



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**MISC SUCCESSION CAUSE NO. 168 OF 2011**

**IN THE MATTER OF THE ESTATE OF THE LATE TIMOTHY KANYUA MUGAMBI**

**DAVID MURIUKI MUGAMBI.....APPLICANT**

**VERSUS**

**JESSE N. K. MUGAMBI**

**CATHERINE N. MUGAMBI.....RESPONDENTS**

**RULING**

1. This is an application for revocation of grant filed under section 76 C of Succession Act Rules 44 and 73, Probate and Administration Rules, ss 1A, 1B and 3A CPA (Cap 21 Laws of Kenya) and all the enabling laws.
2. According to the applicant, the grant was obtained fraudulently by the making of a false statement and by means of an untrue allegation of fact. Furthermore, the applicant has stated that the proceedings relating to the issuance of the grant of letters of administration were themselves defective.
3. In his affidavit in support of the summons for the revocation of the grant, the applicant has stated that he was not consulted before the grant was issued. He also stated that he is one of the other beneficiaries of the estate who were not consulted.
4. The applicant also says that he was not a party to the consent filed in court on 28<sup>th</sup> January, 2013, because the two respondents who are the administrators of the estate willfully and intentionally excluded him. Additionally, the applicant has stated that the respondents represented to the court that he was not a beneficiary equally qualified to be appointed as an administrator.
5. Finally, the applicant has stated that in paragraph 5 of his affidavit that none of the beneficiaries signed form 38 to consent to the appointment of the two administrators.
6. Counsel for the applicant filed his written submissions urging the court to revoke the grant for the reasons advanced by the applicant. They have submitted the doctrine of *res judicata* does not apply in cases of succession by virtue of section 76 Laws of Succession Act. They have also submitted that the grant was obtained fraudulently and by means of an entire allegations of an essential fact in point of law to justify the grant.

7. The 2<sup>nd</sup> Respondent has opposed the application. She has filed a replying affidavit dated 18<sup>th</sup> October, 2015. She has pointed out the applicant is their brother. According to her, family members had a lengthy deliberation in which all beneficiaries agreed that the grant be issued and that the respondents to be appointed as administrators. She also stated that the parties including the beneficiaries consented to them being appointed as administrators and administratrix respectively. She hastens to add that only the applicant seems to have a problem with them.

8. Furthermore, she has stated that the applicant will not be prejudiced in any manner for he has been provided with his share as a beneficiary of the estate of the deceased.

9. As regards the consent filed in court by the beneficiaries, the 2<sup>nd</sup> respondent in paragraph 15 has stated that

*“THAT consequently a consent was filed and court adopted the orders therein and I am advised that once the consent has been adopted by the court, it is deemed to be a court order and the same cannot be revoked by a party without the consent of the other parties to the consent”.*

10. Counsel for the 2<sup>nd</sup> respondent has filed written submissions urging the court to confirm the grant. According to counsel, the grant cannot be revoked at this stage. Instead it should be confirmed in terms of the proposed schedule and mode of distribution.

11. Furthermore, counsel have submitted that the applicant has not provided good reasons as to why the grant should be revoked. They also submit that the administrators have not dealt with the estate fraudulently or interfered with it to the detriment of the other beneficiaries.

12. Finally, counsel has submitted that this being a court of equity and justice should immediately confirm the grant and allow the administrators to distribute the estate urgently.

13. I have considered the affidavit evidence of the parties, the submissions of their counsel and the applicable law. I find that the applicant did not sign the consent. His evidence on this point is uncontroverted. It is a requirement of the law that the beneficiaries consent is required in the appointment of the administrators. I also believe the applicant that he was not consulted before the appointment of the respondents.

14. Counsel for the 2<sup>nd</sup> respondent has urged this court to invoke its equitable powers to order for the confirmation of the grant and to allow the administrators to urgently distribute the estate for the benefit of the beneficiaries. This submission is not correct in law. This court is not permitted to invoke its equitable jurisdiction where the applicable law prescribes what ought to be done. Equitable jurisdiction cannot be invoked to defeat clear statutory provision. Moreover, it is one of the .....of equity that “equity follows the law”.

15. I agree with counsel for the applicant the doctrine of *res judicata* is inapplicable in matters of succession. This is clear from section 76 Law of Succession Act which empowers the court to set aside a grant of representation whether or not confirmed at any time upon application by an interested party or on its own motion, once the requirements of section 76 have been met.

16. It therefore follows that the consent filed in court did not find the applicant as he was not a party to it.

17. In the light of the foregoing, I find that the grant of representation was obtained by a false statement in terms of section 76 Laws of Succession. I therefore set it aside.

18. There will be no order as to costs as the parties are members of the same family.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **16<sup>th</sup>** day of **NOVEMBER** **.2015**

In the presence of both counsel and in the presence of Mr Kamwongori and in the absence of counsel for both respondents.

Court clerk Nyaga

**J.M. BWONWONGA**

**JUDGE**

**16.11.15**