



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCC NO. 306 OF 2003

**IN THE MATTER OF THE ESTATE OF THE LATE JACKSON M'RIUNGU
MUINDI(DECEASED)**

RUSA RUFAS NTWIGA.....PETITIONER

VERSUS

JANE GACHUNKU.....INTERESTED PARTY/APPLICANT

J U D G M E N T

The petitioner through a petition dated 25th May, 2003 sought grant of letters of administration to the estate of Jackson M'Riungu Muindi his father. That on 24th November, 2003 the court issued temporary grant of letters of administration to the petitioner and confirmed the grant on 5th June, 2006. On 24th July, 2013 the applicant Jane Gachunku through an application pursuant to Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules sought that the grant of representation issued to RUSA RUFUS NTWIGA M'RIUNGU on 5/6/2006 be revoked or annulled.

The petitioner was served with the application but did not file any Replying Affidavit. When the matter came up for hearing the petitioner insisted he was ready to be heard in spite of having not filed a replying affidavit, consequently the matter was ordered to proceed to hearing by way of oral submissions as per parties wishes.

Mr. Murithi, learned advocate for the applicant/interested party submitted on behalf of the applicant that the proceedings to obtain grant were defective in substance and that the grant was obtained fraudulently by making of a false statement and by concealment of material information from the court. The counsel submitted consent of beneficiaries was not sought and obtained and prayed the grant be revoked. The petitioner on his part admitted the beneficiaries were omitted in the list of survivors to the deceased estate and are his sisters and mother respectively. He opposed the revocation of the grant averring that the said sisters are all married and stays with his mother at their matrimonial home. He averred that his mother gave him consent to petition for the grant but did not have any document in writing. As regards his sisters he averred he did not seek their consent since they are married far away. He further stated that his mother gave him consent by surrendering the deceased Death Certificate and his identity card. He admitted that during the confirmation of the grant he did not seek his sister's and his mother's consent on the mode of distribution and to the confirmation of the grant.

The issue for consideration is whether the applicant has satisfied conditions as set out under Section 76 of the Law of Succession Act to warrant revocation of the grant issued to the petitioner herein.

Section 76(a), (b) and (c) of the Law of Succession Act provides:-

76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any 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 the 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 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.”

The applicant in her affidavit dated 9th July, 2013 depones that she is a daughter of the deceased. That the petitioner conducted these proceedings secretly and is guilty of fraud and material non-disclosure. That all beneficiaries were to be included in this cause and that he omitted Harriet Karimi, Rose Ndege, Jane Gachunku and Lilian Mugai, daughters to the deceased and Humprey Kimathi, grandson to the deceased in distribution of the estate. That the beneficiaries consent and that of the deceased widow were not sought prior to instituting the cause.

That the petitioner included Mary Jane Kagendo Mbura in the sharing of the deceased estate notwithstanding that she is not a beneficiary but a total stranger. The petitioner subdivided the land into 8 portions contrary to certificate of the confirmation of the grant. The applicant further averred that the subdivision was done without their consent and in exclusion of their rights. The petitioner did not controvert the contents of the affidavit of the applicant and in actual fact the record shows that none of the beneficiaries gave him consent to petition for the grant or consent to the confirmation of the grant.

Rule 26(1),(2), of the Probate and Administration Rules provides:-

“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

Rule 26(1), (2) of the Probate and Administration Rules is couched in a mandatory manner, meaning that before letters of administration are granted to any applicant, notice must have been made to every person entitled in the same degree as or in priority to the applicant. In the instant cause there is clear and overwhelming evidence that the applicant and beneficiaries who are entitled in the same degree as or in priority to the applicant were not given notice of petitioning for the grant nor was their consent sought and obtained by the applicant. The petitioner acted fraudulently when he declared in Form P&A 80 that every person having equal or prior right to grant of representation had consented or renounced their right or were issued with citation to renounce such right to apply for grant of representation. Further to the above the petitioner did not comply with Rule 40(8) of the Probate and Administration Rules which provides:-

“40(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other

persons as the court thinks fit”.

The applicant did not comply with Rule 40(8) of the Probate and Administration Rules in that he did not obtain the consent of other beneficiaries nor involve them at the time of confirmation of the grant. Consequently they could not have attended and voiced their protest to the confirmation of the grant.

I therefore find that the petitioner obtained the grant in contravention of Section 76 of the Law of Succession Act.

The upshot is that the applicant’s application succeeds and I proceed to make the following orders:-

- 1. That grant issued to the petitioner on 5th June, 2006 be and is hereby revoked.***
- 2. Rusa Rufus Ntwiga and Harriet Karimi are appointed joint administrators. Fresh grant (P&A41) do issue to the two appointed administrators forthwith.***
- 3. That all titles issued pursuant to the revoked grant out of Mwimbi/Kiraro/477 be and are hereby cancelled and the whole land revert back into the name of Riungu Muindi(deceased).***
- 4. The administrators to file joint or separate schemes of distribution within the next 60 days from today.***
- 5. As parties are sisters and brother I direct that each party to bear its own cost.***

DATED, SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF MAY, 2014.

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence of:

1. Mr. Murithi for the applicant

2. Petitioner in person – present

J. A. MAKAU

JUDGE