



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 313 OF 2014**

**IN THE MATTER OF THE ESTATE OF NKIUNGA KIRICHU NCEBERE (DECEASED)**

**ALOISE KIRIGIA KIUNGA.....PETITIONER/RESPONDENT**

**VERSUS**

**KENDI KIUNGA.....APPLICANT/INTERESTED PARTY**

**RULING**

**No consent sought**

[1] I am considering a Summons for Revocation/Annulment of Grant brought pursuant to Section 76 and Rule 73 of the Probate and Administration Rules of the Law of Succession Act CAP 160 of the Laws of Kenya. In the application, the Applicant seeks the following orders:

- 1. THAT this honourable court to be pleased to revoke and/or annul the Confirmed Grant herein obtained on 18<sup>th</sup> May 2015.**
- 2. THAT costs of this Application be borne by the Petitioner.**

All the other orders sought therein are now spent.

[2] The application is grounded upon the affidavit of the Applicant and grounds set out in the application. The predominant grounds are two-fold inter alia; (1) that the Grant was obtained fraudulently by making of a false statement; and (2) that no consent was obtained from the Applicant herein as provided by the law. The Applicant amplified her case by arguing that, although she was a daughter of the deceased, it had come to her knowledge that the Petitioner had applied for and had the Grant confirmed without her involvement. She insisted that this was done despite the fact that she had neither denounced her right to apply for administration nor given her consent towards distribution of her father's estate. According to her, the Petitioner had not made a disclosure of her existence and had acquired all the estate to the exclusion of all others including the Applicant.

[3] The Applicant also submitted that under Section 76 of the Law of Succession Act, this Grant of representation should be annulled/ revoked as it was issued by concealment of a material element in that the Applicant was not disclosed as a heir and that her consent was not obtained. Consequently the Applicant asked the court to allow the Application.

**Application was opposed**

[4] The Petitioner filed Grounds of Opposition and a Replying Affidavit on 25<sup>th</sup> September 2015, where the Petitioner contended inter alia that the interested party did not apply for leave to be enjoined in the case and that the Application was misconceived and a non-starter. She submitted that the estate of the deceased was shared amongst all the beneficiaries before the death of the deceased and that filing of the Succession Cause was consented to by all the beneficiaries leave alone the interested party who was not present during the Confirmation as she was away on maternity leave. She also submitted that the interested party being the daughter of the deceased has a right to inherit the deceased estate which she was given as per the will and wishes of the deceased. Consequently the Petitioner urged the court to dismiss the application with costs.

## **DETERMINATION**

[5] Upon carefully consideration of this Application; the authorities relied upon by the Applicant and the rival submissions by the parties, I am of this orientation. This application has been brought inter alia pursuant to Section 76 of the Law of Succession Act CAP 160 of the Laws of Kenya, and considering the arguments presented before me, I think the most apt grounds which the Applicant should establish are that;

***(a) The proceedings to obtain the grant were defective in substance;***

***(b) 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; and***

***(c) 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.***

[6] The Applicant has argued that she was a daughter of the deceased. This fact was not contested and was admitted by the Petitioner in her submission. The Applicant contended that she did not consent to the filing of this Succession Cause. The Petitioner on the other hand asserted that all the beneficiaries had consented to the filing of this cause. Here I must resort to the record. I have carefully perused the affidavit filed on 7<sup>th</sup> April 2015 in support of the Summons for Confirmation of Grant. The name of the Applicant is missing in the list of the beneficiaries named in paragraph 2 thereof. Again, the Petitioner in paragraph 5 of thereof, allocated the entire estate to herself. That is not all; the name of the Applicant is missing from the consent form filed in court on 7<sup>th</sup> April 2015. When all these factors are taken together, the only logical inference is that the Applicant was neither consulted in, nor gave her consent prior to the filing of this Succession Cause. Such omissions are substantial; they are concealment of material information which renders the grant issued in such circumstances amenable to outright revocation. See what was held in the case of **SAMUEL WAFULA WASIKE vs. HUDSON SIMIYU WAFULA CA NO.161 OF 1993** (Kwach, Omolo and Tunoi JJA) that:-

***“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”***

[7] An interesting submission by the Petitioner; that the deceased estate had been shared among all the beneficiaries prior to his death. No evidence was tendered to support these quite substantive assertions. Similarly, the Petitioner alluded to a will that had been allegedly made by the deceased prior to his demise. Again the alleged will was not produced for the benefit of the court. In the end result and having come to the above conclusion, I do hold and find that the Grant herein was obtained without the Applicant's consent. Consequently, I do hold and find the Application dated 23<sup>rd</sup> June 2016 to be meritorious and I accordingly allow it. As the Petitioner admitted in her submissions that the Applicant is a daughter of the deceased and alluded to some Will of the deceased in which he expressed his wishes and through which the Applicant was given her inheritance, I direct the Petitioner to provide the said alleged Will within 14 days of today. The court will thereafter delve into the appointment of the personal representative of the estate herein. As this is a succession matter between members of one family, I direct that each party shall bear own costs.

Dated, signed and delivered in open court at Meru this 22<sup>nd</sup> day of November 2016

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

M/s. Njengah advocate for Mr. Mwanzia advocate for interested party

Petitioner present

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**F. GIKONYO**

**JUDGE**