



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 196 OF 2005

**IN THE MATTER OF THE ESTATE OF THE LATE WAHOME MWENJE NGONORO-
DECEASED**

Priscicah Muthoni Wahome.....1st Applicant

Beatrice Nyokabi Gathuri.....2nd Applicants

vs

John Mwenje Wahome.....Respondent

RULING

Priscicah Muthoni Wahome and **Beatrice Nyokabi Gathuri** (herein after referred to as the applicants) seek to revoke the grant of letters of administration issued to **John Mwenje Wahome** (hereinafter referred to as the Respondent) on grounds that the proceedings leading to the issuance of the grant were defective in substance and that the grant was obtained fraudulently and by concealment of material facts.

The applicants case is that the deceased had three wives and children, that the Respondent failed to disclose to the court that **L.R. No. Aguthi/Gititu/323** comprising of the deceased's estate had been partitioned into three by the clan and each house is utilizing its portion, that the Respondent lied that he was not able to obtain a letter from the chief because he knew the chief would disclose the truth, that the applicants were not served with the court papers, that the Respondent failed to obtain the consent of the beneficiaries as required and further that the Respondent failed to disclose the survivors of the deceased in the P&A 5 form. A look at form P & A 5 filed in court shows that the applicants names are missing. The grant was confirmed and the Respondent was given the entire parcel of described in the confirmed grant as parcel number **Aguthi/Gatitu/196**. However, this was rectified by way of an oral application consented to by both counsels to read **Aguthi/Gatitu/323** which is the correct title number. Attached to the applicants' affidavit is a letter from the chief dated 7th July 2010 listing the deceased's three wives and children.

On record is an affidavit sworn by the Respondent sworn on 29th May 2007 in which he averred the chief refused and or was unable to give him a letter confirming the beneficiaries. In the P & A 5 filed in court on 8th June 2005, the Respondent did not disclose all the beneficiaries of the deceased nor did he include the surviving widow of the deceased who is the first applicant herein. Also on record are citations taken out by the Respondent curiously for service upon himself and a one **Ngatia Wahome**. In an affidavit of service filed on 5th April 2007, the process server purports to have served the said citations upon the citees among them the Respondent who had taken out the citations "*ironically*" to cite himself and another person.

The Respondent applied for confirmation of the grant on 20th April 2009 and proposed that the above land be transferred to him. He did not disclose all the beneficiaries in the affidavit in support of the petition. There is a consent purported to have been signed by only four persons even though those were not the only surviving children of the deceased.

In his Replying affidavit filed on 3rd March 2011, the Respondent admits that the deceased was polygamous but averred that the deceased gave a gift *inter vivos* to the first and third houses being land at Ng'arua. He also averred that the deceased gave some shares of land in Gatarakwa to the third wife which she opted to sell.

He further averred that title number **L.R. No. Aguthi/Gititu/323** was given to him by the deceased in appreciation of his "*generosity in helping him during his life time*" and that he planted some coffee on the said land. He denied that he obtained the grant fraudulently. Details of the alleged generosity were not provided.

In yet another Replying affidavit filed on 15th September 2014, the Respondent denied that he concealed that the deceased was polygamous, that all the parties were aware of this case, that he has no intention of moving his step mother from the land, that the applicants land is in Laikipia and that the same was bought through the efforts of the deceased.

The first applicant filed a further affidavit on 25th November 2015 in which she averred *inter alia* that she is the surviving widow of the deceased, that she is about 100 years old, that she has no children of her own but she adopted a son by the name **Peter Kamau Wangunu**, a son to her co-applicant who is heir to her estate.

At the hearing the first applicant stated that she was the deceased's wife, that the deceased had three wives, namely, **Tabiha Wangui Wahome**-deceased, **Nyakiriga Wahome**-deceased and herself . She stated that the first and second wives had children as listed in paragraph **3 (a)** of the affidavit in support of the revocation of grant but herself she had no children, but she had adopted her sisters son **Peter Kamau Wanguno** who will inherit her share.

The applicants called one witness, namely **John Ndirangu Wamithi** who adopted his statement filed on 25th November 2015 in which he states *inter alia* that the deceased divided his land in 1980's into three equal portions among his three wives and each wife took possession of her portion.

The second applicant **Beatrice Nyokabi Gathuri** essentially relied on the affidavit in support of the application. She was married to **Daniel Gathuri Wahome**-deceased, a son to the first wife of the deceased in these proceedings. She stated that the deceased in this case divided his land into three before he died among his three wives and each wife had a portion of her own. She also stated that she was present when the deceased divided the land. She prayed that the court orders that the land be divided as the deceased had done. She also complained that she was not notified when these proceedings were filed and that she only learnt from the chief. She insisted that she bought the land at Ngarua with her husband and that it is not true that they were given the said land by the deceased in this case. She asked for the grant to be revoked.

The Respondents testimony was that he notified the protestors at the time of filing these proceedings, that he called them at the chiefs place. He insisted that the deceased had given him the land and added that the deceased bought land for the protestors at Ngarua and that his mother was given the land at Gatarakwa. He also alleged that the first applicant sold her land together with the deceased. He denied that the deceased divided the land during his life time and insisted that the land was divided after the deceased's death. He also insisted that **Peter Kamau Wangunu** is a stranger to him and was not a member of their family.

I have carefully considered the affidavit and oral evidence by both parties and also the relevant law and authorities and in my view, the issues for determination are **(i) whether or not the applicants have**

demonstrated sufficient grounds for court to revoke the grant as provided for under Section 76 of the Law of Succession Act[1] 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*[2] 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 evidently deliberate failure by the Respondent to involve the applicants at the time of filing these proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in view in bad faith and amounts to concealment of material facts. 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 were other beneficiaries who were interested in the deceased's estate, the court would have hesitated to issue the grant. The applicant did not disclose that the deceased's widow lives in the same land, hence she was not only a lawful beneficiary but a person interested and entitled to benefit from the deceased estate. Further, the omission to disclose her presence and interests was bound to adversely affect her interests. I am persuaded that the Respondent concealed crucial information to the court, information which could have influenced the court in issuing the grant to him.

No consent was obtained from the applicants 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^[3] 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. The petition ought to have been accompanied by a consent as provided under Rule 26 of the Probate and Administration Rules signed by all the beneficiaries of the appropriate renunciation or in the alternative a renunciation duly signed as required.

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*^[4] 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 Respondent misrepresented to the court that he 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. The petitioner did not act in good faith an act which amounts to abuse of court proces.

The Respondent knew at all material times that the first applicant was in occupation. He admitted this in court when he said he has no intention of evicting her. He secretly petitioned for the grant but failed to involve her. I find that by failing to inform her 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*^[5] by Viscount Reading, Chief Justice of the Divisional Court.

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 him but also to any additional facts which he would have known if he 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*^[6] 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 states 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*[7] the proceedings were declared to be defective and the grant was revoked under similar circumstances.

The expression "**defective in substance**" has judicially been defined to mean a defect of such a character as to substantially affect the regularity and correctness of the previous proceeding.[8]

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.[9] 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.[10] **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.[11]

I have carefully evaluated the Respondents' claim that the deceased gave him the entire land prior to his death because of "*his generosity to him.*" No convincing evidence was submitted to show that the deceased gave the land to the Respondent and excluded his last wife who lives on the land up to now. Further, no convincing evidence was tendered to show that the deceased bought land for the any of his wife's at Ngarua as alleged. I find the evidence of the second applicant reasonably persuasive that she bought the land at Ngarua together with her late husband. I am also persuaded that the land in dispute on the ground is divided into three portions and that the first applicant still occupies her position, the Respondent occupies the position that was allocated to his late mother. Thus, I find sufficient evidence has been tendered to demonstrate that the deceased divided his land into three during his life time. The evidence of **John Ndirangu** was convincing in this regard.

The first applicant stated that she never had a child of her own and that she adopted her sisters son a one **Peter Kamau Wangunu** who lives with her and takes care of her and that she has made up her mind that she will give her share to him. To me, this appears to be the cause of the problem, since the Respondent views the adopted son as an outsider and he is openly opposed to him inheriting the said portion. Unfortunately for him, I hold the view that the first Respondent has a right to decide who will inherit her estate and despite her advanced age, she firmly reiterated this position. This court not only respects her choice, but finds nothing illegal in the said choice which has been exercised freely, voluntarily and for a good reason, namely, her own good since the adopted son takes care of her during this hour of great need when she is aged almost 100 years. She has decided to reward her adopted son who takes care of her in her advanced her. The court will uphold her wishes.

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 20th July 2010 and order that as follows:-

- i. **That** the grant of letters of administration issued on **18th July 2008** to **John Mwenje Wahome** and confirmed on **27th day of November 2019** be and is hereby revoked.
- ii. **That** a fresh grant of letters of administration be and is hereby issued and confirmed to **John Mwenje Wahome, Prisciah Muthoni Wahome** and **Beatrice Nyokabi Gathuri**.
- iii. **That** title number **Aguthi/Gititu/323** be divided into **three equal portions** to be shared as follows:-
 - a. One portion to be allocated to **Prisciah Muthoni Wahome** to own absolutely.

b. One portion to be held by **Beatrice Nyokabi Gathuri** to hold in trust for herself and the children/family of **Wangui Wahome**-deceased.

c. One portion to be held by **John Mwenje Wahome** to hold in trust for himself and the children/family of **Nyakariga Wahome**-deceased.

iv. **That** the three administrations are further ordered to sign such documents as are necessary to facilitate the sub-division and transfer of the said portions as herein above ordered **within 60 days** from the date of this ruling and to avail such documents as may be required to effect the said sub-division and transfer and further in default by either or them to comply as herein above ordered, then the Deputy Registrar of this court shall at the request of either party execute such documents as may be required to effect the said sub-division and transfer.

v. **That** in the event either of them fails to avail such documents as may be necessary to effect the said sub-division and transfer including production of the original title, then the Land Registrar Nyeri is hereby directed to dispense with the production of the original title or any such said documents that may not be availed and effect the said sub-division and transfer to the beneficiaries the absence of such documents notwithstanding.

vi. **That** the Respondent shall pay the costs of this case.

Right of appeal 30 days

Signed, Delivered and Dated at Nyeri this 24th day of October 2016

John M. Mativo

Judge

[1] Cap 160, Laws of Kenya

[2] {2005} 2KLR 455

[3] Supra

[4] {2013} eKLR

[5] {1917} 1 KB 486

[6] NBI HC Succ No 935 of 2003

[7] Nakuru Mic 245 of 1988

[8] Behari Ghosh vs SMT. Latika Bla Dassi & Others {1955} AIR 566, [1955] SCR (2) 270

[9] See Samuel Wafula Wasike vs Hudson Simiyu Wafula, CA No 161 of 1993

[10] In the matter of the Estate of Robert Napunyi Wangila, HC SUCC No 2203 OF 1999

[11] In the matter of the Estate of Murathe Mwaria-deceased