the minor has never stayed with her and that the monthly pension of Kshs.18,000/- she was getting was stopped in December, 2013.

In cross examination the witness admitted that she did not know *B.M.A* and the minor*'s* mothers. She also admitted that the minor*'s* mother is alive but nevertheless she obtained a birth certificate for him showing that she was the biological mother because she could not get the minor's mother to do so. She also admitted that she knew the deceased had shares in the Co-operative Society but could not remember the amount, though she thought it was about Kshs.200,000/- shares. She said she took the money part of which was used to pay for college fees. She denied any wrong doing.

In his submission, Mr Mbeche, learned counsel for the applicant, urged the court to allow the summons saying that they had satisfied the test set by *section 76* of the Law of Succession Act. He submitted that what was presented to court amounted to fraud. His contention was that by misrepresenting to court that she was the biological mother to the minor, the 1st petitioner was not truthful. Counsel further submitted that the 1st petitioner again misrepresented to court that she was the biological mother to **B.M.A**. which was not true. Counsel was of the view, that had the 1st petitioner disclosed to the court that **B.M.A.** and the minor were not her biological children the court would probably have not made the Grant of administration intestate in her favour. Counsel further submitted that had the petitioners disclosed that

the minor stays with the applicant, the grant would again have not been made to them. Counsel urged the court to invoke *section 76* of the Act and revoke the Grant.

Learned counsel for the applicant also urged the court to order the petitioners to give a full and true account and inventory of the deceased's estate as provided for under *section 76* as read with *section 83* of the Act. He argued that the deceased's estate was comprised of capital assets in the form of money in various bank accounts, and pension. Counsel relied on the case of *Matheka & Another vs Mathekla* [2005] KLR 455 for the proposition that a Grant may be revoked where there is evidence that proceedings to obtain such grant were defective, in substance or that the grant was obtained fraudulently, *Joyce Ngima Njeru & Another v Ann Wambeti Njue* [2012] eKLR and *Mumbi Mwathi vs Stephen Ndung'u Mwathi* [2012] eKLR for a similar proposition.

Miss Muleshe, learned counsel for the petitioners, on her part relied on her written submissions dated 26th January 2016 and filed in court on even date. Counsel submitted that no basis had been laid under *sections 76* and *83* of the Act to warrant revocation of that Grant herein. According to counsel, the applicant's rights were in terms of priority lower than those of the petitioners and that the minor's priority did not rank above those of the 1st petitioner. Counsel further submitted that the minor whose interests the applicant represents, got a bigger share than the rest of the children due to his special needs as a minor. It was learned counsel's view that from the evidence on record, the applicant had a score to settle with the petitioner and was only using the minor for that purpose. Counsel blamed the applicant for blocking pension to show bad blood between her and the 1st petitioner. Counsel further argued that the minor, being a child of the petitioner, cannot demand account from his own mother. Counsel submitted that there were no other widows in this cause and the applicant has no authority to speak on their behalf. Counsel concluded by saying that the applicant has not demonstrated any basis for allowing the summons and prayed for its dismissal.

I have considered the summons, the evidence by parties herein and submissions by counsel. I have also perused the record in this matter. The summons herein seeks three key orders namely; revocation of the Grant of representation made to the petitioners herein on 28th September, 2011; and confirmed on 30th October, 2013, an order that the Administrators do produce a full and accurate account of the estate of the deceased; and that a joint Grant be issued in the names of the applicant and the petitioners. The applicant, both in her affidavit and oral testimony before court has endeavoured to justify the orders she seeks and her counsel has also done so in his submissions, while the respondents have argued that the orders sought are not justified.

Whether the Grand should be revoked and/or annulled.

The applicant in justifying her quest to have the grant revoked, has relied on the grounds that raise the issue of maladministration and failure to proceed diligently with administration of the estate of the deceased. The petitioners are also accused of failure to make correct, honest and truthful representation of who the true beneficiaries were and how each beneficiary's interest accrued and finally that the petitioners obtained the grant by fraudulent means.

The petitioners/respondents have been accused that they received a lump sum in form of Gratuity and shares from Kakamega Teachers Sacco which they, did not apply diligently. There is also the accusation that they did not disclose that the deceased had two children from other relationships namely *B. B. M.* and *the minor,* but who were made to appear as though they were biological children of the 1st petitioner. The 1st petitioner is also accused of having obtained by fraudulent means, a birth certificate for the minor showing him to be her biological child which was not the case. In the applicant's view, this was dishonest on her part and counsel submitted that had the court been informed that the two named beneficiaries were not biological children of the first petitioner, a grant would not have been made to them as it was. For that untruthfulness, the applicant feels the grant should be revoked. The applicant has also criticised the manner the estate was shared out. According to her, there is no clear indication of what the estate of the deceased was comprised of and how the overall estate was shared out. For those reasons she wants the Grant of representation issued to the petitioners revoked.

The court's power to revoke Grants of representation is provided for under by *section 76* of the Act 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 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 paragraph (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."*

Any of the circumstances enumerated in *section 76*, if proven, may lead to revocation or annulment of a grant of representation whether that Grant has been confirmed or not. In the present cause, the petitioners are widow and son respectively to the deceased. The Grant was made to them on 28th September 2011 and confirmed on 30th October, 2013. From the reading of the summons for revocation of the Grant, and submission by counsel for the applicant, their grounds for seeking revocation seem to fall under *section 76(b)* and *(c),* that the grant was obtained fraudulently by making a false statement that **B.M.A**. and the minor were biological children of the 1st petitioner and by concealing from the court the fact that the two children, had their own mothers who are still alive. This, according to the applicant, was a fundamental mistake on the part of the petitioners, and had the court been made aware of the fact that the two beneficiaries had their own mothers, the grant would not have been made to them.

A proper reading of *section 76(c,)* in my view, does not apply in this cause. For clause *(c)* to apply, the grant must have been obtained by means of an untrue allegation of fact *essential in point of law* to justify the making of that grant even though the allegation may have been made through ignorance or mistake. The applicant herein has not pointed out, and I have not seen myself, the untrue allegation essential in point of law that enabled the petitioners obtain the grant, but without which, the grant could not have been made. That means reliance on clause *(c)* to seek revocation and annulment of the grant in this cause has not been explained and therefore cannot succeed.

In order for the applicant to succeed under *section 76(b)* of the Act, she must show that the petitioners obtained the grant fraudulently by making a false statement or by concealment from the court something material to the case. The operative words under this clause are *fraudulent making of a false statement* or concealment from the court of *something material to the case.* The fraudulent statement or concealment of something material to the case, must, of necessity, have intended to aid the petitioners obtain the grant, and save for that fraudulent statement or concealment of something material to the case, a grant would not have been made to them.

My understanding of the applicant's grievance under *section 76(b), i*s that the deceased had a relationship

with two other women out of which there was a child by each woman. When the petitioners applied for a grant, they did not disclose that the two children belonged to different mothers but were made to appear as if they were biological children of the 1st petitioner. There is no dispute that these two, **B.M.A**. and the minor, are named as beneficiaries of the deceased's estate. The applicant and her counsel have not shown how this is a fraudulent statement or concealment from the court of something material to the case. The court would have appreciated the point were the applicant saying with concrete evidence, that the deceased left behind two other widows, that is mothers to **B.M.A**. and the minor respectively, which would have made sense during confirmation of the grant and in which case *section 40* of the Act would come into play where each widow and her child would be regarded as a "unit~" or "house".

My reading of *section 35* and*40* of the Act does not seem to suggest that children out of a relationship where their mother or mothers were not married to the deceased and are not widows to the deceased, can, on their own, constitute a unit or house. See *Re Estate of john Musambayi Katumanga (deceased)* [2014] eKLR. Only then, would the applicant's argument that there was fraudulent statement and concealment of something material make sense. I note that none of the women has come forward to say that she is widow to the deceased despite the applicant admitting that they are alive and are aware of the demise of the deceased. There is no evidence that they are wives or widows in terms of *section 3(5)* of the Act. The allegation of non disclosure of Bank accounts belonging to the deceased has also not been adequately addressed to show that he had accounts that were not disclosed.

The fact of obtaining a birth certificate on behalf of *the minor*, to my mind, is also not an issue for this court unless it affected the administration and distribution of the deceased's estate. The applicant has therefore not established that there is a ground under *section 76(b)* for this court to revoke or annul the Grant.

Counsel in urging his case, referred to decisions in the case of *Mathethe & Another vs Mathika* (supra) and *Mumbi Mureithi vs Stephen Ndugu Mwathi* (supra). However, those decisions are distinguishable from the present case. In *Matheka's case* for instance, the issue was who had priority to apply for a grant of administration between a widow and a son of the deceased and the court applied the general guidance in *section 66* and held that the widow had first priority. In *Mwathi's case* (supra), the issue related to an oral will and concealment of material facts in that the respondent had failed to disclose material facts that would have been essential in determining the true heirs for purposes of making of a grant, and in the case of *Joyce Ngoma* (supra), the issue was whether the grounds for revocation or annulment had been established and locus standi. In fact this particular decision does not aid the applicant because the court held among others that although the appellants had correctly *cited the ingredients for revocation Grant, the evidence adduced* before the learned Judge did not *establish the existence of those ingredients.* That is the position I find in this application.

Although the court has the final say on the person or persons to whom a grant of representation should be made, *section 66* of the Act gives a general guide on the order of priority. The section provides:-

> s.66 *"When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:-*
>
> *a) surviving spouse or spouses, with or without association of other beneficiaries.*
>
> *b) other beneficiaries entitled or intestacy, with priority according to their respective beneficial interests as provided by part V;*
>
> *c) the Public Trustee; and*
>
> *d) creditors."*

The petitioners and/or administrators are widow and son of the deceased. They are therefore in the first

and second category of those entitled to apply for grant of letters of administration. Having so applied and a grant made in their favour, I do not find any justifiable reason to revoke or annul that grant and issue a new one including the applicant.

Whether the court should order an account

The last issue for determination is whether the court should order the petitioners to give an account for the deceased's estate. The applicant's view was that the estate of the deceased received a lump sum of money from the *Sacco* and *death gratuity* from the Pensions Department, but that no adequate provision from the above accounts has been made to the minor, who is under the guardianship of the applicant. I have perused the record herein especially the petition for Grant of letters of administration. The affidavit in support of the petition indicates that the only asset left behind by the deceased was "**MONIES FROM KAKAMEGA TEACHERS CO-OPERTIVE SOCIETY**." The amount was not discussed. When the respondents applied for confirmation of the grant, the asset was indicated as *monies from Kakamega Teachers Co-operative Society* without again disclosing how much. The money was to go to the 1st petitioner wholly. I have not seen the affidavit in support of summons for confirmation of Grant and therefore the court could not establish if the amount was disclosed therein. Again upon the Grant being confirmed, the certificate of confirmation of Grant shows that proceeds from Kakamega Teachers Sacco would go to 1st petitioner – wholly. There is no disclosure of the amount.

In the course of the hearing of the application for revocation it was disclosed by both parties that some money was shared out. It was shown that the family of the deceased had agreed to share gratuity as follows:-

PERSON	*RELATIONSHIP*	*AMOUNT*
1. MINOR	*son*	*Kshs.424,846/-*
2. G. A. M.	*widow*	*Kshs.200,000/-*
3. B. M. A.	*son*	*Kshs.112,423/-*
4. M. M.A.	*son*	*Kshs.112,423/*
5. L. A. M.	*daughter*	*Kshs.112,423/-*
6. S. M. M.	*daughter*	*Kshs.112,423/-*
7. ILLEGIBLE	*daughter*	*Kshs.112,423/-*
8. B. O .M.	*daughter*	*Kshs.112,423/-*

The total amount shared out was Kshs.1,299,384/- and the minor took approximately 32.7 percent leaving the rest of the beneficiaries to share the remaining 67.3 percent. During her testimony, the 1st respondent confirmed that the money was shared out as above. The document is clear that what was shared was the "gratuity".

Section 83 of the Act outlines the duties of the personal representatives which include among others, distribution of the estate to the respective beneficiaries and render accounts when called upon to do so. S*ection 83(h)* more particularly provides that personal representatives have a duty to produce to the court., if required by that court either on its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased, and an accurate account of all dealings upto the date of such account, where the account requested is for *assets* that can be dealt with under the Law of Succession Act.

For the Court to order administrators to render a true and accurate account, representation must relate to

an estate of a deceased person as provided for in the Act. *Section 3* of the Act defines an *"Estate"* as the free property of a deceased person, and "*free property"* is defined as the "*property of which that person (deceased) was legal competent freely to dispose of during his lifetime and in respect of which his interest has not been terminated by his death."*

The deceased held shares with Kakamega Teachers Sacco Society because that is what the estate herein is all about. However, under *section 39(1)* of the Co-operative Societies Act 1997, upon the death of a Co-operator, the Society may transfer his shares or interest to the person nominated by the Co-operator in accordance with the Act or if no person has been nominated, to such person as may appear to be the personal representative of the deceased. Although shares could be said to be free property of the deceased herein, shares in a Co-operative Society are dealt with differently and only in accordance with *section 39(1)* of the Co-operative Society Act where the co-operator nominated nominee. The section makes it clear that where the Co-operator nominated a person to be the nominee. Shares in the Co-operative Society should be transferred direct to that person. The personal representative comes in and can only access those shares in cases where there was no nominee.

In the case of re Estate of *Carolyne Achieng Wagah* (deceased) 2015 eKLR Nairobi *Musyoka, J*. rendered himself on the law as follows:

> *"It is the law that funds the subject of a nomination do not form part of the nominator's estates and therefore such funds cannot pass under the will of the deceased or vest in his personal representative. Such funds are not subject to the succession process, and should be delt with in accordance with the law governing nominations. Nominations are statutory, in the sense of them being specifically provided for by a particular statute."*

A similar legal position was taken by *Gikonyo, J.* in the case of *Benson Mutuma Muriungi vs CEO Kenya Police Sacco & Another* [2016] eKLR when the learned Judge said:-

> *"Nominations under the Co-operative Societies Act are statutory. Section 39(1) of the co-operative Societies Act provides that upon death of a member, a Co-operative Society may transfer the share or interest of the deceased member to a person nominated in accordance with the Act or the rules made thereunder ... The property which is subject of a statutory nomination is not free property of a deceased member. It does not pass or vest in the personal representative of the deceased member or to the estate; it passes directly to the nominee."*

When the petitioners brought this cause, they said the estate of the deceased comprised shares in Kakamega Teachers Co-operative Society. I agree with both *Musyoka, J*. and *Gikonyo, J*. that shares in a Co-operative Society do not form part of a deceased's estate since they are delt with in accordance with clear provisions of a statute.

The question would be whether there was a nomination in the case of the deceased herein, and if his share was delt with in accordance with the law. However that is not an issue before this Court now. In my view, it was wrong for the share of the deceased in the Co-operative Society to be made the subject of this cause as forming the estate of the deceased. It is not subject to succession proceedings under the law of Succession Act.

The applicant also raised the issue of Pension and Dependants' pension from the Pensions Department of the ministry of Finance which was said to have been paid to the widow, the 1st petitioner herein. Gratuity and/or dependants pension is payable under the Pensions Act, Cap 189 Laws of Kenya, and regulations made thereunder in the event retirement or death of a public officer or employee. In my respectful view, payments under the Pensions Act and Regulations, do not form the estate of the deceased in terms of the law of Succession Act. *Section 3(1)* of the Pensions Act provides that pension, gratuities and other allowances may be granted by the Minister in accordance with the Pensions Regulations to officers who have been in the service of Government.

Pension or gratuity is only paid upon retirement or demise of the officer, and section 17 of the same Act

provides that Dependants Pension shall be paid to the widow. The same section is clear that the only time dependants pension will not be paid to the widow is when she remarries or on demise. Furthermore *section 13* is categorical that a pension, gratuity or other allowances granted under the Pensions Act *shall not be assignable or transferable* and *shall not be liable to be attached, sequestrated or levied upon for or in respect of any debt or claim whatever except a debt due to the government*.

This is a clear departure from the law of Succession Act where the estate of a deceased is liable to be attached to satisfy indebtedness. *Section 66* of the law of Succession Act also allows creditors to take out grant of representation for the deceased's estate and can pay a debt therefrom.

From the above analysis, it emerges that pension and gratuity cannot be said to be free property of a deceased person so as to form part of his estate. They are delt with strictly in accordance with the Pension Act and Regulations, being a charge on the consolidated fund. Not being an estate in terms the law of Succession Act, an account under *section 83* is not feasible.

After a careful consideration of this matter, I am of the considered view that the applicant has not made a case for the order she seeks. The main allegation of maladministration and failure to proceed diligently have not also been established. The widow has shared the "*gratuity"* fairly where the minor took the largest portion, while the rest of the children got equal shares. The widow also got less than half of the minor's share.

That being my view of this matter, I decline the invitation to revoke the grant or make the orders of account the applicant seeks. I make the following orders:

1) The application dated 4th March, 2015 is hereby dismissed.

2)The 1st petitioner do release forthwith, the minor's share of Kshs.424,864/- to the applicant who shall invest the said amount on behalf of the minor, in a reputable financial institution until the minor attains the age of maturity, or when need arises but shall only be withdrawn with leave of the court.

3) Interest from such investment shall be used for the upkeep of the minor.

4) Given the relationship of the parties herein, each party shall bear their own costs.

Dated and delivered at Kakamega this 22nd February, 2016.

E.C. MWITA

JUDGE