



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.773 OF 2002**

**IN THE MATTER OF THE ESTATE OF JAMES AGGREY OSUNDWA MULAMA  
(DECEASED)**

**ALICE AKINYI MULAMA.....1<sup>ST</sup> PETITIONER**

**NORMAN CHEMUTI MULAMA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**PHYLIS MONICA MULAMA.....OBJECTOR**

**RULING**

James Aggrey Osundwa Mulama, the deceased to whose estate these proceedings relate died on 21<sup>st</sup> October 2001. On 27<sup>th</sup> March 2002, Alice Akinyi Mulama (Alice) and Norman Chemuti Mulama (Norman) petitioned the court to be issued with a grant of letters of administration intestate. Alice claimed to be the widow of the deceased while Norman claimed to be the son of the deceased. The grant of letters of administration intestate was issued to the said Petitioners on 10<sup>th</sup> June 2002. Before the grant was confirmed, Phylis Monica Mulama (the Objector) filed summons pursuant to **Section 76** of the **Law of Succession Act** seeking to have the said grant revoked on the grounds that the Petitioners had failed to disclose to the court all the dependants of the deceased in the petition. In the affidavit in support of the application, Phylis deponed that she was the first wife of the deceased, having got married to the deceased on 16<sup>th</sup> February 1963. She annexed a copy of the marriage certificate to the said affidavit. She also stated that the marriage was blessed with five (5) children. The Objector and the five children of the deceased had not been recognized as dependants of the deceased in the petition filed by the petitioners.

In response, Alice filed a replying affidavit in opposition to the summons. She deponed that she was married to the deceased under Luhya Customary Law in 1973. She had lived with the deceased from the time of her marriage until his demise. At the time of her marriage, she was informed that the deceased was previously married but had divorced his first wife. She annexed a copy of a court order issued in **Nairobi Resident Magistrate's Court Maintenance Cause No.6 of 1970** between the Objector and the deceased in which the court directed that the deceased was no longer bound to cohabit with the Objector. The court further ordered the custody of the then four (4) children of the marriage to be committed to the Objector. The deceased was ordered to pay maintenance for the upkeep of the children. Alice further deponed that during his life time, the deceased never contacted, lived or interacted with the Objector. She further stated that two (2) of the children that were born of the deceased with the Objector, namely

Stephen Mulama and Catherine Mulama were deceased while the two daughters, Irene Mulama and Emily Mulama were married. It was her case that the Objector was not entitled to benefit from the estate of the deceased.

The Objector swore a further affidavit in which she reiterated that she was a widow of the deceased. She stated that she had not been divorced by the deceased. She narrated instances where the deceased participated in the lives of their children including allowing the deceased children to be buried in their ancestral home. She further deponed that during the marriage of their daughter Irene Mulama, the deceased participated and even received the dowry that was paid. She annexed copies of two letters which the deceased wrote to the Pastor in charge of Nairobi Pentecostal Church Nairobi (dated 12<sup>th</sup> December 1998 and 14<sup>th</sup> December 1998) in which the deceased indicated that he had no objection to Irene being married by her husband, Humphrey Osore. In essence, it was the Objector's case that she was indeed a dependant of the deceased and ought to be considered as such by the court.

In a Ruling delivered on 25<sup>th</sup> November 2008, while considering an application for injunction which had been filed by the Petitioners, Gacheche J made the following observations:

***“ However, having found that Monica is still legally married to the deceased at the time of his death, I would in the interest of justice, and with a view to avoiding wastage of funds, order that the parties agree on what Monica should inherit, for which reasons I decline to grant a mandatory order to compel her to remove the structures that she has put on the suit property, whose fate will be decided once they agree on her share, and if not, after her application for provision as a beneficiary is heard and determined by the court.”***

It was clear from subsequent developments that the parties did not abide by the advice given by the court hence the decision by the Objector to prosecute the application for revocation of grant. When the case was listed for hearing on 7<sup>th</sup> October 2013, Mr. Mburu for the Objector informed the court that that date was fixed by consent of the parties. The court proceeded to hear the summons for revocation of grants in the absence of the Petitioners.

The issue for determination by this court is whether the Objector made a case for this court to revoke the grant that was issued to the Petitioners. As stated earlier in this Ruling, the Objector's application is predicated on **Section 76(b)** of the **Law of Succession Act** that grants this court jurisdiction to revoke or annul a grant where it is established the grant was obtained by the fraudulent making of false statement or concealment from the court of something material to the case. In the present application, it was clear that the Petitioners failed to disclose to the court the fact the deceased had another wife with children. It appeared to the court that the Petitioners proceeded on the assumption that the order of separation that was issued in the maintenance case between the Objector and the deceased in 1970 amounted to a divorce. Nothing could be further from the truth. Although the deceased was legally separated from the Objector, they were not divorced. Neither the deceased nor the Objector petitioned the court to be divorced from each other. This court therefore holds that the deceased was still married to the Objector at the time of his death. This court was further persuaded by affidavit evidence that indeed the deceased participated in lives of his children with the Objector until the time of his death. The Petitioners therefore concealed from the court the fact that the deceased had other dependants. The Objector and her children are dependants of the deceased within the meaning of **Section 29** of the **Law of Succession Act**.

In the premises therefore, the grant issued to the Petitioners on 10<sup>th</sup> June 2002 is hereby revoked. A new grant shall be issued to Alice Akinyi Mulama and Phylis Monica Mulama. They are ordered to agree on the mode of distribution of the properties that comprise the estate of the deceased to the beneficiaries and thereafter file an application for confirmation of grant. If they shall fail to agree, each of them is ordered to file a proposal on the mode of distribution. The court shall then determine how the properties that comprise the estate of the deceased shall be distributed to the beneficiaries. There shall be no orders as to costs. It is so ordered.

**DATED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY, 2014.**

**L. KIMARU**

**JUDGE**