



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**SUCCESSION CAUSE NO.34 OF 2007**  
**IN THE MATTER OF THE ESTATE OF**  
**ASITAI MABEGE MOGAKA – DECEASED**

**JOSEPH MOSWAGI MABEYA                    -   -    PETITIONER/RESPONDENT**

**VERSUS**

**ALFRED GICHANA MABEYA AND 4 OTHERS - OBJECTORS/APPLICANTS**

**RULING**

1. The Objectors/applicants filed the application dated 10<sup>th</sup> June, 2009 by way of Notice of Motion brought under **Sections 29 and 76 of the Law of Succession Act** and **Section 3 of the Civil Procedure Act** seeking the following orders:
  1. **The Honorable court be pleased to revoke and/or nullify Grant letters of Administration intestate issued on the 25<sup>th</sup> day of July, 2007 the Petitioner/Respondent.**
  2. **That costs of this application be borne by the Respondent/Petitioner.**
  3. **Such further and/or other orders be made as the court may deem just and expedient.**
2. The application is supported by the grounds on the body of the Notice of Motion application which were stated as follows:
  - a. **That the Respondent/Petitioner has sworn falsely an affidavit as the deceased died leaving eight (8) sons surviving him.**
  - b. **The letters of administration intestate were obtained fraudulently by making false statement and concealment from the court of something material to the case.**
  - c. **The interests of the Objectors/Applicants as sons of the deceased herein were totally ignored and omitted.**
3. The said application was also supported by the affidavit of ALFRED GICHANA MABEYA, the

first objector herein in which he deposed that the petitioner, in conjunction with their area chief gave false information to the court to the effect that the deceased was survived by only 2 sons and six daughters thereby leaving out other rightful beneficiaries who were also entitled to benefit from the deceased's estate.

4. He has also further deposed that the petitioner has embarked on transferring the estate of the deceased to third parties even before the grant issued to him is confirmed which grant he obtained secretly without the knowledge or consent of all the beneficiaries. The applicant exhibited copies of certificates of official search and green cards as annexures to the affidavit in support of the application to demonstrate that he petitioner had transferred the deceased land parcel **No. West Kitutu/Mwakibagendi/1099** to a third party one John Ogowo Mokaya.
5. The application is opposed by the petitioner/respondent through a replying affidavit sworn on 23<sup>rd</sup> June, 2009 in which the petitioner has stated that the application is defective and should be struck out.
6. When the application came up for hearing before me on 14<sup>th</sup> October, 2015, Mr. Soire counsel for the petitioner and Mr. Bosire counsel for the objectors agreed that parties would canvass their arguments by way of written submissions.
7. The objectors filed their submission on 9<sup>th</sup> February, 2016 in which they reiterated that the grant was obtained fraudulently by concealment of material facts from the court. In this regard, the objectors stated that the petitioner deliberately left out some of the beneficiaries from the succession case. The objectors contend that the petitioner has fraudulently and unlawfully transferred the property of the deceased to a third party.
8. The petitioner filed his submissions on 29<sup>th</sup> January, 2016 in which he stated that the applicants' application was defective as it was not filed under the right heading, format, Sections and Rules of the Law of Succession Act and Probate and Administration Rules. The Petitioner cited the case of **In Re Estate of Murimi (deceased) (2002) 2KLR 158** in which an application for revocation of grant was disallowed for failure to comply with the format provided in form 107.
9. The petitioner further argued that the application was defective since it was brought under Section 3A of the Civil Procedure Act and by way of Notice of Motion instead of summons for Revocation and Annulment of Grant. According to the petitioner, section 3A is not one of the sections listed under Rule 63 of the Probate and Administration Rules as the provisions of the Civil Procedure Rules or act that are applicable in succession matters.
10. Lastly, the petitioner submitted that one of the properties of the estate being **West Kitutu/Mwakibagendi/1099** had already been transferred to a third party and therefore in line with Section 93 Law of Succession Act, the revocation of the grant would not affect such a transfer.
11. I have considered the application, the response by the petitioner and the written submissions filed by the parties.
12. The petitioner has taken issue with the format used in the applications and the sections under which it has been brought. On the format and the sections, I note that the objector cited Section 76 of the Law of Succession 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 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.”**

13. It is my finding that the applicant cited the right section of the law when filing this application. However, even if the right section and format had not been used by the applicant, that defect alone cannot defeat the application as that would be a procedural technicality that does not affect the substance of the case.

14. **Article 159 (2) (d)** of the Constitution mandates this court to administer justice without undue regard to procedural technicalities.

15. On the merits of the application, I find that the petitioner deliberately concealed from the court, the true identity of all the beneficiaries when applying for grant of letters of administration and he has further gone ahead to transfer the estate of the deceased even before the confirmation of the grant. The petitioner cannot seek cover under the provisions of **Section 93 of the law of Succession Act** to say that the revocation of grant will serve no useful purpose because that section is only applicable where a transfer has been effected to a third party after the confirmation of grant.

16. The said **Section 93** of the Law of Succession Act states as follows:

**“93. Validity of transfer not affected by revocation of representation**

- 1. All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.**
- 2. A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.”**

17. Furthermore, I note that form P & A 5 which the applicant filed when seeking the grant listed the properties of the deceased as; **LR.NO. W. Kitutu/M|wakibagendi/1197** and **LR. No. W.**

- Kitutu/Mwakibagendi/1099.** In this regard, therefore, even if the court was to hold that one parcel of land had already lawfully changed hands, which is not the case, there would still be the one property left to be distributed among the rightful heirs after the revocation of grant.
18. In the end, I find that the applicants have made out a case and satisfied the conditions for revocation and/or annulment of grant. Consequently, I allow the application dated 10<sup>th</sup> June, 2009 and order that the grant issued to the petitioner on 25<sup>th</sup> July, 2007 is hereby revoked and in its place a fresh grant is issued in the joint names of the petitioner and the first objector **ALFRED GICHANA MABEYA.**
19. The Land parcels belonging to the deceased being **LR. NO. West Kitutu/Mwakibangendi/1197** and **West Kitutu/Mwakibangendi/1099** shall revert back to the names of the deceased to await distribution by this court during the confirmation of grant. The third party to whom **L. R. No. West Kitutu/Mwakibagendi/1099** had been transferred will be at liberty to register his claim as a purchaser during the said confirmation of the grant.
20. The petitioner shall bear the costs of this application.

**Dated, signed and delivered in open court this 19<sup>th</sup> day of April, 2016**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

Mr. Nyagesoa for Soire for the Petitioner and the 1<sup>st</sup> Objector

Mr. Sagwe for the Objector

Omwoyo: court clerk