



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA ATR MOMBASA**

**SUCCESSION NO. 537 of 2007**

**IN THE MATTER OF THE ESTATE OF MARGARET MSHAI JUMA (DECEASED)**

**PATRICK MWANGEMI WANJALA**

**TEREZI NGODA**

**MSHAI NGODA**

**JOSAM NGODA**

**JUMA NGODA.....APPLICANTS**

**VERSUS**

**JACKSON NGODA JUMWA.....RESPONDENT**

**RULING**

1. The deceased to whose Estate the proceedings herein relate is Margaret Mshai Juma, who died on 24.12.04 in Nyolo, Taita Taveta. From the record, the deceased was survived by her son Jackson Ngoda Jumwa and several grandchildren. A Grant of Letters of Administration was issued to the said Jackson Ngoda Jumwa, the Respondent herein on 26.3.08.

2. On 31.3.09, the Applicants Patrick Mwangemi Wanjala, Terezi Ngoda, Mshai Ngoda, Josam Ngoda and Juma Ngoda filed a Summons for Revocation of the Grant of Letters of Administration issued to the Respondent who is their father. The Applicants have also prayed that the Respondent provides accounts of the properties and income of the estate since the demise of the deceased. The Application is supported by the grounds on the face of it and in the Affidavit of Patrick Mwangemi, one of the Applicants.

**The Applicants' Case**

3. It is the Applicants' case that the proceedings for obtaining the Grant were tainted with material nondisclosure of vital information *to wit* that the deceased died testate having left a Will in which she bequeathed property to them and to the Respondent. The Applicants claim that the Respondent obtained a Grant of Letters of Administration intestate with a view to depriving the Applicants of the property bequeathed to them by the deceased. The Applicants further claim that the Respondent has taken over the whole estate of the deceased solely benefitting from the same to the detriment of the Applicants.

4. The Applicants called one witness Kastrungi Mngwana, a senior chief and a neighbour of the deceased.

He testified that he prepared the deceased's Will at her direction and that the deceased signed the same in his presence and in the presence of another neighbour Mariam Leshamta. He further testified that the Respondent was the only child of the deceased and that the Applicants were all the Respondent's children. On cross examination, the witness denied that he had a love affair with Sabina Susana Kigiala, the wife of the Respondent, and that he had conspired with her to make the Will so as to exclude him and to give the deceased's house to the Applicants.

5. In their written submissions, the Applicants argue that PW1 confirmed in his testimony that the deceased executed her Will in his presence and in the presence of Mariam Leshamta. They submitted that the Respondent acknowledged in cross examination that he knew of the Will and that he was Willing to give the Applicants their inheritance if they apologised to him. That he failed to disclose the existence of the Will as he considered the same was a fraud.

6. It is the Applicants' submission that the Respondent was bound to disclose the existence of the Will and that it was not for him to determine whether or not the same was genuine. That failure to disclose the existence of the Will was concealment of a material fact and thus the application herein is merited.

7. The Applicants argue that the Respondent has a grudge against them due to the separation with his wife. They submitted that the fact that the Respondent stated that he would give his children their inheritance if they apologised to him showed that he obtained the Grant herein out of malice and to punish the Applicants over his marital issues. The Applicants further argue that as grandchildren of the deceased, they are her dependants within the meaning of Section 29 of the Law of Succession Act having been provided for by the deceased.

8. To buttress their submissions, the Applicants cited several authorities and prayed that their application be allowed.

### The Respondents Case

9. In his Replying Affidavit sworn on 24.9.14, the Respondent claims that in the year 2004, the Applicants' mother who is his estranged wife, together with their younger son, went to his mother's home with a suspicious copy of a Will purportedly written by his mother bequeathing her property to her and their children. He claims that his late mother told his aunt that she wanted him to administer her estate as her only son. A fact he claims his said aunt confirmed. The Respondent further claims that he followed due process when he petitioned and obtained the Grant of Letters of Administration. That his children who were then staying with him did not object to the same.

10. The Respondent further claims that the Applicants are under the influence of their mother who gave them the Will and that the purported Will is a forgery. He claims that the Will was attested to by the chief of Taveta location who was his estranged wife's lover and that the second witness was the chief's friend. He states that the two witnesses were not friends of the deceased and that the chief was particularly an enemy of the deceased due to his affair with his estranged wife. He urged the Court to dismiss the Summons herein as they are baseless and designed to

11. In his testimony, the Respondent concedes that the Applicants are all his children. He further states that he separated with the Applicants' mother in July 1986.

12. In his submissions, the Respondent urged the Court to reject the Will of the deceased for several reasons. He argues that the Applicants are being instigated by their mother who was chased away for engaging in a sexual relationship with the Chief who testified on behalf of the Applicants. He further argues that the Will of the deceased is a forgery as the purported witnesses to the Will were not independent and competent as required by Section 11 of the Law of Succession Act. He claimed that the said witnesses could not see eye to eye with the deceased and that they never even attended her burial. That in fact the evidence of the Chief should not be relied on as he was the one who led to the breakdown of his marriage to the Applicants' mother. That the second witness to the Will was never called to testify.

13. The Respondent further submitted that the Will must have been obtained by fraud, coercion and duress. This, the Respondent argues, is born out of the fact that the Will was made shortly before the death of the deceased who had previously made her intentions known to several persons including the Respondent's aunt. He submitted that the Will should be declared void as provided for under section 7 of the Law of Succession Act.

14. The Respondent submits that the original Will was never produced in Court as evidence and that none of the Applicants testified in Court that there was a Will left in their favour. He further argues that there was no authority filed of the other Applicants showing that they had authorised the deponent of the Affidavit in support of the Summons to swear the same on their behalf. He further submits that there is no evidence on record that the other Applicants are even aware of the matter herein.

15. The Respondent submits that there being no valid Will, he lawfully obtained Grant of Letters of Administration intestate and the same was confirmed vesting the estate on him being the only son of the deceased. He argues that it is the sale of one of the properties forming the estate of the deceased that prompted the Applicants to file the Summons herein. The Respondent submits that the Summons herein has been brought in bad faith as he has not breached any of the duties provided under Sections 83 and 84 of the Act. He further argues that the Summons herein does not meet any of the conditions set out in Section 86 of the Act and prays that the same be dismissed. It is his argument that the Applicants ought to have filed an application under Section 26 of the Act for provision as dependants if they

16. The Respondent further argues that there was inordinate delay in the filing of the Summons herein. The Grant was issued on 28.3.08 and the Summons was filed on 12.8.14 and no explanation has been proffered for the delay of more than ten years.

17. The Respondent cited several authorities to buttress his submissions and urged the Court to dismiss the Summons for Revocation of Grant.

#### Determination

18. I have considered the depositions and submissions in support of and in opposition to the Summons for Revocation of Grant. I have also considered the authorities cited by both parties in support of their respective positions. The Applicants claim that the Respondents applied for a Grant of Letters of Administration fraudulently by the concealment from the court of something material to the case *to wit* that the deceased died testate having left a Will. The Respondent has rejected the Will claiming it was a fraud and urged the Court to dismiss the Summons for Revocation of Grant. From the foregoing, the issues that have emerged for determination are:

- i. Whether there was inordinate delay in filing the Summons herein?
- ii. Whether the Grant herein was obtained fraudulently by the concealment from the court that the deceased left a Will;
- iii. Whether the Will was valid

19. The Applicants relied on the case of Eunita Anyango Geko & Another v. Philip Obungu Orinda [2013] eKLR to support their position. Unlike in the instant case, the Respondent in that decision had no beneficial interest in the estate of the deceased and had represented himself as the only son of the deceased yet he was a grandson. The authority is therefore of little relevance to the matter herein.

20. On the claim of inordinate delay, Section 76(b) of the Law of Succession Act provides

***“ 76 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) ...***

**(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)...**

21. Although the Summons herein was filed on 12.8.14, six years after the Grant was issued on 28.3.08, and ten years after the demise of the deceased on 24.12.04, the law is clear that a “grant of representation, whether or not confirmed, may AT ANY TIME be revoked or annulled ...” (emphasis mine). There is therefore no limitation as to the time for filing summons for revocation of Grant. The law does not even provide that a party must explain any delay in seeking revocation of a grant. Consequently, this Court makes nothing of the fact that the Summons herein was filed 8 years after the grant was issued.

22. The Applicants claim that the Grant herein was obtained fraudulently by the concealment from the court that the deceased left a Will. The Respondent does not in his affidavit, testimony or submissions deny the existence of the Will. He however disputes the validity of the Will. In A.S. & 2 Others v S.A.M. [2014] eKLR, Muriithi J in revoking the Grant of Probate therein stated

***“The Court is entitled on its own motion and, in this case justified by the applicants’ summons for the revocation of the grant herein, to revoke the Grant where the conditions set out in section 76 of the Law of Succession Act exist.”***

23. The Respondent claims that the Will is a fraud because firstly, the witnesses thereto were not competent as required by Section 11 of the Act which provides

***11. No written Will shall be valid unless—***

***(a) the testator has signed or affixed his mark to the Will, or it has been signed by some other person in the presence and by the direction of the testator;***

***(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will;***

***(c) the Will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.***

24. The Respondent submitted that the two attesting witnesses of the Will were incompetent in that one, the Chief had an affair with his wife, the Applicants’ mother and was responsible for the breakdown of his marriage. He further claimed that the second witness was the Chief’s friend and that they both did not see eye to eye with the deceased and did not even attend her burial. The Respondent submitted that if this Court were to accept the Will then it would be “sanctioning a nullity as the said “Will” was not only not properly attested as one of the witnesses was having a love affair with the Respondent’s wife.” No evidence of bad blood between the deceased and the attesting witnesses was adduced. Secondly, other than his mere statement, the Respondent did not adduce any evidence to prove his allegation of a love affair between his estranged wife and the Chief. The failure of the attesting witnesses to attend the deceased testator’s funeral cannot in any way invalidate a will. The Respondents then cited the case of Macharia v. Jerusha Wanjiku CA No. 8 of 1997. With respect, the cited case is of no relevance to the instant case.

25. Section 3 of the Act defines a competent witness as “a person of sound mind and full age”. The Respondent failed to adduce any evidence to show that the two persons who attested the Will of the deceased were either of unsound mind or not of full age. The Will was attested by two competent

witnesses as required by law, a fact which the Respondent acknowledges. The failure by the second attesting witness to testify in Court does not in invalidate the Will of the deceased.

26. The Respondent submits that the Will must have been obtained by fraud, coercion and duress as it was made shortly before the death of the deceased testator who had previously made her intentions known to some people including to the Respondent's aunt. The Respondent urges the Court to declare the Will void as provided by Section 7 of the Act. The said section provides

***A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.***

27. A look at the Will shows that it was made on 20.8.03 while the deceased died on 24.12.04 a year and four months after. This is by no means a short period. Even if it were true that the Will was made shortly before the death of the deceased, which it was not, for the Will to be declared void, evidence must be adduced to show the taking away of the free agency of the deceased in making the Will. The onus was on the Respondent to prove the alleged fraud, coercion or duress but he failed to demonstrate to the satisfaction of this Court that the deceased was at the time of making the Will not acting as a free agent. There was nothing in the Respondent's evidence or submissions to suggest or to cast doubt on the mental capacity of the deceased testator to make the Will. The Respondent failed to discharge the burden placed on him by Section 5(4) of the Act of proving that the deceased testator lacked the requisite mental capacity to make the Will.

28. The Respondent claims that the deceased testator had previously made her intentions known to some people including to his aunt. However, the alleged people and aunt of the Respondent remain unnamed and were not called as witnesses. Further, even if the deceased testator had made her intentions known as claimed, the same were superseded by the written Will.

29. The Respondent submits that the original Will was never produced in evidence. However, the record contains the original Will which was produced by Chief Kastrungi Mungwana as Pexb1 when he testified before Court on 27.10.14. The said Kastrungi Mungwana is the person who wrote the Will for the deceased and attested the same.

30. In their Application, the Applicants have also prayed that the Respondent provides accounts of the properties and income of the estate since the demise of the deceased. The Respondent on his part has submitted that the deceased's estate was vested upon him as provided for under Section 79 of the Act. He claims that the Summons herein is prompted by the fact that he sold a property of the estate. It is his case however that he sold the property in exercise of the power vested upon him by Section 82 of the Act.

31. This Court agrees with the Respondent that the estate of the deceased was vested in him as administrator thereof in terms of Section 79 of the Act which provides

***“79. The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative”.***

32. On the Respondent's claim that he sold a property of the estate in exercise of his powers under Section 82 of the Act, this Court disagrees. Section 82 provides *inter alia* as follows:

***“82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—***

***a) ...***

***b) to sell or otherwise turn to account, so far as seems necessary or desirable in the***

*execution of their duties, all or any part of the assets vested in them, as they think best:*

***Provided that—***

***i) ...***

***ii) no immovable property shall be sold before confirmation of the grant;”***

33. The proviso to Section 82(b) clearly states that no immoveable property shall be sold before confirmation of the grant. From the record, the grant herein is yet to be confirmed. Consequently, the said sale of the property of the estate by the Respondent was done in contravention of the law and in breach of his fiduciary duty as administrator. The Respondent must therefore give account as required by Section 83(h) of the Act which provides

***83 Personal representatives shall have the following duties-***

***(h) to produce to the court, if required by the court, either of 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 a full and accurate account of all dealings therewith up to the date of the account;***

34. In view of the foregoing, this Court finds that the Will meets the requirements of the law. There is nothing in the evidence to show that the Will of the deceased was made through fraud, coercion or under duress. I therefore accept the Will of the deceased made on 20.8.03 as a valid Will. This being the position, it follows that the intestate proceedings herein were defective in substance as the Grant was obtained fraudulently by the making of a false statement that the deceased died intestate and by the concealment from the Court of something material to the case *to wit* that the deceased left a valid Will. Given that the conditions set out in section 76 of the Act do exist herein, the Grant must be revoked.

35. In the circumstances, I allow the Summons for Revocation of Grant and make the following orders:

- a) The Grant of Letters of Administration for the estate of Margaret Mshai Juma issued to Jackson Ngoda Jumwa on 26.3.08 be and is hereby revoked.
- b) The Respondent do produce to the Court a full and accurate account of all dealings of the assets and liabilities of the deceased up to the date of the account within 60 days of the date hereof.
- c) Costs in the cause.

**DATED, SIGNED and DELIVERED in MOMBASA this 24<sup>th</sup> day of March, 2016.**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicants**

..... **for the Respondent**

..... **Court Assistant**