



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.968 OF 2011**

**IN THE MATTER OF THE ESTATE OF LEONIDA BUSHURU MUHOLO – DECEASED**

**AND**

**ELIZABETH ATEMO OMUHOLO ..... PETITIONER/RESPONDENT**

**VERSUS**

**WILLIS NERIMA MUHOLO**

**alias WILLIS JOHN OMUHOLO ..... OBJECTOR/APPLICANT**

**RULING**

1. By summons dated 23<sup>rd</sup> February 2015, **Wills Nerima Muholo alias Willis John Omuholo**, (the objector) sought revocation of Grant of representation made on 24<sup>th</sup> July 2012 and confirmed on 17<sup>th</sup> September 2013 and issuance of a new grant to him.
2. The grounds on which the application for revocation was made were that the grant herein was obtained by means of fraud and untrue facts, that the objector was not involved in the proceedings and that his consent was not sought or obtained. The objector says that the petitioner failed to disclose to the court that Parcel Number LR 37/242/25 was owned jointly between the deceased herein and the objector but was made to appear as though it was wholly owned by the deceased. The objector also says that his signature on the petition for grant of representation was not sought since he was not aware of the succession proceedings being undertaken.
3. Summons for revocation is supported by an affidavit by the objector sworn on 23<sup>rd</sup> February 2015. The objector says he is son to the deceased and brother to Elizabeth Atemo Omuholo, the first petitioner herein, but was unaware of the petition for grant of representation until December, 2014 when he received a letter from a firm of Advocates drawing his attention to the existence of the grant. The objector denies having signed any of the documents in the petition or summons for confirmation. The objector further deposes that he and the deceased became joint owners of the property the subject of these succession proceedings on 14<sup>th</sup> September 1998 and took issue with his sister for failure to disclose that the property was not wholly owned by the deceased but was subject to a joint tenancy.
4. The objector further deposes that by virtue of being a joint tenant, the confirmation of Grant in the manner it was done, dispossesses him of his interest in the land. That, according to the objector, is a non-disclosure of material facts to the court which warrants revocation of the Grant. When summons for confirmation came up for hearing, Mr Fwaya appealed for the objector but the 1<sup>st</sup> petitioner was absent. On ascertaining that the 1<sup>st</sup> petitioner had been duly served, the court allowed hearing or summons for

revocation of Grant to proceed.

5. Mr Fwaya, learned counsel for the objector, urged the summons and pleaded with the court to allow the same. He submitted that the 1<sup>st</sup> petitioner did not inform the objector that she was taking out succession proceedings in respect of their mother's estate and that the objector was all along unaware that a grant of representation had been made. Counsel therefore prayed that the grant be revoked, the certificate of confirmation set aside and a new grant be issued in the objector's name alone.

6. I have considered the summons for revocation, affidavit in support and the annexures thereto. I have also perused the record herein and considered the same. The deceased was mother to the two parties herein who are sister and brother and both of whom are administrators of her estate pursuant to a grant issued to them.

7. According to the petition, (form P8A 80), the petitioners were **Elizabeth Atemo Omuholo** and **Willis Nerima Omuholo**. The petition is signed by Elizabeth but not by Willis. Willis does not seem to have signed any of the forms accompanying the petition but that notwithstanding, a grant of representation was made in their joint names on 20<sup>th</sup> July 2012 and issued on 24<sup>th</sup> July 2012. The property forming the estate was named as LR Nairobi/37/242/25.

8. Summons for confirmation of that Grant was filed on 3<sup>rd</sup> March, 2013 and once again only signed by the 1<sup>st</sup> petitioner Elizabeth. The property was to be shared equally between Elizabeth and Willis. Summons for confirmation came up for hearing on 17<sup>th</sup> September, 2013 before Dulu J and Elizabeth informed the Court that the objector was aware that summons for confirmation were coming up for hearing but did not know where he (Willis) had been held up. The court allowed the application the result being that the land was to be shared equally between the two. A certificate of confirmation was issued on 20<sup>th</sup> September, 2013 to that effect.

9. The objector has applied for revocation of that Grant saying it was obtained fraudulently and without his knowledge. The objector says that he was not aware that proceedings had been initiated for purposes of taking out a grant of representation. From the record, it is clear that he did not sign any of the documents and the only reason he has offered is that he was not aware. And although Elizabeth was served, she did not attend court or respond to the summons for revocation of Grant.

10. There is no dispute that the parties herein are sister and brother, Sons and daughter of the deceased. Under section 66 of the Law of Succession Act, Cap 160, laws of Kenya, (the Act) both parties herein are equal in priority to taking out a grant of representation to the estate of their deceased mother. Both are listed as petitioners for a grant of representation and indeed a grant was issued to both of them as administrators.

11. Under **section 76** of the Act, this Court has power to revoke a grant of representation where the grant was obtained fraudulently or by concealing from the court of something material to the case, or if the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertent.

12. The applicant has accused the 1<sup>st</sup> petitioner of obtaining the grant fraudulently without informing him. However, the applicant is one of those listed as petitioners and a grant was issued to the two. When the 1<sup>st</sup> petition came to court, for hearing of summons for confirmation, she informed the court that the applicant was aware of the proceedings and summons for confirmation, although the objector denies being aware of the petition.

13. In my view, the fact that the two are administrators of their mother's estate, cannot be said to have been fraudulent and given that the court allowed the petition to be processed even though it was not signed by the applicant, cannot be blamed on the 1<sup>st</sup> petitioner. It is not easy to say at this stage whether the applicant was or was not aware of proceedings herein. In any case what is of most importance is full disclosure and equity and in this case the two were to benefit from the estate of the deceased. I do not

therefore see good reason for revoking the grant and I am unable to fault the 1<sup>st</sup> petitioner given that she did not purport to sign the petition on behalf of the objector.

14. The applicant has also faulted the 1<sup>st</sup> petitioner for listing the property and proceeding as though it wholly belonged to the deceased. In my respectful view, this was done in ignorance and can be addressed by setting aside the certificate of confirmation of Grant so that that issue can be addressed afresh. The objector is raising a legal issue which many ordinary Kenyans may not appreciate without the benefit of legal advise.

15. For the above reasons, I am of the view that both the applicant and respondent should remain as administrators in this cause until the issue of the estate of the deceased is fully addressed.

16. The objector has further sought an order cancelling registration of LR No. NAIROBI/37/242/25 in the names of the objector and the respondent. I have perused the documents and title attached to the summons for revocation of Grant but could not see such an entry if at all a transfer was effected pursuant to the certificate of confirmation of Grant. As it is, I am not sure whether the transfer was indeed effected.

17. Be that as it may, summons for revocation of Grant partially succeed and I make the following orders:

1) The order made on 17/9/2013 confirming the Grant of representation to the estate of the late **Leonida Bushuru Muholo** is hereby set aside and the certificate of confirmation of Grant issued on 20<sup>th</sup> September 2013 pursuant to that order cancelled.

2) Any transfer of Parcel Number Nairobi/37/242/25 in the names of **Elizabeth Atemo Omuholo** and **Willis Nerima Muholo** pursuant to the certificate of confirmation dated 20<sup>th</sup> September, 2013 is hereby cancelled and the property reverts in the names of **Leonida Bushuru Muholo** and **Willis Nerima Muholo** as joint tenants.

3) The administrators or anyone of them do file fresh summons for confirmation of Grant and serve the other party without delay.

4) Costs be in the cause.

**Dated and delivered at Kakamega this 16<sup>th</sup> day of March, 2016.**

**E.C. MWITA**

**JUDGE**