

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

SUCCESSION CAUSE NO: 972 OF 1997

IN THE MATTER OF THE ESTATE OF MUSA OBUYA AKOKO - (DECEASED)

RULING

The summons for revocation of Grant dated 9th August, 2011 was taken out by Sammu Musa. She complains that the grant of letters of administration intestate made to her brother Twalib Musa Obuya was obtained irregularly. She cites misrepresentation of facts, reliance on forged documents and false information. According to the affidavit in support of the application, the matter relates to the estate of Musa Obuya Akoko who died on 14th July, 1991. The grant was sought by and made to the applicant's brother Twalib Musa Obuya and her mother, Zuhura Salim Dossa.

The applicant asserts that process of obtaining the grant was attended by certain improprieties.

- 1.

- It was falsely alleged that she was 27 years old and married, yet she was 36 years of age then.
2. The grant was issued to her mother and brother, yet at confirmation the certificate cites the name of Twalib Musa Obuya as administrator and omits that of Zuhura Salim Dossa.

3. Her signature was forged in the papers filed with the petition.
4. Her mother was illiterate, yet she signed the petition form, which does not have an accompanying certificate to show that she understood what she was attesting to.
5. The guarantee form shows that she had guaranteed the petitioners, when in fact that ought not have been the case as she was a survivor of the deceased and therefore a beneficiary who should not have stood surety.
6. The estate devolved wholly on Twalib Musa Obuya leaving out the applicant, yet she was also a child of the deceased.
- 7.

There are also allegations touching on the administration of the estate.

The administrator, Twalib Musa Obuya, has filed a replying affidavit. In the affidavit, the administrator concedes that the applicant is his sister. He says that there was no fraud on his part. The applicant had in fact consented to the application, and being a married woman, she consented to acting as a guarantor. He explains that he had been appointed administrator jointly with their mother, but at confirmation the mother agreed to leave the administration to the Respondent, hence the Respondent sought and obtained confirmation as a sole administrator. He denies that he forged or relied on documents with a forged signature of the Applicant, and invited her to subject her signature in the documents to a handwriting examination by an expert. He further denies forcing their mother to sign certain documents. He denies misappropriating estate property.

To the reply, the applicant responded through her affidavit sworn on 31st October, 2011. She asserts in this affidavit that she did not sign any consent as alleged by the Respondent. She argues that confirmation of the grant ought to have been sought jointly by the two administrators; and the certificate

of confirmation of grant ought to have come out in the names of the two administrators. She explains that at the time the confirmation of grant was sought her mother was still alive. She suggests that confirmation was done clandestinely. She then proceeds to raise issues touching on the administration of the estate. She swore an affidavit on 19th March, 2013 to inform the court that the mother, Zuhura Dossa wife of Musa Obuya, died on 7th December, 2009.

I have carefully gone through the Summons for Revocation and the affidavits sworn by the parties. I have also carefully studied the arguments articulated in the written submissions filed by counsel. The allegations made in the matter are weighty and border on criminality. I am particularly referring to the claim of forgery. These are matters that cannot ideally be determined on affidavit evidence only. They are matters that can only be tackled through oral evidence, where the stories of the respective parties and their witnesses would be tested through cross-examination. Ideally, revocation application should, as a matter of principle, be dispensed of by way of oral evidence. To rely on affidavit evidence in applications of this nature is to do grave injustice to the parties.

Be that as it may, I have very closely perused through the record. I note that the deceased died on 14th July, 1991. Representation to his estate was sought on 13th May, 1997 by his widow, Zuhura Salim Dossa, and his son, Twalib Musa Obuya. According to the papers lodged in court on 13th May, 1997, he was survived by his widow and two children – Twalib Musa Obuya and Saumu Achola Musa. The ages of the children are put at 29 and 28 years respectively. This is confirmed by a letter from the chief of Pumwani, Nairobi, dated 8th February, 1998, which puts the ages of the children at 39 and 37 years respectively. He was said to have had died possessed of six landed properties-situated at Nairobi and Mombasa, and shares in Simba Colt Motors Ltd. Grant of letters of administration intestate was made to Zuhura Salim Dossa and Twalib Musa Obuya on 14th July, 1997.

On 20th January, 1998, Twalib Musa Obuya sought confirmation of the grant made on 14th July, 1997 by an application of even date. In his affidavit he explained that the deceased had been survived by his wife and two children, that is the applicant and the Respondent in the instant application. The applicant was

indicated as married. The application proposed to have the assets shared out almost evenly between the two administrators, Zuhura Salim Dossa and Twalib Musa Obuya. The grant was confirmed in those terms on 9th February, 1998, and a certificate of confirmation of grant issued accordingly. It is this confirmation which triggered the current proceedings.

Revocation of a grant of letters of representation whether of probate or letters, whether confirmed or not, is provided for in **section 76** of the Law of Succession Act. **Section 76** states as follows:-

“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 grant were effective 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 that essential in point of law to justify the grant notwithstanding the allegation was made in ignorance or inadvertently;

(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either -

(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) To proceed diligently with the administration of the estate; or

(ii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particulars; or

(e) That the grant has become useless and inoperative through subsequent circumstance.”

On the face of it, the application dated 9th August, 2011 is grounded on reasons that bring it under **Section 76 (a) (b) and (c)** of the Laws of Succession Act. There are allegations that grant was obtained on the basis of misrepresentation of facts, forged documents and false information. The affidavit in support complains about improprieties in administration, which brings the application within the realm of **Section 76 (d)** of the Law of Succession Act.

The issue that I have to determine is whether there is sufficient material before me upon which I can determine whether to order revocation of the grant or not. Where revocation is grounded on **Section 76 (a) (b) and (c)**, the material that the applicant must place before the court must touch on the process of obtaining the grant, and must be of such nature as to fundamentally undermine the integrity of the process. There must be defects in the process that are substantive; in the sense of touching the very core

or centre of the process. Say where the person is founded on a false or forged or fake document, or where a critical step in the process is omitted. Alternatively, there should be fraud or reliance on false statements or concealment of important matter. These latter grounds suggest criminality, for fraud is a criminal offence. In the civil process, employment of fraud has always been a good ground for vitiating a contract, for example. It is equally a good excuse for cancelling a grant of representation. Reliance on untrue allegations of fact, or misrepresentation is of facts a good ground of revocation. It applies to contracts, and equally so to the grant making process in succession law. There must be strong evidence that the process of the obtaining the grant was fundamental flawed.

I ask myself, is that the case here? Were their defects in the process through which the grant was made in this case, so fundamental as to nullify the process? Was this fraud? Were there false statements or concealment of something material to the case?

The applicant alleges that there was fraud in that the respondent falsely stated the applicant age as 27 instead of 36 years and for stating that she was married. The parties did not place before me any evidence on the applicant as at the time of the filing of the petition. The assertion by the applicant that she was 36 at the time was not specifically contravened by the respondent. Her position is given credence by the letter from the Chief who put her age at 37 years as of 4th February 1998. This would mean that she was 36 or thereabout as of May 1997. Is disclosure of age relevant? Yes it is, to determine whether the heirs are minors or adult since the law has specific provisions catering for minor heirs. Is it material in this case? I think not. The applicant was an adult at the time and it did not matter whether she was 27 or 36. It would have only mattered if she was below 18 and was categorised as being above that age.

On the marriage, the applicant is not clear whether or not she was married at the time. She does not even appear to be seriously flagging the issue. The respondent in his papers is however categorical that she was married, and appears to imply that that being so she was not entitled to play a role in the

administration of the estate of their deceased father nor to get a share in it. Is the marital status of the parties relevant or material? It is not material so long as distribution of the estate in question is governed by the Law of Succession Act. The definition of “*child*” for the purposes of succession under the Law of Succession Act is found in **Section 3**. The said provision makes no distinction between male and female children, neither does it discriminate between married and unmarried children. Likewise, Part V of the Law of Succession Act, which governs intestate succession, makes no such distinction. Quite clearly therefore whether a child of a deceased person, be the child male or female, is married or not is neither here nor there when it comes to intestate succession under the Law of Succession Act.

It would however be material if succession is under other systems of law. It does matter under customary law and under Islamic Law. Customary law is irrelevant to this case as Part VII of the Law of Succession Act does not, by virtue of **Section 44**, apply to estates which are subject to African customary intestate succession law. Since Part VII of the Law of Succession Act does apply to the estate of Muslims, the

issue at hand will be relevant. It has not been made clear which substantive law applies to this estate, whether Islamic Law or the Law of Succession Act. I have noted that all the parties in this matter have Arabic or Muslim names, and it may be presumed that they are Muslims, although they have not specifically stated that Islamic Law applies to them or at least to the estate of the deceased.

On the forgery allegations, no evidence placed before the court. The respondent is being accused of criminal conduct. I agree with him when he avers that the documents bearing the said signature should be given to a handwriting examiner. The forgery matter is a mere allegation without any proof. The burden of proof lay with the person alleging the forgery. It was incumbent upon the applicant to adduce evidence on it. She did not. She alleges that their mother was coerced into signing documents. Again, there is no evidence to support this claim. It might have helped if the parties had given oral evidence, as cross-examination would perhaps like opened some ground. Was the process defective? The applicant has not provided any evidence of defects in the process leading up to the making of the grant.

The other provision that ought to be examined as against the material before the court is **Section 76(d)** of the Law of Succession Act, specifically **Section 76(d)(ii)** of the Act. The question is whether the respondent proceeded diligently with the administration of the estate. Diligence bespeaks being careful and persistent in effort and application. In the concern of administration, it refers to care and effort in discharging the duties of personal representative that are enumerated in **Section 83** of the Law of Succession Act. **Section 83** provides:

“Personal representatives shall have the following duties:-

- a. *To provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;*
- b. *To get in all free property of the deceased ...;*
- c. *To pay all expenses of obtaining the grant of representation and all reasonable expenses of*

administration...;

- d. *To ascertain and pay out, of the estate - of the deceased, all his debts:*
- e. *... to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and full and accurate account of all dealings up to the date of the account;*
- f.

to distribute on to retain or trust all assets remaining after payment of expenses and debts according to the respective beneficial interests under the will or on intestacy..."

The applicant accuses the respondent of transferring assets to himself, of a large part of the estate remaining unadministered and misappropriating the property of the estate. The applicant also raises the issue of confirmation. The applicant applied and obtained confirmation alone, yet he was supposed to be jointly administering the estate with their mother. Confirmation must be sought, by virtue of **Section 71** of the Law of Succession Act, by the holder or holders of the grant. The confirmation process is meant to

confirm among other things, the appointment of administrators. The confirmation of the grant to the respondent alone was irregular and in contravention of **Section 71**. Related to that is the fact that the applicant was excluded from benefit. She was not given a single asset.

To this accusation the respondent says that the estate is still intact. He says that the assets were transferred to his name in his capacity as administrator. He concedes that some assets were sold, but he does not explain to who, for what consideration and what the proceeds were applied towards. He denies misappropriation of the assets. He does not explain why the applicant was not provided for in the confirmation process, even though he claims that she has custody of some of the assets and actually collects rent in respect of one of them.

I am of the view that the respondent has not been diligent in the management of the estate. For one, it has not been explained convincingly why he had to apply for confirmation as a sole administrator, while in

fact there was a co-administrator. Why would he contravene the very clear provisions of **Section 71** of the Law of Succession Act. Secondly, it is not explained why the applicant has not provided for. She was entitled to a share under Part V of the Law of Succession Act, if that law was the one applying to the estate. Equally, if Islamic Law was the applicable law, she was still entitled to an inheritance under it. An administrator who disinherited a heir cannot be said to have acted diligently. I am satisfied that a case has been made out for revocation of the grant under **Section 76(d)(ii)** of the Law of Succession Act.

After taking everything into account, I am disposed to make the following orders:-

1. That I hereby revoke the grant of letters of administration intestate made on 14th July 1997.
2. That I appoint Twalib Musa Obuya and Saumu Achola Musa administrators of the estate of Musa Obuya Achola, deceased.
3. That a fresh grant of letters of administration intestate shall issue.

4. That the certificate of confirmation of grant dated 9th February 1998 is cancelled and Twalib Musa Obuya is directed to return it to the registry for cancellation purposes.
5. That the new administrators shall apply for confirmation of grant afresh.
6. That Twalib Musa Obuya shall within thirty(30) days from the date of this ruling produce to the court a full and accurate inventory of the assets and liabilities of estate of the deceased and a full and accurate account of all his dealings with the estate upto the date of this ruling.
- 7.

- That the matter shall be mentioned after 30 days to confirm compliance.
8. That Twalib Musa Obunya shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27th DAY OF June 2013.

W. MUSYOKA

JUDGE