



**REPUBLIC OF KENYA**

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

**SUCCESSION NO. 456 OF 2011**

**IN THE MATTER OF THE ESTATE OF THE LATE NAUMI MBENEKA MBINDO**

**MARTIN MUNGUTI MWONGA .....APPLICANT**

**VERSUS**

**DAMARIS KATUMBI MUTUKU .....RESPONDENT**

**RULING**

1. The deceased to whose Estate the proceedings herein relate is Naomi Mbeneka Mbindo, who died on 15.6.10 at the Taveta District Hospital. From the record, Damaris Katumbi Mutuku the Respondent herein, obtained a Grant of Letters of Administration in respect of the estate of the deceased on 24.9.12. In her affidavit in support of the Petition for Grant, the Respondent claimed that the deceased was survived by herself, a daughter. In her affidavit in support of her Summons for Confirmation of Grant sworn on 3.4.13, the Respondent averred that the deceased left no other survivors other than herself. The entire estate of the deceased devolved to the Respondent as the sole beneficiary vide the Certificate of Confirmation of Grant dated 24.6.13.

2. The Application before me dated 4.11.15 is a Summons for Revocation of the said Grant brought under Section 76 of the Law of Succession Act. The Applicant, Martin Munguti Mwonga seeks stay of the execution or implementation of the Grant confirmed on 24.6.13. He further seeks revocation of the said Grant.

3. The Application is premised on the grounds that the Grant was obtained by concealment of material facts and through the making of false and untrue allegations of fact. The Applicant avers in his Affidavit sworn on 4.11.15 that the Respondent and his late father David Munguti Mbindyo were the only children of the deceased. That his father died on 26.5.86 as per the death certificate annexed to his affidavit. That the Respondent failed to disclose this fact to the Court when obtaining the Grant of Letters of Administration.

4. The Respondent in her Grounds of Opposition dated 30.11.15 and filed on even date opposes the Application. The Respondent claims that the Applicant lacks locus standi, being neither a beneficiary nor executor of the estate. That she followed due process in obtaining the grant and the application is therefore frivolous, vexatious and an abuse of the Court process. She further states that the application offends the provisions of Section 38 of the Law of Succession Act.

5. In his oral submissions, the Applicant states that no consent was given by any family members in the proceedings to obtain the Grant. That the Applicant did not include the names of the Respondent and his siblings as required by Section 51(2)(g) of the Law of Succession Act. The Applicant argues that his father being a son to the deceased and a sister to the Respondent was an heir to the deceased. That his

father's two wives and their children are entitled to his share of the deceased's estate.

6. In response, the Respondent stated that the Applicant's father had predeceased the deceased and therefore the Respondent was the only surviving child. According to the Respondent, Section 38 of the Law of Succession Act is clear in situations where a deceased dies without a spouse but leaves a child or children. That in the instant case, the deceased left one child, that is herself and that therefore the entire estate goes to her as the only surviving child of the deceased.

7. It was submitted for the Respondent that what was before the Court was not an application for provision by a dependant under Section 26 of the Act and even it was, it would have been time barred as such application ought to be made before confirmation of grant. It was further submitted that due process was followed and no objection was raised when the matter was advertised. The Respondent further argued that the Applicant lacks locus standi. On the issue of consent, it was argued that none was required, the Respondent being the only heir of the deceased. The Respondent urged the Court to dismiss the Application as it was vexatious and frivolous and misconceived.

8. I have carefully considered the Application, depositions and submissions in support of and in opposition to the Summons for Revocation of Grant.

9. The Applicant claims that the Respondents applied for a Grant of Letters of Administration fraudulently by the making of a false statement or by the concealment from the court of something material to the case *to wit* that the she was the only beneficiary of the estate of the deceased. She concealed from the Court the existence of her deceased brother's widows and children.

10. It is not disputed that the Respondent had a brother who had predeceased the deceased or that in fact he left a family. In deed the Respondent acknowledges that the Applicant is a son of her deceased brother. Section 51(2)(g) of the Law of Succession Act provides that an application for a grant of representation should include *inter alia*:

***“in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers, and sisters of the deceased, and of the children of any child of his or hers then deceased;”***

10. The Respondent failed in her application to include the names of the children of her deceased brother contrary to the requirements of Section 51(2)(g) of the Act.

11. 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) ...***

12. The averment by the Respondent in her Affidavit in support of her Petition for Grant of Letters of Administration herein that she is the only person who survived the deceased amounts to making a false statement. Further her failure to disclose to the Court that she had a brother who predeceased the deceased and was himself survived by widows and children amounts to concealment from the Court of something material to the case. This Court finds that not only was there concealment from the Court of something material to the case but there was also a false statement made by the Respondent that she was the only survivor of the deceased. To this extent therefore, the Grant to the Respondent herein was obtained fraudulently.

13. As stated earlier, the Respondent does not deny that the Applicant is a son of her late brother. What the Respondent disputes is that her brother's family is entitled to a share in the deceased's estate. Citing Section 38 of the Law of Succession Act, the Respondent argues that because her brother predeceased the deceased, his family is not entitled to the estate. That only such of the deceased's child or children who survived her are entitled to her estate. In this case, because only the Respondent survived the deceased, she argues that she alone is entitled to the deceased's estate. Section 38 which provides:

***“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”***

14. The provisions of Section 38 are not absolute but are subject to and must be read with Section 41 of the Act. Section 41 provides for the principle of representation where there is substitution of a grandchild for his or her parent in all cases of intestacy where the parent dies before the intestate as in the instant case. In re the Estate of Joseph Gichuki Riunge (Deceased) [2016] eKLR, Musyoka, J stated:

***“ However, should the child be survived by their own children, who would then be grandchildren of the dead parent, then it should be the children of the dead child, the grandchildren of the dead parent, who would be considered as the survivors of the parent of their own parent. That is the effect of section 41 of the Law of Succession Act. It is called the principle of representation: the surviving child of a dead child taking the share of their dead parent from estate of the dead child's parent”.***

15. The position argued by the Respondent manifests a misapprehension of the import of Section 38 of the Law of Succession Act. The Applicant and his siblings are entitled under the principle of representation under Section 41 of the Act to take their deceased father's share in the estate of the deceased.

16. It was further submitted that the Applicant, being neither a beneficiary nor executor lacks locus standi. Section 76 of the Law of Succession Act provides:

***“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-”***  
*(emphasis added).*

The Applicant is a grandson of the deceased whose father predeceased the deceased and therefore an interested party. As an interested party, the Applicant cannot be deemed to lack the capacity to make the application herein. I therefore find that he has the locus standi to make this Application by virtue of Section 41 of the Act.

17. On the issue of consent, the Applicant claims that the consent of family members was not sought when the application for Grant was made. In this regard, I agree that the Respondent was not obligated to seek the consent of the Applicant or of any other person. Reason being that Rule 26(1) and (2) of the Probate and Administration Rules provide:

***“26. (1) Letters of Administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.***

***(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by affidavit...”***

The Applicant herein being a grandson of the deceased is not entitled in the same degree or in priority with the Respondent, a daughter of the deceased, to apply for the grant. Consequently, the claim that consent was not obtained from him or his father's family does not hold water. The Respondent was not obligated to obtain the consent of a person entitled to a grant in a lesser degree than herself.

18. In view of the foregoing, I find that the Respondent obtained the Grant herein fraudulently by making a false statement and concealment from the Court of something material to the case. In the circumstances, I allow the Application and order that the Grant of Letters of Administration for the estate of Naomi Mbeneka Mbindo issued to Damaris Katumbi Mutuku on 24.9.12 and confirmed on 9.5.13 vide Certificate of Confirmation dated 24.6.13 be and is hereby revoked.

**DATED, SIGNED and DELIVERED in MOMBASA this 21<sup>st</sup> day of July, 2016**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

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

..... **Court Assistant**