



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS CIVIL APPLICATION NO.244 OF 2011

IN THE MATTER OF THE ESTATE OF BLASIO MOTURI SAGWE DECEASED

ELIZABETH KERUBO MOTURI APPLICANT

VERSUS

ZAKARIA SAGWE MOTURI RESPONDENT

JUDGMENT

1. By an application dated 29th November 2011 brought under certificate of urgency, the applicant herein Elizabeth Kerubo Moturi seeks for orders that:-
 1. *The grant of letters of administration made to Zakaria Sagwe Moturi on 5th day of July 2011 vide Keroka Senior Resident Magistrate's Succession Cause Number 11 of 2008 be revoked and or annulled forthwith.*
 2. *Costs of the application be provided for.*
2. The application is expressed to be brought pursuant to **Section 76 Rule 44 and 73** of the **Probate and Administration Rules Part VIII of Cap 160** of the **Laws of Kenya** and is supported by the annexed affidavit of the applicant and the co-wife Nyariana Mongina Moturi. The following are the grounds set out on the face of the application:-
 - a. *The proceedings to obtain the grant were defective in substance.*
 - b. *The grant was obtained fraudulently by the making of the statements or by concealment from Keroka Senior Resident Magistrate's court in Succession Cause Number 11 of 2008 some material facts to the case.*
 - c. *The grant was obtained by means of untrue allegation of facts essential in point of law to justify the grant.*
 - d. *The respondent has now presented himself to the Chairman Mogusii*

Farmers Group Company Limited to be paid dividends of the shares of

the late Blasio Moturi Sagwe which dividends were specifically bequeathed to the applicant Elizabeth Kerubo Moturi and Nyariana Mongina Moturi who are the widows of the late Blasio Moturi Sagwe.

3. In her affidavit in support of the summons for annulment the applicant states that she is the widow of the late Blasio Moturi Sagwe who died intestate on 19th May 1990. She has annexed a copy of the death certificate marked "EKM-7" issued on 6th January 1999. Further that the death

- certificate used by the Respondent in Keroka Succession Cause “EKM-2” is not genuine as it indicates the date of her late husband as 12th May 1990 which is not true. She explains that her late husband had two wives herself and Nyariana Mongina Moturi.
4. That the respondent herein made a false statement in form P&A 5 by failing to indicate her co-wife and her other four sons namely Thomas Bundi Moturi, Peter Obare Moturi and Christopher Agwata Moturi also survived her late husband. The copy of form P&A5 filed by the respondent is marked as “EKM-3”.
 5. She further states in her affidavit that at the time of her husband’s death, he had already distributed all his properties to his children and had bequeathed to her and her co-wife his shares in Mwamogusii Company from which the two were to enjoy the dividends during their lifetime.
 6. That she never gave her consent to the respondent to process the grant of letters of administration and further that the affidavit filed by the respondent at Keroka Law Courts in succession cause No.11 of 2008 on 21st July 2008 being annexure “EKM-4” is a forgery as she never signed the same and she has never been involved in its preparation and filing.
 7. She states further that her location is Keera and that the letter in court to identify all the genuine beneficiaries of her late husband's estate should have come from her area chief and not the chief of Mekenene location. She contends that the respondent cleverly avoided her area chief with a view to defrauding her and her co-wife. The letter is marked “EKM-5”. She states that the respondent was issued with a certificate of confirmation of grant on 5th July 2011 marked “EKM-6” after making a false affidavit. That in the circumstances, the proceedings to obtain the grant and certificate of confirmation of the grant in respect of her late husband’s estate were defective in substance and unprocedural in law to the extent that the respondent never involved the appellant's co-wife and her other sons as beneficiaries of the deceased's estate nor did he obtain their consent.
 8. On her part Nyariana Mongina Moturi in her supporting affidavit confirms being the co-wife to the applicant and the widow to the late Blasio Moturi Sagwe who died on 19th May 1990. She also confirms what has been stated in her co-wife’s affidavit (the applicant) herein that the respondent secretly and fraudulently obtained a grant from Keroka court by which he has stopped them from receiving and enjoying the dividends bequeathed to her and her co-wife, the applicant.
 9. The application having been certified urgent on 6th December 2011 was served upon the respondent herein who instructed the firm of Kerosi Ondieki & Co. Advocates to act for him. The said firm filed a replying affidavit in opposition to the application for revocation/annulment of the grant.
 10. In his replying affidavit the respondent Zakaria Sagwe Moturi concedes

that his father was married to two (2) wives as deposed in paragraph 5 of the supporting affidavit by the objector. That his father died on 12th May 1990 and was buried on 19th May 1990 contrary to the averments of the objector in paragraphs 3 and 4 of the supporting affidavit. He states that his certificate of death is genuine since he has quoted the correct date of death as well as the burial date.

11. He also contends that the persons named in the supporting affidavit who are his step mother and brothers respectively did not have any interest in the Mogusii shares since his late father had given them their share of the estate before he died. He adds that contrary to the averments in paragraph 6 of the supporting affidavit his father never bequeathed his shares to anybody except him since he has no shares in his father’s ancestral land as his late father had distributed all his properties to his children.
12. In reply to paragraph 8 of the affidavit he states that his location is Mekenene and that is where the shares as well as the land are situated, while the objectors location is Keera and that is where they reside. He said that the objectors have no business whatsoever in Mekenene which is far from the home of his late father and that his late father is the one who wholly brought him to Mekenene Mogusii.
13. He states that his mother and step mother have never attempted to collect the said shares since his father died or since he got the grant and lastly that the application is mischievous frivolous and otherwise an abuse of the court process and should be dismissed with costs.
14. Parties on the 22nd day of April, 2013 agreed to proceed with the

summons by way of written submissions. On the 30th day of May, 2013 S.O. Omwenga Advocates filed their written submissions on behalf of the applicant. In their submissions they contend that the Magistrate's court at Keroka had no jurisdiction to deal with the estate of the deceased which was estimated to be worth Kshs.200,000/-.

15. It is further submitted that the Respondent in his replying affidavit did not rebut or contradict the issue raised by the applicant in her application and affidavits in support thereof.
16. Thus it is submitted that the applicants have established that the proceeding to obtain the grant at Keroka court were defective and they were obtained fraudulently by the making of false statements or by concealment of some material facts to the untrue allegations of facts essential in point of law to justify the grant. It is the applicant's submissions that the prayers be granted as prayed.
17. The firm of M/s Kerosi Ondieki also filed their submissions on the 5th day of June, 2013 on behalf of the Respondent. It is submitted for the Respondent that he has lived his whole life at Mogusii with the full knowledge of the applicant together with her co-wife.
18. It is further submitted for the Respondent that the issue regarding the land at Mogusii and the shares thereof together with the other one at Keera sub-location in Nyamira Division, ought to have been dealt with prior to the demise of the deceased owner of the estate in question during the funeral and burial ceremonies of the deceased owner or shortly after his demise. Failure to do that by the applicant/petitioner meant that she knew that she is not entitled to any share at Mogusii settlement scheme since the Respondent does not have any property at Keera Sub-location. That when the letters of administration were granted to the Respondent herein after due gazettement, the petitioner/ applicant did not raise any claim suggesting that she did not have any interest and even if she had any such claim the same is overtaken by events and cannot be sustained at this stage.
19. Further it is submitted for the Respondent herein that the applicant/petitioner herein is well aware that it is the Respondent who has been dealing with the tea bushes at Mogusii and other properties and this is prior, during and after the demise of the deceased for the simple reason that the property at Mogusii had been duly and legally and properly allocated to him by the deceased which is why such a claim was not raised during the funeral and burial ceremonies of the deceased.
20. On the other hand it is submitted for the respondent herein that the petitioner/applicant was given her own share at the ancestral land at Keera in Nyamira Division during the lifetime of the deceased owner and therefore she should not claim the dividends which she had never earned either during the life time of the deceased owner or in her own life time.
21. On the issue of fraud it is submitted for the Respondent that the same was not referred to the law enforcement personnel charged with curbing crime and in the absence of that it cannot be inferred that there was fraud. In a nutshell it is submitted that the applicant's objection be declined and there be confirmation of the petitioner's letters of administration duly granted to him.
22. Having carefully considered the application, the affidavits on record

and the written submissions by counsel for respective parties I am of the view that the main issue for consideration is whether the application for revocation and/or annulment of the said grant is merited. This takes me straight to **Section 76 of the Law of Succession Act Cap 169 of Kenya** which sets out the grounds for revocation of grant. Thus a grant of representation whether or not confirmed may be revoked or annulled at any time if the court is satisfied that the proceedings to obtain the same were defective in substance. I am satisfied that the proceedings to obtain the grant were defective as the same was done without the consent of all the dependants of the deceased person herein who were entitled to know that the respondent herein had undertaken the process of obtaining letters of administration on behalf of the estate herein. I have noted that the respondent herein is the son of the applicant and therefore there was nothing for him to fear to approach his mother, step mother and his other siblings to obtain their consent before moving ahead with the petition.

23. Secondly, the grant too can be annulled or revoked if it was obtained fraudulently or by making false statement or by concealment from court of something material to the case. The application herein, supporting affidavits by the applicant and his co-wife show clearly that the consent was

fraudulently obtained. There is an element of fraud which this court will not overlook simply because the same was not reported to the police. The respondent made false statements and concealed to the lower court that there were other dependants of the deceased herein. The respondent has not denied that the applicant is his mother nor that she had a co-wife who had children who are petitioner's

step brothers.

24. The applicant only realized that the respondent had taken out the said grant when the same was presented to the Chairman Mogusii Farmers Group Company Limited for payment of dividends. Had they not gone to look for the dividends, they would not have known of the same to date.
25. Thirdly the grant may also be nullified if it is proved that there was untrue allegation of a fact essential in point of law. This is the case here. First, the allegation that the respondent was the one to receive dividend from Mogusii Farmer Group Company Limited cannot be said to be true. It appears to me that all along the applicant and her co-wife were the ones receiving the said dividend from the farmers group which must have made the respondent to find a way of shot changing them by obtaining letters of administration of the deceased's estate without consulting them (applicant), without their consent and fraudulently forging their signatures. The allegations made in support of the petition were factual and truthful. It is my considered view that the instant application is merited as it discloses defects in substance in obtaining the said grant.
26. The applicants herein have been able to demonstrate acts of fraud committed by the respondents. They have also shown that the said grant was issued to the respondent through concealment of material information. Thus I find that this is a suitable case under which a grant can be revoked. The applicants have proved their allegations against the respondent. In the case of **Estate of Waithure Kihoro (deceased) [2009] e KLR** it was held:-

“That in any event it is a cardinal principle of our justice system that whoever alleges must prove the allegation.”

27. In **Julius Machabe Marombo –vs- Augustine Wanjala Marombo [2011] e KLR** it was observed that **“in the absence of fraud mistake or misrepresentation the objector cannot sustain an application for revocation of grant.”**
28. I am of the considered view that in the instant case, there is basis for revoking the grant of letters of administration made to Zakaria Sagwe Moturi on the 5th day of July 2011 vide Keroka Senior Resident Magistrate's Succession cause No.11 of 2008. First he did not name all the beneficiaries of the deceased's estate and secondly he obtained the Chief's letter from a chief of a location other than the one where the deceased died and was buried. The application by the applicants is merited and the same is allowed. The grant issued to the respondent on 5th July 2010 be and is hereby revoked.
29. Before I conclude this judgment, I wish to point out that this is a matter that should have proceeded by way of viva voce evidence as earlier agreed upon by the parties. In the absence of such evidence the affidavits evidence alone favours revocation.

Dated, signed and delivered at Kisii this 26th day of June, 2014

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. S.M. Sagwe for Omwenga (present) for Applicants

Mr. Bosire F.O. for Mr. Nyogaga for Respondents

Mr. Bibu - Court Assistant

