



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 25 OF 2011

BINYANYA ABDUL.....APPLICANT

VERSUS

BAKARI MEHRAAJ FAUZ.....RESPONDENT

RULING

1. The Applicant filed Summons for Revocation of Grant dated **14th January, 2011**. The Grant of Letters of Administration Intestate sought to be revoked was issued on the **25th January, 2007**. The application is premised on grounds that;-
 - i. The proceedings to obtain the grant were defective in substance;
 - ii. The grant was obtained by means of untrue allegations of fact and fraudulently by making of a false statement or concealment from court of some material facts.
2. In support of the application is an affidavit deponed by the applicant where she states that the deceased died in **1938**, Letters of Administration were issued to the respondent on the **25th July, 2007** and a certificate of Confirmation of the Grant issued on **7th May, 2008**.
3. The respondent is a grandson to the deceased while the applicant is the deceased's daughter. The deceased was survived by six (6) children, three (3) of them are alive. In obtaining the grant the surviving children of the deceased were not consulted though they should have been given priority in representation of the estate. The respondent misrepresented to the court that he was the only heir of the deceased.
4. In response, thereto the respondent stated that the applicant had not made full disclosure of facts. That the applicant is a daughter to the deceased's co-wife hence not entitled to the estate of the deceased. He applied for letters of administration in his capacity as the deceased's grandson, the deceased's children, Bishara his mother inclusive having died. He included all beneficiaries of the deceased. **Aisha** the applicant's mother lived in **Mwingi** away from the deceased.
5. In a supplementary affidavit the applicant stated that the property in issue was bought by her father **Mohamed Sabur** and registered in the name of the deceased, which property was bought so that her brother **Sabur Mohammed** could attend Madarassa at the **Kitui Mosque**. Admitting that the deceased had two (2) children, **Bishara** and **Masoso Mohamed**, he stated that **Bishara** was indeed the respondent's mother but he is not the only surviving kin as **Bishara** and **Masoso** had children whose consent had not been obtained.
6. Alluding to the **Islamic law** he stated that after the demise of the deceased her property reverted to her husband **Mohamed Sabur** and not **Alima**. The respondent being an illegitimate child was not entitled to the property under **Islamic Law**.
7. In a further affidavit, the applicant stated that the deceased acquired the property before getting married to **Mohamed**. His sister **Halima Sheuwa** is married and has no interest in the estate.

8. The applicant moved this court to annul/ revoke the grant issued herein pursuant to the provisions of **Section 76 (a), (b) and (c)** of the **Law of Succession Act** which provides thus;-

“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.”*

9. What can be deduced from affidavit evidence presented by both parties is the fact that the deceased herein, **Alima Nzelam** was also known as **Halima Nzelam**. She had a co-wife, **Aisha Kayumya Athman**. The two (2) women were married to one **Mohamed Sabur**. **Alima** had **two (2) children, Masoso Mohamed and Bishaa Mohammed**.
10. **Aisha** on the other hand had five children who included **Sabur Mohamed, Athman Mohamed, Fatuma Mohamed, Ahmed Mohamed** and the applicant herein, **Binyanya Mohamed**. The respondent herein is a son to **Bishara Mohamed** and so is his sister **Halima Sheuwa**. **Masoso** had four (4) children including **Halima, Aisha, Kubwa and Sudo**.
11. It is not in dispute that the deceased herein owned the property in issue. It has been averred that the property in issue was purchased by the husband to the deceased who registered it in the deceased's name. This is not substantiated. What is not in contention is the fact that the property forming the estate of the deceased was registered in her name.
12. The deceased died in the year **1938**. The **Law of Succession Act** came into operation on the **1st July, 1981**. **Section 2(2)** of the Act provides:-

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act”.

Section 2(4) of the Act also provides:-

“Notwithstanding the provisions of subsection (3), the provisions of Part VIII relating to the administration of estates shall where they are not inconsistent with those of Muslim Law apply in case of every Muslim dying before, on or after the 1st January, 1991”.

13. It is therefore clear that the deceased herein having been a **Muslim** at the time of her death, devolution of her estate ought to have been governed by **Islamic law**.
14. It has been stated that the deceased herein predeceased her husband who is said to have died in **1938**. This allegation has not been disputed by the respondent. If this is the case then the husband was entitled to part of her estate. According to the **Islamic Law**, the husband would be entitled to **quarter (1/4)** her estate while her children would be entitled to **3/4** of the estate.
15. The respondent being a grandson to the deceased would be entitled to part of his mother's share. He alleged that his sister had no interest in the property. No evidence was adduced to that effect. Similarly his cousins, survivors of **Masoso** have not been considered. They have not renounced their rights.
16. If indeed **quarter (1/4)** of the estate ought to have gone to the husband of the deceased, then the

applicant would be eligible to part of it. In the premises, at the point of petitioning for Letters of Administration Intestate the respondent ought to have disclosed all beneficiaries to the estate of the deceased.

17. **Rule 73** of the **Probate and Administration Rules** provides:-

“Nothing in the Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

18. This is a case where the court must intervene to prevent abuse of the process of the court. It is a case that calls upon this court to exercise its powers to revoke the grant issued.

19. Consequently, I do revoke the grant issued herein and direct that the file shall be placed before **Kadhi Kitui** for hearing and determination. Mention on the **9/10/14**.

DATED, SIGNED and DELIVERED at MACHAKOS this 23RD day of SEPTEMBER, 2014.

L.N. MUTENDE

JUDGE