



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 161 OF 2006**  
**IN THE MATTER OF THE ESTATE OF L A K – (DECEASED)**

**RULING**

1. The deceased herein, L A K, died on 30<sup>th</sup> July 2005 at the age of 43 years. Two succession causes were commenced in respect of her estate. The first one being **Nairobi HCSC No. 161 of 2006**, and the other being **Nairobi HCSC No. 690 of 2006**.
2. **HCSC No. 161 of 2006** was filed on 24<sup>th</sup> January 2006 by M O O and D E K who described themselves as widower and son, respectively, of the deceased. She is said to have been survived by three persons – the two petitioners and a minor of nine (9) by the name A A L, a daughter. The deceased is expressed to have died possessed of two assets – Ngong/Ngong / **[particulars withheld]** and shares in the Cooperative Insurance Company Kenya Limited. There is a charge on Ngong/Ngong / **[particulars withheld]** in favour of the Cooperative Insurance Company of Kenya Limited to secure a loan granted to the deceased.
3. Attached to the petition filed in Nairobi **HCSC No. 161 of 2006** are several documents. Among them is a birth certificate showing that the minor A A L was born on 27<sup>th</sup> April 1996, to the deceased and the first petitioner. There is also a letter from the Chief of Oloolua Location, Ngong, stating that the deceased was survived by the first petitioner, who is described as her husband, the second petitioner, who is described as her son, and A A L, who is described as her daughter. The letter from the Chief purports to attach a certificate of marriage which was not filed together with the petition.
4. The petition in Nairobi **HCSC No. 161 of 2006** was gazetted on 12<sup>th</sup> May 2006, vide gazette notice number 3407. The gazettelement provoked an objection to the making of grant to the petitioners. The objectors were M S K and D K E, who describe themselves as sister and son respectively, of the deceased.
5. The objection is supported by an affidavit sworn on 2<sup>nd</sup> June 2006 by the first objector. The objectors raise a number of issues. The deceased and the first petitioner were not married but were in a cohabitation which produced one child, of nine (9) years at the time the objection was filed, the minor A. Secondly, the first objector had been appointed a trustee of the two children of the deceased, who had been named beneficiaries of the deceased's group life insurance policy. Thirdly, the first petitioner had stealthily applied for letters of administration intestate without consulting the family of the deceased. Fourthly, that the second petitioner had not signed the relevant petition papers, suggesting that his purported signature in the documents was a forgery. Fifthly, that the objectors had filed their own petition for grant of letters of administration in Nairobi **HCSC No. 690 of 2006**. Finally, it is stated that the deceased was also survived by her parents, L K and E K K.

6. The first petitioner responded to the affidavit in support of the objection by swearing an affidavit on 11<sup>th</sup> October 2006. He asserts that he was lawfully married to the deceased and exhibits a marriage certificate serial number 65012, which shows that the first petitioner and the deceased had contracted a statutory marriage on 19<sup>th</sup> July 1996 at the Office of Registrar of Marriages in Nairobi. It was out of this union that the minor Anita was born on 27<sup>th</sup> April 1996, as per the attached birth certificate serial number **[particulars withheld]** of 28<sup>th</sup> May 1996.

7. I note that the objectors did not thereafter file an answer to the petition and a cross-application as required by *Sections 68 and 69* of the Law of Succession Act.

8. **Nairobi HCSC No. 690 of 2006** was commenced on 27<sup>th</sup> March 2006 by the objectors. It is stated that the deceased was survived by the two objectors and the minor of the daughter of the deceased called Anita. The letter from the Chief of Kongoni Location, Turbo, describes the deceased as having died single, survived by her two children, D E and A A L, said to be under the care of L K and E K K. She is described as having died possessed of Ngong/Ngong / **[particulars withheld]**. The court file in **HCSC No. 690 of 2006** does not have evidence of a gazette notice in respect of the petition in **HCSC No. 690 of 2006**, but a grant of letters of administration intestate was made in the cause on 2<sup>nd</sup> June 2006 to M S K and D K E.

10. On 8<sup>th</sup> March 2007, the first petitioner in Nairobi **HCSC No. 161 of 2006**, filed a Summons for Revocation of Grant in Nairobi **HCSC No. 690 of 2006** seeking that the grant made in that cause on 2<sup>nd</sup> June 2006 be revoked. His case is that he was married under statute to the deceased and he was living with her happily in their matrimonial home at Ngong. They were blessed with the child referred to earlier. He states that he had applied for a grant jointly with the son of the deceased in Nairobi **HCSC NO.161 of 2006**. He argues that as the surviving spouse of the deceased he had a superior claim to the estate than the first administrator, the sister of the deceased.

11. There is no evidence that the summons dated 6<sup>th</sup> March 2006 was ever served on the administrators, and there is equally no evidence that they filed any replies to it.

12. On 23<sup>rd</sup> January 2007, it was directed that both files be put together. After they were put together it was further directed on 4<sup>th</sup> June 2007 that the two matters be heard jointly on the basis of submissions filed founded on the filed affidavits. Both sides filed their respective written submissions in Nairobi **HCSC No. 161 of 2006**. The petitioner's submissions were filed on 20<sup>th</sup> June 2010, while those of the objectors were filed on 27<sup>th</sup> July 2010. In both sets of written submissions the parties give vent to the arguments set out in their respective affidavits.

13. I have an objection filed in **HCSC No. 161 of 2006** and a revocation application filed in **HCSC No. 690 of 2006**. These are the two matters that I am called upon to determine.

14. The law on objections is *Sections 68 and 69* of the Law of Succession Act, as read with rule 17 of the Probate and Administration Rules. The procedural requirements are that upon gazette of the petition, the intending objector files a notice of objection, followed by an answer to the petition and a cross-application. Where a notice of objection is lodged, but no answer or no cross-application is filed, the court grants representation as per the petition. If an answer and a cross-application are filed, then the court should proceed to hear the dispute. Quite clearly, the petition, answer to the petition and the cross-application form the pleadings for the purpose of the objection proceedings. It therefore follows that where an answer to the petition and a cross-application have not been filed the pleadings are incomplete, and a grant ought to be made in terms of the petition. Where the pleadings are complete, with the filing of the answer to the petition and the cross-application, the court ought to take evidence with a view to deciding to whom the grant ought to be made.

15. In this case a notice of objection was lodged in court, supported by an affidavit. In reply, the petitioner swore a replying affidavit. No answer to the petitioner nor a cross-application was filed. The

pleadings with respect to the objection proceedings are not complete, and therefore there is no valid objection on record as required by the law. The court should therefore proceed to issue the grant to the petitioners as prayed.

16. I cannot however order the making of a grant to the petitioner since there is another grant in place, which was made in **HCSC No. 690 of 2006**. The fate of that grant has to be decided and therefore I have to determine the revocation application.

17. Revocation of grants is governed by *Section 76* of the Law of Succession Act. The relevant portions of *Section 76* are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.

18. I have already noted that there is no reply to the revocation application. The principal argument by the applicant is that he is the surviving spouse of the deceased and by dint of that fact he should have preference over the sister of the deceased. His case is that the fact that he survived the deceased as her widower was concealed from the court and therefore the proceedings to obtain the grant were defective.

19. The law on who has preference with respect to the making of a grant of letters of administration intestate, such as the current one, is *Section 66* of the Law of Succession Act. Under *Section 66* of the Act, preference is given to the surviving spouse of the deceased, followed by the children and other relatives in that order. The list is not binding, it provides a guide, it can be departed from for good cause.

20. In the instant case, the applicant has attached a certificate of marriage as evidence that he was married under statute to the deceased. There is also attached a certificate of birth as evidence that the union of the two was blessed with issue. The child was nine (9) years old at the time of the deceased's death. The fact of the birth of the child is not contested. It is also not in contention that the applicant and the deceased cohabited. As the application is not contested, it would mean that the statutory marriage is not challenged.

21. Going by the scheme set out in *Section 66* of the Act, the applicant has priority over the sister of the deceased concerning entitlement to grant of letters of administration intestate. This means that the process of obtaining grant in **HCSC No. 690 of 2006** was defective and was founded on concealed facts.

22. In view of the above, the grant made in Nairobi **HCSC No. 690 of 2006** is hereby revoked. A fresh grant of letters of administration intestate shall be made out of **HCSC No. 161 of 2006** in accord with the petition filed in that cause on **HCSC No. 161 of 2006**. For the avoidance of doubt, the grant shall be made to M O A and D K E.

23. It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 11<sup>th</sup> DAY OF December 2014.**

**W. MUSYOKA**

**JUDGE**

**No appearance of the advocate for the applicant.**

**In the presence of Mr. Wahome for Mr. Odhiambo for the respondent.**