



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 1299 OF 2012**

**IN THE MATTER OF THE ESTATE OF THE LATE JOHN NYAGA NYOKO-DECEASED**

**JOSEPH MUHORO NYAGA & 4 OTHERS .....APPLICANTS**

**VERSUS**

**PETERSON GITHU GATHINGU.....RESPONDENT**

**RULING**

**Charles Nyoko Nyaga & four others** (herein after referred to as the applicants) have applied to this court seeking to have the grant of letters of administration issued to **Peterson Githu Gathingu** on 27<sup>th</sup> May 2013 revoked on grounds that the same was obtained by means of untrue allegations, that the applicants came to learn that the Respondent had obtained a grant after a dispute erupted relating to rental collection from **Othaya/Kihugiru/561/122/L**, that the beneficiaries of the deceased appeared before the local chief on 10<sup>th</sup> October 2012 where the **Esther Waigumo Nyaga** and **Alfonza Wakonyo** the widows of the deceased were proposed as the administrators, a position confirmed by the letter from the chief filed in these proceedings. The applicants also disputed that their father left a will, hence the grant was obtained by means of untrue allegations.

The Respondent did not give oral evidence but opted to rely on the replying affidavit dated 11<sup>th</sup> February 2015 in which he insists that the deceased left behind a will which was deposited with his advocates and that the applicants knew about these proceedings, that he is not a beneficiary of the estate and that he does not stand to gain anything from the estate.

I have carefully considered the oral and affidavit evidence and submissions by both counsels and also the relevant law and in my view, the issue for determination is whether the applicants have demonstrated sufficient grounds for the revocation of the grant as provided for under Section 76 of the Law of Succession Act<sup>[1]</sup> which provides that:-

*A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an 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 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 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.*

The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all the above grounds. A close look at Section 76 shows that the grounds can be divided into three categories:- the first two deal mainly with the propriety of the grant making process; the other grounds deal mainly with mal-administration i.e personal representatives have not been effective in administration. The third ground is where the grant has become useless and inoperative through subsequent circumstances.

The proceedings to obtain a grant are considered defective in substance under several circumstances. For example where there is a will, which is the basis of the petition, and the same is found to be invalid. [2] In the present case the applicants case is that they were not aware of the existence of the will and insist that they attended a meeting before the chief on 10<sup>th</sup> October 2012 and the issue of the existence of the said will was not raised at all and the letter from the chief filed in court clearly shows that the family had nominated the two widows of the deceased to be the administrators of the deceased's estate. Clearly, whether or not the deceased left behind a will is a serious issue which needs to be determined after a full trial. Also, the court will need to address itself to the question why the issue of the will was never raised at the said meeting if at all it existed and why the family proposed the two widows as administrators if at all there was a will in existence.

In the matter of the state of *Mwaura Mutungi alias Mwaura Gichichio Mbura alias Mwaura Mbura-deceased*[3] a grant was revoked because the applicant had failed to notify the applicant of the petition and obtain his consent. In the present case, the applicants state that they were never notified when these proceedings were filed nor was their consent sought. Similarly, In *the matter of the Estate of Karanja Gikonyo Mwaniki-deceased*[4] the proceedings were declared to be defective and the grant was revoked.

The Supreme Court of India in *Anil Behari Ghosh vs SMT. Latika Bla Dassi & Others*[5] interpreting their equivalent of Section 76 (a) had this to say:-

*"the expression "defective in substance" ....means that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings"*

A grant can also be revoked on account of false statements and concealment of vital matters or on grounds that the applicant deceived the court as was held in *Samuel Wafula Wasike vs Hudson Simiyu Wafula*. [6]

A grant obtained fraudulently by the making of a false statement can also be revoked by the court. In *the matter of the Estate of Robert Napunyi Wangila*[7] the sister of the deceased applied for and obtained letters of administration. She did not disclose in her petition that the deceased had died testate and that a grant of probate had already been issued to the executors. Her grant was revoked on application by the executors.

In *the matter of the Estate of Murathe Mwaria-deceased*[8] **Koome J** summarised the grounds for revocation of a grant under Section 76 as follows:-

- i. when the procedure followed in obtaining the grant is defective in substance.
- ii. when the grant is obtained fraudulently by making a false statement.
- iii. making an untrue allegation of fact essential in point of law to justify the grant.
- iv. or when the person who has the grant has failed to proceed diligently with the administration of the estate.

Under Section 76, the court has discretionary power when faced with application for revocation. It can make such orders as it considers fit in the circumstances. The court is not bound to issue revocation even where the case has been set out under Section 76. In *Kipkurgat arap Chepsior and Others vs Kisugut arap Chepsior*,<sup>[9]</sup> the court declined to grant the prayer for revocation, but instead entered the names of the applicants in the grant as beneficiaries. In *the matter of the estate of Jonathan Mutua Misi-deceased*<sup>[10]</sup> the applicant sought revocation on grounds that it had been obtained on false statements. He was a son of the deceased and his name had been omitted from the list of survivors and instead of ordering a revocation, the court directed that his name be included in the list.

Turning to the facts of this case I find that the family herein appeared before the chief, that the issue of the existence of the will was not discussed at all before the chief and two administrators were agreed upon by the family and appointed and the letter from the chief stated so clearly. The two widows were to petition for the grant. The assertion by the applicants that they were not aware of these proceedings is in my view unchallenged and I find that the proceedings were initiated without their knowledge or consent. My conclusion is that the proceedings leading to the issuance of the grant are defective in substance and that material information was not disclosed to the court in that had the court been made aware that two persons had been chosen as administrators, it would have hesitated to issue the grant. I am persuaded that the applicant concealed crucial and relevant information to the court.

A grant whether confirmed or not can be revoked on the grounds enumerated under Section 76 of the Act. I find that the applicants have established sufficient grounds for the court to annul or revoke the grant as provided under section 76 of the Act.

Accordingly, I hereby allow the application dated 12<sup>th</sup> May 2014 and order that the grant of letters of administration issued on 27<sup>th</sup> May 2014 to **Peterson Githu Gathingu** be and is hereby revoked.

The Respondent shall pay the costs of this application to the applicants.

Right of appeal 30 days

**Signed, Delivered and Dated at Nyeri this 26<sup>th</sup> day of July 2016**

**John M. Mativo**

**Judge**

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[1] Cap 160, Laws of Kenya

[2] See *Mwathi vs Mwathi & Another* {1995-1998} 1 EA 229

[3] NBI HC Succ No 935 of 2003

[4] Nakuru Mic 245 of 1988

[\[5\]](#) {1955} AIR 566, [1955} SCR (2) 270

[\[6\]](#) CA No 161 of 1993

[\[7\]](#) HC SUCC No 2203 OF 1999

[\[8\]](#)

[\[9\]](#) CA No. 24 of 1991

[\[10\]](#) HC P & A 95 of 1995