

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE 606 OF 2009

IN THE MATTER OF THE ESTATE OF MICHAEL MBOGO MURUTHI - DECEASED

GEORGE PATRICK MURUTHI

CHARLES JAMES MUTUOTA.....APPLICANTS/BENEFICIARIES

VERSUS

LUCY WANGECHI MBOGO.....PETITIONER/RESPONDENT

RULING

By an application entitled summons for the Revocation and/or annulment of Grant dated and filed on 27th July 2011, the Applicants sought the following orders -

(1) That this honourable court be pleased to certify this summons as urgent and the same be heard ex-parte in the first instance,

(2) THAT pending hearing and determination of this summons the Grant of Letters of Administration intestate issued on the 15/2/2010 and confirmed on the 11/2/2011 be suspended,

(3) THAT the Honourable Court be pleased to restrain and/or stop the Petitioner her agents, assignees and/or servants from intermeddling sub-dividing or from dealing in any way with the estate of the deceased person more particularly L.R. NO. MARMANET/MELWA BLOCK 1/636 (MUHOTETU), GITUAMBA/MUHOTETU BLOCK 2/99, GITUAMBA/MUHOTETU BLOCK 2/309, MARAMANET/MELWA BLOCK 1/2079 (MUHOTETU) & EUASO NYIRO/PAJETA BLOCK 1/1132 pending the hearing and determination of this summons inter-partes.

(4) THAT the Applicants herein be made co-administrators of the estate of the late MICHAEL MBOGO MURUTHI.

(5) THAT the Grant of Letters of Administration intestate issued on the 15/2/2010 and confirmed on the 11/2/2011 be revoked and/or annulled.

(6) THAT the title deeds for parcels L.R. NO. MARMANET/MELWA BLOCK 1/636 (MUHOTETU), GUTUAMBA/MUHOTETU BLOCK 2/99, GITUAMBA/MUHOTETU BLOCK 2/309, MARMANET/MELWA BLOCK 1/2079 (MUHOTETU) & EUASO NYIRO/PAJETA BLOCK 1/1132 fraudulently obtained by the Petitioner be cancelled and/or nullified.

(7) THAT costs of this application be borne by the Petitioner.

Prayers 1, 2 and 3 were granted by the court on 27th July 2011, pending the determination of prayers 4, 5, 6 & 7 costs. The application was based upon the grounds on the face thereof, and the Applicant's Supporting Affidavit sworn on 27th July 2011 and the Applicants further Affidavit sworn on 11th November 2011.

The Application was however opposed by the Petitioner/Respondent in her Replying Affidavit sworn on 21st October 2011 and her sons affidavit sworn on 14th January 2012. In addition, counsel for the parties agreed that the issues raised by the application be determined by way of affidavit and written submissions. Accordingly counsel for the applicant filed her written submissions on 13th February 2012, and counsel for the Petitioner/Respondent filed his submissions on 21st March 2012.

Both submissions were helpful to the court. The Applicants' counsel's submissions raised two issues -

- (1) whether the Applicants had laid a threshold for revocation of the grant,
- (2) if the answer to the above issue(s) was positive, should the grant be revoked?

On his part, the Petitioner/Respondent's counsel raised the following issues in his submissions -

- (1) were the proceedings of obtaining the Grant of Letters of Administration defective?
- (2) was the Grant of Letters of Administration obtained fraudulently by making a false statement?
- (3) was the Grant of Letters of Administration obtained by concealment?
- (4) Did the Applicants have adequate provisions from the deceased?
- (5) If the answer to (3) is positive, was the concealment material to the case, and would it have any effect?
- (6) Does the application have merit and who should bear the costs?

I have considered the submissions and the authorities cited by both counsel. The law regarding or governing annulment/revocation of grants is specific, and is set out in Section 76 of the Law of Succession Act, (Cap. 160, Laws of Kenya). It says -

"76. A grant of representation whether confirmed 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 making of a false statement or by 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;
- (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
 - (iii) to produce to court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (f) of Section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.

The Applicants' case against the Petitioner/Respondent is that:

- (a) the Grant of Letters of Administration was obtained fraudulently by concealment from the court the existence of all beneficiaries and dependants of the deceased's estate and more particularly the Applicants who are the legal sons and beneficiaries of the deceased's estate;
- (b) the consent to the making of a Grant of Letters of Administration Intestate a person of equal or lesser priority was not obtained from all bonafide beneficiaries to the estate of the late Michael Mbogo Muruthi (deceased);
- (c) that the proceedings to obtain the Grant and Confirmation of representation for the deceased's estate are defective in substance and a nullity;
- (d) the Petitioner obtained the Grant of Letters Administration intestate by concealing some material facts from the court;
- (e) the documents in support of the application for Grant of Letters Intestate were fraudulently obtained and more particularly the letter from the chief Muhotetu Location,
- (f) if the said Grant is not revoked or annulled the Petitioner will be at liberty to unfairly proceed to transact the assets of the estate of the deceased to the detriment of the Applicants and other dependants of the estate herein.

To determine whether (a) the Grant was obtained fraudulently by concealment from the court of the existence of all beneficiaries and dependants of the deceased's estate, or concealment of material facts from the court, and who should be the rightful applicants for grant of Letters of Administration, or whether consent of the Applicants ought to have been obtained, it is necessary to examine the law and procedure for ascertaining who has a prior right to petition for a Grant of Letters of Administration Intestate, and the role of the Administration Officer, the Chief or Assistant Chief thereon.

I will commence with the role of the Chief. Under Section 45 and 46 of the Law of Succession Act, it is the duty of an administrative officer to protect the estate of a deceased person once he learns or is informed of the death of a person within his location or sub-location. In particular under Section 46(4) of the Act -

"46 (1) - (3)

(4) An Assistant Chief, Chief or Administrative Officer becoming aware that there is in his sub-location or area any free property of a deceased person, or that there are resident in his sub-location or area any person appearing to have the greatest legitimate interest in succession to or administration of the estate of a deceased person, but no grant of representation of that estate has been made, shall, at the request of any person who appears to have any legitimate interest in that estate, and without waiting for a report under this section, forthwith take, in respect of the property or persons, the steps prescribed by subsection (2);

The steps required of the Chief or Assistant or Administrative Officer by sub-section (2) are among others, to ascertain the properties of the deceased and protection of those properties and for ascertainment of all persons appearing to have the greatest legitimate interest in succession to or administration of his estate, and for the guidance of prospective executors or administrators as to formalities and duties. That is the basis of issuance by chiefs of letters such as the one dated 25th August, 2008 and also the subsequent one dated 2nd May 2011 by the same chief of Muhotetu Location.

The legal question is, who is the person, or the persons with the greatest legitimate interest in the deceased's estate? For purposes of the grant of Letters of Administration that question is answered by Section 66 of the Law of Succession Act. Under that section the court has a final discretion as to the person or persons to whom a grant of Letters of Administration shall, in the best interests of all concerned, be made, but (the court) shall, without prejudice to that discretion, accept as a general guide the following order of preference -

- (a) surviving spouse or spouses, with or without association of other beneficiaries,

(b) other beneficiaries entitled on intestacy with priority to their respective beneficial interests as provided by Part V (Intestacy),

(c) the Public Trustee,

(d) Creditors.

There is no question of involvement of the Public Trustees or creditors, or partial intestacy. The issue here is who should have been appointed Administrator or taken out Letters of Administration? I have no doubt in my mind that that person is the Respondent herein. These are my reasons.

The Respondent was the lawful wife of the deceased after ending the relationship with his first wife, acknowledged by the Chief in his letter of 02.05.2011, from information, not from his former wife, but from elders - "Wazee was Mtaa."

The Respondent complied with all the necessary procedures for the application, and grant of Letters of Administration. The Applicants had been provided for by their late father upon ending the marriage with their mother. At 45, 43 and 41 respectively, the Applicants must have been fairly young compared to the ages of their step-siblings at 36, 34, 33, 31 and 24 years, when the relationship with the 1st wife, the Applicant's mother, ended.

Notwithstanding the ending of that relationship the deceased had provided for the Applicants, out of his 72 acres, estate, ten (10) acres each. Under Section 42 of the Law of Succession Act where -

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house, or

(b) property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35. the property shall be taken into account in determining the share of the nett intestate finally accruing to the child grandchild or house."

From this perspective as well, the Applicants had been adequately provided for, and there would be no basis for including the Applicants in the Petition for Grant of Letters of Administration, they had no more interest in the nett intestate estate left by deceased to the Respondent and her children or house. The exclusion of the Applicants is not a material concealment within the provisions of Section 76 of the Act which constitute a ground for revocation or annulment of the Grant.

It seems clear to me that having sold their inheritance as deponed to by the petitioner/respondent in her Replying Affidavit 21st October 2011, the Applicants cannot come back upon their father's nett intestate and hope to have a second bite at the sherry. The Chief's letter of 22.05.2011 says - "Their late father had given them a portion of land to indicate they were still his children."

Having disposed of their respective shares, they must as deponed by the Petitioner/Respondent they cannot find solace in the provision of Section 76 of the Act, and invent defectiveness, concealment or fraud in the hands of the Respondent. I find no basis in fact or law to support such claims, and I accordingly reject them.

There is however disturbing aspect of the Respondent's Replying Affidavit paras. 13-15, that the Respondent has registered in her name, Marmanet/Melwa Block 1/636 which parcel was to go to George Patrick Muruthi. The Respondent explained this by saying that it was to safeguard the interest of the 1st Applicant. Subject to the consent of the 1st Applicant, the said parcels should be transferred to the purchasers forthwith.

Any other properties acquired by the deceased and the Respondent following cessation of marriage between the deceased and the Applicant's mother properly belong to the Respondent and her children, and the Applicants' have no interest in them whatsoever.

In summary therefore, I find and hold that -

(a) the proceedings of obtaining the grant of Letters of Administration intestate by the Respondent were regular and proper and were not defective,

(b) the grant was not obtained fraudulently or by making of a false statement, or by concealment of any material fact,

- (c) the deceased made adequate provision for the Applicants,
- (d) the Application had no merit at all.
- (e) for avoidance of any doubt temporary orders granted herein are hereby vacated.

This being a family matter, I direct that each party bears the costs connected, and incidental to the 1st application.

It is so ordered.

Dated, signed and delivered at Nakuru this 29th day of June, 2012

**M. J. ANYARA EMUKULE
JUDGE**