

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 1042 OF 2012

IN THE MATTER OF THE ESTATE OF THE LATE WANJIKU MBIRU alias WANJIKU
NDEGWA-DECEASED

MERCY NJOKI IRUNGU.....
.....APPLICANT

VERSUS

LUCY WAMUYU
MARURU.....RESPONDENT

RULING

Mercy Njoki Irungu (herein after referred to as the applicant) seeks to have the grant of letters of administration issued to **Lucy Wamuyu Maruru** (hereinafter referred to as the Respondent) on 29th day of January 2013 and confirmed on 29th day of June 2015 annulled/revoked on grounds that the same was obtained fraudulently and/or that the grant was obtained by concealment of material facts aiming deliberately to acquire the applicants property, namely, title number **Loc.7/Gakoigo/783** which land she claims to be in occupation since 1990.

On 4th September 2012 the Respondent petitioned for the said grant stating that she was the grand-daughter of the deceased and named herself as the sole person surviving the deceased. She listed the above property as the only asset owned by the deceased. On record is a protest was filed by a one **Nelson Ngugi Mwangi** claiming to be a grandson of the deceased. The protestor listed other beneficiaries and stated that these proceedings were commenced without his knowledge and that he was not agreeable to the mode of distribution. The record shows the same day the grant was confirmed, the court revoked it after realizing that there was a protest.

The said protest was to be heard on 29th June 2015 and on the said date the protestor did not attend court and the court being satisfied that the protestor was duly served dismissed the protest and confirmed the grant.

Interestingly on the said date other persons/ beneficiaries though not named in the petition attended court and stated that they had no objection to the confirmation. These are listed as **Elizabeth Wamaita Mwangi**, a one **Wanjiku** described on record as wife to **Antony Macharia Mwangi** and **Rose Wairimu Mwangi**. Though the issue did not arise, there was no explanation as to why all of them were not listed in form **P & A 5** filed in court by the petitioner yet they were beneficiaries.

Essentially, the grounds raised by the applicant are *inter alia* that she was married to a **one Stephen Irungu Crispo** alias **Stephen Irungu Mungai** in 1990 and they lived in the above land which was being utilized by her husband's parents, that her husband died on 4th June 2002 and was buried on the said land, that her father in law a one **Chrispo Mungai Nganga** purchased one acre out of the said land from the deceased in these proceedings, that the agreed payments were effected, that the deceased herein died in 1971 and in 1974 her daughter a one **Njoki Mbiru** agreed to sell the remaining portion of the said land to her father in law who took possession. That the parties agreed that the said **Njoki Mbiru** would commence succession proceedings with the aim of effecting the transfer of the said land. The applicant

annexed copies of the sale agreements in support of the said transactions.

The applicant avers that the deceased herein was survived by her daughter a one **Njoki Mbiru** who died in 1977 and she was survived by the persons listed in paragraph **9 (c)** of the applicants affidavits among them a one **Simon Peter Marubu**-deceased who was the Respondents husband, hence the Respondent herein is a grand-daughter in law to the deceased herein and not a grand-daughter as stated in the petition. The applicant avers that the foregoing is the correct information and accuses the Respondent of making false statements and concealment of material facts to the court. The applicant avers that had the correct material been disclosed to the court as aforesaid, the court could have declined to issue the grant. The applicant accuses the Respondent of using the said grant to cause the suit premises to be transferred to herself, and she has since filed HCC ELC No. 29/2016, Nyeri seeking to evict the applicant from the said land she has occupied since 1990 as explained above.

In her Replying affidavit filed on 6th June 2016, the Respondent avers that the application is an afterthought seeking to defeat the above suit which she has filed seeking eviction orders. The Respondent states that the applicant is not a member of their family hence a stranger to the deceased's estate, that the application is fatally defective, lacks merit because the applicant lacks the *locus standi* to file the application, that she lacks the legal capacity to bring a claim on behalf of her deceased husband, that this court lacks jurisdiction since this claim relates to purchase of land, that this court has no jurisdiction to annul a title, that the application is abuse of court process.

In their written submissions, counsel for the applicants argued that the applicant is an interested party within the meaning of section **76** of The Law of Succession Act,^[1] that the grant was obtained by concealment of material facts in that she did not disclose the interests of the applicant and that had the applicant disclosed to the court that the land was sold over 40 years ago and that the purchaser took possession it would have reached a different conclusion and that this court has powers to annul the illegal transfer. Counsel cited the cases of *Bahdurali Ebrahim Shamji vs Alnoor Jamal & 2 Others*,^[2] *Estate of Christopher Jude Adela-Deceased*^[3] & *Nyaribari Gekone vs Peter Miyianda & Another*.^[4]

On 6th September 2016, I granted counsel for the Respondent **14 days within** which to file their submissions. As at the close of businesses on **20th September 2016**, no submissions had been filed. The Respondents however filed their submissions on 21st September 2016 after the expiry of the above period. No explanation was offered for the delay. The court will not condone such practice. Nevertheless, I have considered the said submissions in this ruling. In particular, I note that counsel for the Respondent in his submissions essentially reiterated the grounds in the replying affidavit summarized above, namely, that the applicant is a stranger to the estate and that her claim lies in a civil suit, that she lacks the legal capacity to institute these proceedings and that the court lacks jurisdiction to entertain this matter.

I have carefully considered the affidavit evidence by both parties and submissions by both counsels and also the relevant law and authorities and in my view, the issues for determination are **(i) whether or not the applicant has demonstrated sufficient grounds for court to revoke the grant as provided for under Section 76 of the Law of Succession Act**^[5] 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.

The above provision was construed by the court of appeal in the case of *Matheka and Another vs Matheka*^[6] where the court of appeal laid down the following guiding principles.

i. A grant may be revoked either by application by **an interested party** or **by the court on its own motion**.

ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.

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 a 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 the following categories:- the propriety of the grant making process; mal-administration or where the grant has become inoperative due to subsequent circumstances.

It is trite law that if a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that 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 inadvertently, such a grant can be revoked or annulled. The law permits the court to revoke a grant on its own motion or on application by an interested person.

The first issue to determine is whether the applicant is "an interested party" within the meaning of section 76 cited above and if so, whether she has the legal capacity to bring the application now under determination. As I determine the foregoing issue, it is important to bear in mind the provisions of section 47 of the Law of Succession Act^[7] which enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act^[8] and pronounce such decrees and make such orders therein as may be expedient. Further under Rule 73 of the Probate and Administration Rules it is provided that "*Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*"

It is a requirement that a party to a probate claim must have an "**interest**" in the estate. The foundation of title to be a party to a probate or administration action is "**interest**" - so that whenever it can be shown that it is competent to the Court to make a decree in a suit for probate or administration, or for the revocation of probate or of administration, which may affect the interest or possible interest of any person^[9] such person has a right to be a party to such a suit in the character either of plaintiff, defendant, protestor or intervener.^[10] The applicant herein states that she lives on the suit premises. On this ground alone, she is likely to be affected by any order, decree, or judgement passed in these proceedings touching on the land in question and in particular touching on the deceased's estate. The validity or otherwise of her claim including the capacity under which she claims can only be determined at the hearing of the dispute. To me, the applicant is an **interested person** within the meaning of section 76 cited above.

"**Interested person**" or "**person interested in an estate**" includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual or a person that has priority for appointment as personal representative; and a fiduciary representing an interested person. The Blacks' Law Dictionary^[11] defines "**interested party**" as a party who has a recognizable stake (and therefore standing) in a matter.

The applicant claims that she got married to a one **Stephen Irungu Crispo** alias **Stephen Irungu Mungai** in 1990 and lived with him on the suit premises. At the material time the land was being utilized by her husband's parents and since then she resided on the said land and brought up her children

on the said land and her late husband was buried on the same land. She has also given a brief history of how the land was purchased and annexed documents in support thereof. To me, though she has no letters of administration to her late husband's estate, or to the estate of her deceased father in law, the fact that she is in occupation and has been in occupation and has brought up her children there since 1990 and her husband is buried in the same premises raises valid legal questions as to the circumstances under which she came into occupation a scenario that effectively creates sufficient interest(s), hence she ought to have been involved at the time of petitioning for the grant and during the confirmation. At that point in time the nature of her interest (if any) would have been determined by the court including whether or not she has the legal capacity to raise her claim. In any event the Respondent has all along been aware of her occupation and her possible interest. Why didn't the Respondent involve her in the grant application process? My understanding is that she is entitled to challenge the manner in which the grant was obtained and as an **interested person** she is entitled to apply for its revocation so that she can be afforded an opportunity to ventilate her interest to the deceased's estate. I hold the view that by failing to involve her while filing the petition or seek her consent renders the proceedings defective in substance.

The judgment in *Randall vs Randal*^[12] makes it clear that the courts will adopt a very broad approach in assessing whether a person claiming interest has an interest in a deceased's estate, particularly where the person may have no other form of recourse to explore. It is a common law requirement for persons claiming interest to show they have an interest in the deceased's estate, an interest that is capable of being recognized by the law or an interest that gives them legal standing to bring the probate claim. All that the interested person is required to do is to state the nature of his interest in the deceased's estate. I find that the applicant has satisfied this requirement.

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 there was an **interested party** who had settled in the land peacefully and openly since 1990, it would have hesitated to issue the grant. I am persuaded that the applicant concealed this crucial information to the court.

The petition filed in court shows only the Respondent as the sole surviving beneficiary of the deceased. She described herself as a granddaughter to the deceased, but the applicant insists she is a grand-daughter in law, hence the description in the petition is incorrect. The letter from the chief filed together with the petition names other beneficiaries. The applicant correctly insists that the Respondent did not disclose all the beneficiaries. As observed above, some beneficiaries appeared at the confirmation stage and stated that they had no objection to the confirmation, though no explanation was offered as to why their names did not appear in the petition. No consent was obtaining from them at the time of filing the petition. To me the petition was filed contrary to **Rule 26** of the **Probate & Administration Rules** which states:-

“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 an affidavit of the applicant and such other evidence as the court may require”

Under Section 76 of the Law of Succession Act^[13] the court can on its own motion revoke a grant where there are sufficient grounds to do so. This is a proper case for the court to revoke the grant on its own motion under the foregoing section on account of the fact that the proceedings leading to the issuance of the grant were defective in substance. It matters not that some (not all) beneficiaries appeared later at the confirmation stage and stated that they had no objection to the confirmation process. The initial petition ought to have been accompanied by a consent as provided under Rule 26 of the Probate and Administration Rules.

The effect of failure to comply with Rule 26 of the Probate and Administration Rules was ably discussed by the court in *Al-Amin Abdulrehman Hatimy v Mohamed Abdulrehman Mohamed & another*^[14] where

the court held that the law of succession by virtue of Rule 26 requires that any application for issue of a Grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate.

It is also important for the court to address the question whether or not the above omission is an abuse of the court process. Abuse of court process connotes that the process of the court must be used properly, honestly and in good faith and the court will not allow its process to be used for oppression or a means of vexation. Due to the fact that all beneficiaries were not informed of the filing of this petition, and in view of the fact that the petitioner misrepresented to the court that she was the sole beneficiary, I find and hold that the grant herein was indeed obtained by concealment of material facts, namely the existence of other beneficiaries and also the interest of the applicant who is said to be occupying the suit premises and against whom an eviction order has been sought in a separate case filed in the ELC court. The petitioner did not act in good faith.

The Respondent knew at all material times that the applicant was in occupation. She secretly petitioned for the grant and armed with it she sued the Applicant seeking to evict her from the land. I find that by failing to inform the applicant at the time of filing these proceedings and also failing to disclose her interests to the court amounted to non-disclosure of material information. I hold the view that the applicant was under a legal duty to disclose to the court the applicants interest to the deceased's estate and leave it to the court to determine the dispute.

It is settled law that a person who approaches the Court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have a bearing on the adjudication of the issues raised in the case. In other words, he/she owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material facts within his/her knowledge or which he/she could have known by exercising diligence expected of a person of ordinary prudence. If he/she is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner*^[15] by Viscount Reading, Chief Justice of the Divisional Court.

Also in the case of *Brinks-Mat Ltd vs Elcombe*,^[16] it was held that a party is under a duty to disclose to the court all relevant information even if it is not to his or her advantage. I strongly hold the view that the Respondent was under a solemn duty to bring to the attention of the Court the interests of the applicant since she is already in occupation peacefully and as of right and the circumstances under which she came into occupation could be interrogated by the court and then the court would determine her interests if any.

The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the judge to know in dealing with the issues before the court. The duty of disclosure therefore applied not only to material facts known to her but also to any additional facts which she would have known if she had made inquiries. The question that inevitably follows is whether the non-disclosure was innocent, in the sense that the fact was not known to the Respondent or that its relevance was not perceived. Though innocence or relevance has not been cited by the Respondent, I find that the non disclosure in this case was not innocent at all but deliberate.

In the matter of the state of *Mwaura Mutungi alias Mwaura Gichichio Mbura alias Mwaura Mbura-deceased*^[17] 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 applicant states that she was never notified when these proceedings were filed nor was her consent sought. Similarly, In *the matter of the Estate of Karanja Gikonyo Mwaniki-deceased*^[18] the proceedings were declared to be defective and the grant was revoked under similar circumstances.

The Supreme Court of India in *Anil Behari Ghosh vs SMT. Latika Bla Dassi & Others*^[19] interpreting their equivalent of Section 76 of the Law of Succession Act^[20] 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*.^[21] As stated above, I find that there was deliberate non-disclosure of relevant materials.

A grant obtained fraudulently by the making of a false statement can also be revoked by the court as was held in *the matter of the Estate of Robert Napunyi Wangila*.^[22] In *the matter of the Estate of Murathe Mwaria-deceased*^[23] **Koome J** summarised the grounds for revocation of a grant under Section 76 as follows, *when the procedure followed in obtaining the grant is defective in substance, when the grant is obtained fraudulently by making a false statement, making an untrue allegation of fact essential in point of law to justify the grant and or when the person who has the grant has failed to proceed diligently with the administration of the estate.*

A grant whether confirmed or not can be revoked on the grounds enumerated under Section 76 of the Act which I find have been proved in this case. I find that the applicant has 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 19th April 2016 and order that the grant of letters of administration issued on **29th January 2013** to **Lucy Wamuyu Marubu** and confirmed on **29th day of June 2015** be and is hereby revoked.

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

Right of appeal 30 days

Signed, Delivered and Dated at Nyeri this 22nd day of September 2016

John M. Mativo

Judge

[1] Cap 160, Laws of Kenya

[2]{1998}eKLR

[3] {2009}eKLR

[4] {2015}eKLR

[5] Cap 160, Laws of Kenya

[6] {2005} 2KLR 455

[7] Cap 160 Laws of Kenya

[8] Ibid

[9] See *Kipping and Barlow v. Ash*, 1 Roberts. 270; 4 N. Cas. 11; *Crispin v. Doglioni*, 2 S. & T. 17; 29 L.J. 130

[10] Dr Tristram, "The Contentious Practice of the High Court of Justice in respect of Probates & Administrations" (1st ed 1881), at p 80:

[11] Eight Edition, Thomson West

[12] {2016} EWCA Civ 494

[13] Supra

[14] {2013} eKLR

[15] {1917} 1 KB 486

[16] {1988} 3 ALL ER 188

[17] NBI HC Succ No 935 of 2003

[18] Nakuru Mic 245 of 1988

[19] {1955} AIR 566, [1955} SCR (2) 270

[20] Supra

[21] CA No 161 of 1993

[22] HC SUCC No 2203 OF 1999

[23]