



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**P&A CAUSE NO.14 OF 2010**  
**IN THE MATTER OF THE ESTATE OF VUSU MUNYORE - DECEASED**  
**AINEA SWEGENYI.....APPLICANT**  
**AND**  
**ESTHER MUSILIBI MUSENI.....RESPONDENT**

**RULING**

1. Before Court is summons for revocation of Grant dated 8th January, 2010 and filed on the same day. It is brought under *section 76* of the laws of Succession Act. By that summons **Ainea Swegenyi** (the 1st petitioner) sought revocation of Grant of representation made by Senior Resident Magistrate Court at Vihiga on 30th January 2009. The grounds relied on are that the grant was obtained fraudulently, by making of a false statement or by concealing from court something material to the case, and that the Grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant. In essence, the 1st petitioner is relying on **section 76(b) and (c)** of the Act.

2. The summons is supported by an affidavit sworn on the same day by the **1st petitioner**. He deposed that the 2nd petitioner made a false statement that she was daughter of the deceased, that there was forged thumb print purporting to be that of the 1<sup>st</sup> petitioner, an unknown person had been included as a purchaser of a portion of the deceased's estate which was not true, that the 2nd petitioner concealed the fact that the deceased left behind a widow, that the 2nd petitioner left out other beneficiaries; that the 2nd petitioner and her late husband intermeddled with the deceased's estate, and that the 2nd petitioner has no right over the deceased's estate. The 2nd petitioner filed a replying affidavit which does not show when it was sworn and where denying the allegations levelled against her by the 2nd petitioner.

3. On 15th June, 2011 the court gave directions that the dispute be resolved by way of oral evidence and matter proceeded as such.

PW1, **Esther Musilibi MMunyole**, testified that she is daughter-in-law to the deceased having been married to the deceased's son **Jairus Munyore Vusu** who is himself deceased. She told the court that she got married to Jairus in 1994 in a customary marriage and dowry paid. She was introduced to mother-in-law **Johnes Masitsa Vusu** and other relatives. Whereas her husband lived in Nairobi, she stayed at his home together with the 1<sup>st</sup> petitioner who is older than her late husband. The witness told the court that when her husband died in 2004 he was buried at Hamisi, his rural home, on the land the subject of this cause.

According to the witness before her father died, he had shared out the land between his wives, **Rispah Khamuya** (the first petitioner's mother) and **Johnes Masitsa**, (her late husband's mother). Her late husband sold a portion to a purchaser. The land on the ground is well demarcated showing portions for the two houses of the respective petitioners. She therefore denied the allegations that she was not married to Jairus before he died.

4. In cross examination, the witness told the court that she got married to Jairus and dowry paid but that they never got children with her late husband. The witness testified that the petition was filed at Vihiga court before the 1st petitioner applied to revoke the grant.

She testified that the deceased had left the following children from the first house:

- 1) **Ainear**
- 2) **Harun**
- 3) **Eilane - deceased but left children**
- 4) **Esnas**
- 5) **Martha**

The second house had the following children;

**Jairus**

**Rose and Jane.**

The witness admitted that when she filed the petition at Vihiga she omitted some names which she had forgotten. She also admitted that she never got consent from the beneficiaries. She admitted that her husband sold part of the land before the petition for a grant of representation had been filed but did not know how much was paid to her late husband.

5. **PW2, Liner Ongayo Kome**, an Assistant Chief of **Kavunduyi** sub-location in Vihiga County told the court **Jairus Munyore Vusu** (now deceased) and Ainea Swesenyi are brothers and sons of the **late Munyore -Vusu**. The witness further told the court that she knew that the 2nd petitioner herein is widow to Jairus.

According to the witness, she wrote a letter dated 6th April, 2010 (PEX1) confirming that position because the petitioners and the late Jairus and his father were residents of her area. She therefore confirmed that **Esther Musimbiis** widow to Jairus who was a brother to Ainea.

6. **PW3, Fred Kirunga Adalla**, a private surveyor, told the court that he received instructions from Esther Musilibi Musini to visit Parcel Number **Tiriki/Hamis/A/343** which was registered in the name of **Vusu Munyole**. His duty was to determine how the parcel was occupied on the ground. He visited the land and established that there were physical boundaries on the land marked by plants used to demarcate land. The land was divided into three clear portions. The people he found in occupation were;

1. **Ainea Swegenyi Gusu who occupied 1.87 HA**
2. **Esther Musini who occupied 0.43 HA and**
3. **Jason Indiga Bilimu who occupied 0.24 HA.**

The witness told the court that he received information from the Area chief that there were other people interested in the land that is Harun Munyone, Wycliffe Ilaini and Gusu Ilaini who is son to Wycliffe

Ilaini. The witness told the court that he prepared a sketch plan which he produced as PEx3.

7. **PW4, Jason Indiga Bulimu** told the court that he knows Ainea Swegenyi as a brother to the late Jairus and that both are sons of the deceased herein. The witness testified that he purchased a portion of one acre land from the late Jairus Munyore on 29th September, 2003 and paid a deposit. He paid the balance by instalment. He took possession of the portion and is correctly in occupation. He produced a sale agreement dated 29th September, 2003 as PEx4. He further told the court that Esther Musibili is widow to Jairus, a son to the deceased herein.

8. Although the date was taken by consent, the 1st petitioner was absent so was his counsel. There was no evidence tendered on the part of the 1st petitioner/applicant hence it is the 2nd petitioner's evidence that forms the basis for determination of the summons for revocation.

9. I have considered the summons for revocation, the evidence as well as perused the record.

**Section 76** of the Act where appropriate provides:

***"A Grant of representation whether or not confirmed may at anytime be revoked or annulled if the court decides either on application by any interested party or of 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.* (emphasis)**

10. The court as powers to annul or revoke a grant of representation if there are justifiable grounds and most importantly if there is evidence that the grant was obtained fraudulently or by concealing material facts from the court. The other ground would be if the petitioner made some untrue allegations of fact to aid him/her in obtaining the grant where, without those allegations, the grant would probably not have been made.

11. According to the 2nd petitioner, the deceased had two wives. She is widow to Jairus Munyore (now deceased) who was son to the deceased herein and one of the widows. The first petitioner is also the deceased's son from another house. The 2nd petitioner is therefore a daughter-in-law to the deceased. She stands in her late husband's position in the estate of the deceased and is therefore a beneficiary of that estate.

12. The 1st petitioner alleged that the 2nd petitioner is not wife (widow) to his step brother *Jarius*, but did not attend court to adduce evidence to prove his allegation. As it is, and on the basis of the evidence by the 2nd petitioner and her witnesses, she is widow to Jairus therefore a beneficiary to the deceased's estate on account of her relation to Jairus. That fact has not been disproved and the 1st petitioner's allegation that she is not widow to Jairus is without foundation or merit.

13. I have perused the petition and noted that the 2nd petitioner described herself as a daughter to the deceased. That description in my view, was so fundamental an error as to attend the petition. The fact that she is a daughter-in-law is enough to entitle her as a beneficiary of the estate. This did not amount to fraud or to making allegations that aided her in obtaining the grant.

14. The second issue raised by the 1st petitioner is that he did not sign the petition. The petition was thumb printed by both petitioners. Having failed to adduce evidence and demonstrate to the court that he did not sign the petition, I do not find this allegation proved. Furthermore, I note that several beneficiaries were disclosed and if one or two names were omitted, such an omission is excusable and there is no

evidence that it was deliberate. The 2nd petitioner said she forgot those names which is human. She cannot be unduly blamed. For that reason, I do not think there is evidence that the 2nd petitioner concealed from the court a material fact that would persuade the court to revoke or annul the grant. For a party to succeed under *section 76* of the Act, there must be evidence the proceedings to obtain the grant were defective in substance, or the grant was obtained fraudulently by making false statement of something material to the case, or that the grant was obtained by means of untrue allegation of fact essential in point of law. See *Matheka and Another v Matheka* [2005] I KLR. The petitioners are beneficiaries of the deceased's estate. The 1st petitioner by virtue of being a son and the 2nd petitioner by virtue of being a daughter in law - widow to the deceased's son - their interests.

15. The applicant (1st petitioner) and the respondent (2nd petitioner) are administrators in this cause. The most important thing in my view would be distribution of the estate and not who between them should be the administrator given the relationship between the two petitioners. What this contest has therefore done is to delay conclusion of this cause which is regrettable.

16. Having considered the summons for revocation and the evidence on record, I am not satisfied that there are sufficient grounds to invoke *section 76* and revoke the grant of representation made on 30th January, 2009. Consequently, the summons for revocation of Grant dated 8th January, 2010 is dismissed with costs.

17. Since the grant was made by the principal magistrate's court at Vihiga, the lower court's file be returned to that court to enable it determine summons for confirmation filed before it and dated 4th November, 2009.

Orders accordingly.

Dated and delivered at Kakamega this 31st day of October, 2016.

**E.C. MWITA**

**JUDGE**