



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**SUCCESSION CAUSE NO. 51 OF 2014**  
**IN THE MATTER OF THE ESTATE OF**  
**NATHAN ABER SUMBA (DECEASED)**

**BETWEEN**

**MUSA OLUOCH ABER ..... APPLICANT**

**AND**

**MARGARET ONYANGO OGEMBO ..... 1<sup>ST</sup> RESPONDENT**

**THE BOARD OF GOVERNORS,**

**HON. OTIENO KAJWANG GERA HIGH SCHOOL..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant Musa Oluoch Aber has brought a summons for revocation of grant dated 3<sup>rd</sup> June 2014 to revoke the grant issued to Margaret Anyango Ogembo, the 1<sup>st</sup> respondent, on 19<sup>th</sup> June 2012 and confirmed on 18<sup>th</sup> February 2013 in ***Homa Bay PMCC Succession Cause No. 119 of 2012*** in respect of the estate of Nathaniel Aber Sumba who died on 17<sup>th</sup> April 2012. According to the certificate of confirmation, the property known as **KASGUNGA/KAMRERI/553** devolved to her wholly.
2. After the confirmation of grant, the 1<sup>st</sup> respondent proceeded to subdivide the said property into two portions. **Parcel No. 4344** and **4345**. She sold **Parcel No. 4345** measuring 7.58 Ha to the Ministry of Education, Science and Technology on behalf of Hon. Otieno Kajwang' Gera High School, the 2<sup>nd</sup> respondent, for the sum of Kshs.3,000,000/=. She retained the other portion, **Parcel No. 4344** measuring 2.06 Ha.
3. The essence of the application is that the grant of letters was obtained by fraud, concealment of material facts and/or deliberate misrepresentation. The facts upon which the grounds are based that the deceased had three wives; Susan Atieno Aber (deceased), Yunes Adhiambo Aber (deceased) and Margaret Anyango Ogembo, the 1<sup>st</sup> respondent. Susan Atieno Aber had four daughters and one son while Yunes Adhiambo had three daughters and two sons. Musa Oluoch Aber, the applicant is the son of the second wife. The 1<sup>st</sup> respondent did not have any children.
4. The 1<sup>st</sup> respondent does not dispute, the genealogy given by the applicant save that she

states that the deceased had already given land to the other two houses prior to his death and that she was entitled to the said property. She also stated that the deceased had donated part of the land to the 1<sup>st</sup> respondent and that one Aber Migisi (deceased), on whose behalf, the deceased held a share of the property had also donated part of the land for development of the school.

5. It is clear from **Form P & A.5**, that the applicant did not disclose the other survivors of the deceased. Full disclosure is a mandatory requirement and it does not matter that the deceased made provision for the other survivors during his lifetime. To this requirement there are no exceptions. The information that should be carried in an application for grant is set out in **section 51(2)** of the **Law of Succession Act**. The relevant provision is **section 51(2)(g)** of the **Act** which states as follows:

*51(2) An application shall include information as to –*

*(g) in cases of total or partial intestacy, the names and addresses of all previous spouses, children, parents, brothers and sisters of the deceased and of the children of any child of his or hers then deceased;*

**Section 51(2)(g)** aforesaid should be read together with **Rule 7(1)(e)(i)** of the **Probate and Administration Rules** which states as follows:

*Where an applicant seeks a grant of representation to the estate of a deceased person ... the application shall be by a petition... containing... the following particulars-*

*(e) in cases of total or partial intestacy –*

*(i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39(1) of the Act.*

6. Furthermore, it is clear that the value the deceased's property was in excess of Kshs. 100,000/- which is the threshold for the jurisdiction of the subordinate court. This fact is confirmed that part of the property sold to the 2<sup>nd</sup> respondent was sold for Kshs. 3,000,000/=.

7. Under **section 76(b)** of the **Law of Succession Act** the court may on application or on its own motion revoke a grant of representation on the ground that, "*the grant was obtained fraudulently by making a false statement or by the concealment from the court of something material to the case.*" This case therefore falls within the parameters of the law as the 1<sup>st</sup> respondent failed to make material disclosures and the court making the grant did not have jurisdiction. I therefore revoke the grant.

8. The 2<sup>nd</sup> respondent has obtained an indefeasible title from the 1<sup>st</sup> respondent who had been issued with a grant at the material time. It is therefore protected by **section 93** of the **Law of Succession Act** which states as follows;

*93(1) Every person making or permitting to be made any payment or disposition in good faith under a grant of representation shall be indemnified and protected in so doing, notwithstanding any defects or circumstances whatsoever affecting the validity of the grant.*

*(2) Where a grant of representation is revoked or varied, payments and dispositions made in good faith to a personal representative under that grant before the revocation or variation thereof shall be a valid discharge to the person making the same, and a personal representative who has acted under the revoked or varied*

*grant may retain and reimburse himself in respect of any other person to whom representation is afterwards granted might have properly made:*

*Provided that a personal representative who so acted shall account for all payments, dispositions, retentions or reimbursements made by him to the person or person to whom representation is afterwards granted.*

9. This leaves **Parcel No. 4344** which shall be the subject of further consideration which as a result of the revocation reverts back to the estate of the deceased. The issues between the parties can therefore be resolved at the stage of distribution of the remaining parcel land.

10. In light of the foregoing, I now make the following orders;

(a) The grant issued to **Margaret Anyango Ogembo** on 19<sup>th</sup> June 2012 and confirmed on 18<sup>th</sup> February 2013 in **Homa Bay PMCC Succession Cause No. 119 of 2012** be and is hereby revoked.

(b) A grant for the estate of Nathan Aber Sumba is hereby issued to Margaret Anyango Ogembo and Musa Oluoch Aber.

(c) The administrators or any of them to apply for confirmation of the grant within 30 days.

(d) There shall be no order as to costs.

**DATED and DELIVERED at HOMA BAY this 20<sup>th</sup> day of April 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Oguttu-Mboya instructed by Oguttu-Mboya and Company Advocates for the applicant.

Mr Obach instructed by Oregu & Odhiambo Advocates for the 1<sup>st</sup> respondent.