



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.448 OF 2009**

**IN THE MATTER OF THE ESTATE OF MARK SHIKOKOTI SHIKANGA (DECEASED)**

**JOSEPHAT SHIKANGA HEYI .....APPLICANT**

**VERSUS**

**PAMELA UNDISA.....1<sup>ST</sup> RESPONDENT**

**MILLICENT VUDEMBU KHERWA .....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

**Introduction**

1. The application for determination herein is the Summons for Revocation of Grant dated 23/09/2013 brought pursuant to Section 76(a) (b) and (c) of the Law of Succession Act Cap 160 Laws of Kenya and Rule 44 of the Probate and Administration Rules. The applicant seeks for ORDERS:
  - a. THAT the letters of Administration ad litem issued to PAMELA UNDISA and MILICENT Vudembu KHERWA on the 23/09/2009 be revoked.
  - b. THAT subsequently any action or proceedings instituted as a result of these letters be stayed, nullified and/or voided.
  - c. THAT the civil suit Milimani Commercial Courts Nairobi CMCC No.8716 of 2009 be stayed pending determination of this application.
  - d. THAT costs be in the cause.
2. The application is based on the grounds as set out on the face of the application itself and supported by two affidavits one by BILLY AMENDI and the other by JOSEPHAT SHIKANGA HEYI, the applicant herein. Briefly Billy Amendi advocate under instructions of JOSEPHAT SHIKANGA HEYI father of the late MARK SHIKOKOTI SHIKANGA (Deceased herein) deponed that this Court issued a limited grant of letters of administration ad litem to PAMELA UNDISA and MILLICENT VUDEMBU KHERWA (see annexure marked "BA – 1"). He claims that the said grant was obtained fraudulently when the respondents submitted to Court fake documents specifically an alleged letter from the Chief of Makhokho location which does not exist in Kakamega County. He has attached a letter which he claims to be the actual letter from Assistant Chief of Makhokho sub location dated 30/07/2013 denying existence of Makhokho location see annexure "BA -2".
3. Billy Amendi also claims that the death certificate used in the proceedings being certificate number C/No 316974 is different from the actual one C/No.229172 (see annexures "BA – 3" and

- “BA – 4”). He further depones that as a result of the said grant PAMELA UNDISA and MILLICENT VUDEMBU filed suit on 18/12/2012 at Milimani Commercial Courts being Nairobi CMCC No.8716 of 2009 claiming for payment in compensation for damages due to the estate of the deceased in this matter. A copy of the plaint is annexed marked at “BA 5”.
4. It is further deponed that the deceased herein died following a road traffic accident and that the deceased was the son of JOSPEHAT SHIKANGA HEYI and GENVEVA KHAYELI who are the rightful successors to his estate. He claims that the letter from the Chief was devoid of essential consanguinity details and the surrender of deceased person’s identity card is dated 21/11/2008 the same date appearing on the alleged death certificate number C.316974.
  5. On the other hand JOSEPHAT SHIKANGA HEYI deponed that he is the father of the deceased who was born in April 1982 at Makhokho sub location Khayega and who died at the age of 26 years. That before his death the deceased was working as a guard in Nairobi as from 24/09/2008 and he used to send his father and mother money for their upkeep and also visited them at home regularly. To the best of the deponent’s knowledge the deceased was not married. He also depones that when he was informed of the deceased’s death he went to Nairobi to get assistance and take the body of his son for burial. It was during that time that he came to know about Pamela Undisa who had taken all the property of the deceased including the deceased’s identity card for the sole purpose of masquerading as his (deceaseds) wife to get his salary from the company/employer and benefits. He further depones that Pamela Undisa claimed to be carrying a pregnancy of the deceased which he did not dispute but asked her to bring the child for the rites. After the burial of the deceased Pamela Undisa left without performing the customary rights to signify that she was the wife of the deceased as required under the Luhya customary law and has since disappeared.
  6. He states that Pamela Undisa only resurfaced to claim compensation for damages arising out of the death of the deceased claiming that the baby belongs to the deceased. He pursued her to give him the property that belonged to his son including his identify card, payslip and household goods. On being threatened that she would be reported to the Police she agreed to go to the lawyers on record when they were advised to file for letters of administration together and thereafter file for any claim which they did in the belief that Pamela’s child was his grandchild.
  7. Thereafter Pamela disappeared into town and switched off her phone and has since taken the child to the rightful father. He says he was informed by his advocate that Pamela went and filed a suit in Nairobi being CMCC No.8716/2009 separate from the one they had filed jointly, namely number CMCC No.3704/2009. Upon perusal of the documents he has realized that Pamela Undisa has included a stranger Millicent Vudembu Kherwa as her co-administrator of the deceased’s estate leaving him and his wife out of the estate.
  8. Josephat further depones that he inquired from his area Chief and assistant chief if they gave Pamela Undisa letters required for filing the grant but they denied ever knowing who Pamela Undisa was, and says that the letter used by Pamela for filing for the grant is false. He claims that Pamela’s sole purpose in filing the cases in Court is to plunder and meddle with the estate of the deceased. He denies that Pamela Undisa is the wife to the deceased.

### **Response to the Application**

9. The application is opposed. MILLICENT VUDEMBU KHERWA the 2<sup>nd</sup> Respondent herein has filed two replying affidavits both dated 2<sup>nd</sup> April 2014. In answer to the two supporting affidavits she depones that she does not know how the 1<sup>st</sup> Respondent obtained the Chief’s letter and that had the applicant’s application been served upon her in good time she would have made enquiries. She explains that the impugned death certificate was genuinely applied for from the registrar of deaths see annextures “MVK 1” and “MVK 2”. She does not deny that JOSEPHAT SHIKANGA HEYI and GENVEVA KHAYELI are the parents to the deceased herein but denies that they are the rightful successors of his estate. She explains the facts that surround this matter in paragraphs 10 – 15. She claims that when the applicant herein filed CMCC No.3704/2009 he did so without the consent of the 1<sup>st</sup> Respondent and also forged her signature. She also claims that there was a settlement of the sum of kshs.808,305 paid to the applicant through the firm of M/s Billy Amendi & co. advocates in CMCC No.3704/2009 without the knowledge of the 1<sup>st</sup>

- Respondent. She claims that since the applicant recognized the 1<sup>st</sup> Respondent as the wife and widow of the deceased herein, he is estopped from denying the fact of that relationship between the deceased and the 1<sup>st</sup> Respondent.
10. The 2<sup>nd</sup> Respondent also depones that consideration must be given to the child of the marriage and whether the said child should be denied the chance of benefitting from his late father's estate by allowing the benefit to be passed to his grandparents. She also claims that they were not properly served with the application herein as the same was served after, the 1<sup>st</sup> respondent had passed on. She says that the 1<sup>st</sup> Respondent was the right person to respond to the issues in the application properly.
  11. In response to the affidavit by JOSEPHAT SHIKANGA HEYI the 2<sup>nd</sup> Respondent depones that it is not true that at the time of the deceased death herein, his (deceased) parents were not aware that the deceased was married to the 1<sup>st</sup> Respondent. She confirms that at the time of his death the deceased was working as a guard with JAPA PROTECTION SYSTEMS and only worked for four (4) months before his death. She explains the different circumstances when the applicant visited the 1<sup>st</sup> Respondents home for example during the burial of the 1<sup>st</sup> Respondents father in March 2005 where the deceased's mother stood and introduced herself as an in law. She also explains that funeral arrangements for the deceased herein were made at the house of the deceased in Nairobi where the 1<sup>st</sup> respondent lived and the applicant stayed in the same house without raising any issue. She also confirms that the 1<sup>st</sup> Respondent accompanied the body of the deceased when it was transported to the village for burial. She has annexed the affidavit of one JANE KAGOYA "see MVK 9" who attended the burial at the deceased's home.
  12. The 2<sup>nd</sup> Respondent also depones that the 1<sup>st</sup> Respondent gave birth to a baby boy on 31/10/2008 and two sisters of the deceased who live in Nairobi visited her at the time. Further that when the baby was two (2) months old he was taken to the deceased's home where child rites were done as required under Luhya customary law and the child was named B S a name she claims was given by the deceased's parents and which name appears in the plaint dated 12/05/2009 filed by the applicant. She also claims that the contents of paragraphs 4 – 14 of the affidavit of JOSEPHAT SHIKANGA HEYI are not true. She denies that the 1<sup>st</sup> Respondent disappeared as alleged and adds that the child is under the custody of his maternal uncle. She maintains that the applicant is not telling the Court the truth because he applied for Letters of Administration Intestate using the name of the 1<sup>st</sup> Respondent and without her consent. She maintains that the applicant has already received damages relating to the road accident that caused the death of the deceased without involving the 1<sup>st</sup> Respondent who was left out of the estate of the deceased.
  13. The 2<sup>nd</sup> Respondent also maintains that the contents of the letter from Chief are correct although she cannot exactly say where the 1<sup>st</sup> Respondent got it from. She depones that the affidavit of Mary Ishuga Igonge and Patrick Ogole "MVK 11" and MVK 12" bear witness to the fact that the family of the Applicant recognized the 1<sup>st</sup> Respondent as the wife and later widow to the deceased.

### **The Submissions**

14. The application herein was canvassed by way of written submissions. This Court has carefully read through the contending submissions. The Court has also taken a careful look at the relevant provisions of the Law of Succession Act, Cap 160 Laws of Kenya (the Act).

### **Issues for Determination**

15. The main issue for determination in this application is whether there are sufficient grounds to warrant revocation of the grant of letters of administration ad litem issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondents by this Court on the 23/09/2009. The Law governing the process of applying for grant of representation is Section 51 of the Act and Rule 7 of the Probate and Administration Rules. These provisions set out the information that ought to be disclosed at the stage of petitioning for grant. For purposes of an application where the deceased died intestate, Section

51(2) and (9) of the Act and rule 7(1) (e) of the Probate and Administration Rules are relevant  
“Section provides as follows:

“51 (2). An application shall include information as to:

(a) .....

**(b) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children parents, brothers and sisters of the deceased and of the children of any child of his or hers then deceased.....”**

16. Rule 7(1) of the Rules reads as follows:-

“7(1) ..Subject to the provisions of sub rule (9) where an applicant seeks a grant of representation to the estate of a deceased person to whose estate no grant.....has been made the application shall be by petition supported by an affidavit ----containing so far as may be within the knowledge of the applicant the following particulars:

(a) .....

(e) in case of total or partial intestacy

(i) the names, addresses, marital status and description of all surviving spouses and children of the deceased.....”

Sub rule 9 provides:-

“This rule shall not apply to applications brought under provisions of rule 36,37,42 or 48”

17.The provisions set out above are in mandatory terms. They show that an applicant or petitioner shall disclose all the surviving spouses, and all the surviving children of the deceased, parents, brothers and sisters.

18.Section 76 of the Act provides for the circumstances under which a grant may be revoked. In the application herein applicant wants the grant revoked because the letters were obtained fraudulently by concealment from the Court of a fact material to the case. The fact herein raised is that the letter from the Chief was a forgery because there is no location known as Makhokho and further that the death certificate used in the proceedings is significantly different because of the serial number. It is also alleged that not all beneficiaries were named in the Petition.

19.Unfortunately the 1<sup>st</sup> Respondent passed on and from the pleadings she was the only one who was in a position to explain where she got the letter from the Chief and how she obtained the death certificate. It will therefore be difficult to ascertain exactly where these documents were obtained from. This Court will therefore not presume or assume that the documents used in obtaining the grant of letters of administration for the estate of the deceased were proper. The fact that there two death certificates for one deceased person also raises eye brows as to their authenticity. One of them must have been obtained fraudulently. For that reason and for the fact that Makhokho location is unknown and further that not all the beneficiaries of the deceased’s estate were named. I am satisfied it is necessary to revoke the grant of letters of administration ad litem issued on the 23/09/2009 to the Respondents (the 1<sup>st</sup> Respondent now being deceased). I also allow prayers (b) and (c) of the Summons dated 23/09/2013.

20.Costs shall be in the cause.

Ruling delivered, dated and signed in open Court at Kakamega this 30th day of November 2015.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Osan go for B. Amandi for Applicant

Miss Kitonga (absent) for Respondents

Mr. Lagat - Court Assistant