



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 269 OF 2005

**IN THE MATTER OF THE ESTATE OF THE LATE JOSPHAT MURUGA GITICHE-
DECEASED**

LEAH WAIRIMU MURUGA & 8 OTHERS..... APPLICANTS

VERSUS

SAMUEL MWANGI MAINA.....RESPONDENTS

RULING

I note from the court record that this matter has been in court since 2005, a fairly long time which to me is unacceptable. A protest by the applicants herein was heard and determined and the grant confirmed to the Respondent. The applicants being dissatisfied with the said decision appealed to the court of appeal. Unfortunately for them their appeal was dismissed for non attendance. Having lost the appeal as aforesaid, the applicants filed the application now the subject of this ruling seeking to have the grant revoked under the provisions of section 76 of the Law of Succession Act.[\[1\]](#)

In order to put everything into proper perspective, I find it necessary to briefly enumerate the history of this case and the various steps taken by the parties as far as it is relevant for the determination of the application now the subject of this ruling.

Josphat Muruga Gitiche (herein after referred to as the deceased) died intestate on 20th June 2000. On 16th June 2005 **Samuel Mwangi Maina**, claiming to be a creditor to the deceased's estate (hereinafter referred to as the Respondent) filed a petition for letters of administration intestate to the deceased's estate. Also, the record shows that on 16th August 2005 the Respondent took out citations for service upon the applicants herein who filed an entry of appearance to the citation on 15th September 2005.

On 21st June 2006, the Respondent applied for the said appearance to be struck off for failing to take further steps. The record does not show whether the said application was heard and determined.

The grant was issued to the Respondent on 22nd January 2007 and on 15th January 2008 the Respondent applied for the grant to be confirmed and proposed that title number **Muhito/ Gatuira/669** be registered in the name of **Leah Wairimu** to hold in trust for her children and that half interest in plot number **3**, Kiahungu Market to be registered in his name.

On 8th February 2008, **Festus Kabarur Muruga** filed an affidavit of protest on his own behalf and on behalf of the applicants herein stating *inter alia* that the Respondent is a stranger to the deceased's estate, that the above plot was the subject of a court dispute and that the said suit had abated.

The Respondent filed a further affidavit on 18th April 2008 and averred that whereas he himself was substituted in place of his deceased father in the civil suit referred to, the applicants herein deliberately refused to be substituted in place of the deceased, hence he filed these proceedings as a creditor after their refusal.

Festus Kabaru Muruga filed a further affidavit in which he averred *inter alia* that the search exhibited by the applicant reflected the deceased and the applicants father as the proprietors and that this court was being invited to distribute a disputed property.

The protest was heard and on 5th June 2008 Makhandia J (as he then was) in a detailed decision confirmed the grant and ordered distribution as proposed by the Respondent. The protestors dissatisfied with the said decision appealed to the court of, but on 23rd May 2013 the Court of appeal dismissed their appeal for non-attendance. The court of appeal in its ruling noted that the protestors had been given thirty days to apply for substitution in the said appeal but failed to do so.

Having lost in the court of appeal as stated above, on 6th October 2009, the applicants applied for the revocation of the said grant under section 76 of the Law of Succession Act^[2] on grounds that the grant was obtained fraudulently by concealment of material facts from the court, that is, the Respondent failed to disclose to the court that he had instituted succession cause number 2610 of 1995 in which he claimed half share of the plot in question and that he failed to disclose to the court that he had already caused himself to be registered as owner of half share of the said plot. The applicants further alleged that the grant was obtained fraudulently by making false statements and concealment of material facts and by means of untrue allegation of facts and further that the proceedings were defective in substance.

The Respondent filed a Replying affidavit on 9th November 2009 and averred that the application for revocation was not brought in good faith, that he issued citations to the applicants to petition for the grant but they failed to do so hence he petitioned for the grant. He also stated that after being served with citations, the applicants engaged an advocate who filed an entry of appearance to citation, that the applicants were served with summons for confirmation of the grant (and they filed affidavits of protest), hence at all material times the applicants were aware of these proceedings.

There is a further affidavit in support of the summons for the revocation sworn by **Alfred Wambugu Muruga** stating that the deponent in the application for revocation is unable to testify and reiterating the grounds relied upon in support of the application.

At the hearing of the application, **Alfred Wambugu Muruga** testified that he sought to have the grant revoked because the Respondent is not a son to the deceased, that the disputed plot was registered in his father's name alone, that the Respondent's father had no interest in the plot, that he was aware that the Respondent obtained temporary grant for the deceased's estate and changed the plot into his name, that there was a dispute in court between the deceased and the Respondent's father touching on the plot. He insisted that the grant was obtained without their knowledge.

The Respondent testified that there was a dispute between the deceased and his father over the plot in question, and that his own father died in 1995 during the pendency of the case, that he applied to be substituted in the case in place of his late father and proceeded with the case but the deceased herein also died before the suit was concluded. He unsuccessfully asked the deceased's wife to join the case but she refused. His advocate advised him to file succession case for the deceased's estate, and he issued citations to the applicants who filed an entry of appearance. He stated that he filed the cause as a creditor, obtained the grant and applied for confirmation and asked for half share of the plot. The applicants filed an affidavit of protest and the matter was heard and judgement rendered. He insisted that the applicants were represented by an advocate in the case.

Counsel for the applicants submitted that the summons for confirmation has merits and urged the court to allow it while the Respondent's counsel submitted that the application is an abuse of the court process and dismiss it.

I have carefully considered the oral and 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 applicants have demonstrated sufficient grounds for court to revoke the grant as provided for under Section 76 of the Law of Succession Act[3].**

It is important for me to point out that the Respondent took out citations, served the applicants, that the applicants filed an appearance through an advocate and after the Respondent applied for the confirmation of the grant, the Respondents filed a protest that was heard and a decision rendered by Makhandia J (as he then was) and dissatisfied with the said decision the applicants filed an appeal to the court of appeal. Their appeal was dismissed for non attendance as stated earlier. In my view, the applicants hope was in the said appeal which was dismissed in which they had the legal avenue of challenging the high court's decision. Since their appeal was dismissed as aforesaid, they cannot turn round and seek to invoke the provisions of section 76 of the act. In light of the above circumstances, the application before me has absolutely no merits and to me it is gross abuse of judicial processes.

Nevertheless, I will proceed to consider the merits of the application. It is alleged that the Respondent is a stranger to the estate. The relevant provision is section 66 of the Law of Succession Act[4] which provides as follows:-

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- (a) surviving spouse or spouses, with or without association of other beneficiaries;*
- (b) surviving spouse or spouses, with or without association of other beneficiaries;*
- (c) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*
- (c) the public trustee; and*
- (d) creditors provided.....*

The Respondent petitioned as a creditor to the deceased's estate as provided under the above section. This was after issuing citations to the Respondents who failed to petition for the grant. To me, the petition was properly brought to court as provided under the above section. Accordingly, the proceedings to obtain the grant cannot be said to be defective in substance. The Supreme Court of India in *Anil Behari Ghosh vs SMT. Latika Bla Dassi & Others*[5] interpreting their equivalent of Section 76 of the Law of Succession Act[6] 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"

I find nothing in the proceedings before me to show that the proceedings were substantially defective so as to affect the regularity and correctness of the proceedings.

Section 76 of the act 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*^[7] 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.

I find nothing to show that the grant as obtained by concealment of material facts. The Respondent served citations. The applicants filed affidavits of protest and the protest was heard and even appealed against the decision. The applicants were aware of these proceedings at all material times and having participated in the proceedings as protestors and having unsuccessfully appealed to the court of appeal, they cannot now turn round and claim that they were not aware of the proceedings. There is absolutely nothing to show that the Respondent concealed any material facts from the court.

Accordingly, I find that the application dated 20th September 2009 has no merits and I hereby dismiss it with costs to the Respondent.

Right of appeal 30 days

Dated at Nyeri this 24th day of **November** 2016

John M. Mativo

Judge

Delivered at Nyeri this 24th day of **November** 2016

Hon. Justice Ngairus Ngaah

Judge

[1] Cap 160, Laws of Kenya

[2] Cap 160, Laws of Kenya

[3] Cap 160, Laws of Kenya

[4] Cap 160, Laws of Kenya

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

[6] Supra

[7] {2005} 2KLR 455