



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Succession Cause 294 of 2008**

**IN THE MATTER OF THE ESTATE OF THE LATE JASPER ALIWA ONGOR (DECEASED)**

**ALICE AKOTH ALIWA ..... APPLICANT**

**VERSUS**

**BARACK OMUDHO ALIWA ..... RESPONDENT**

**RULING**

(1) Before the court is an application by way of Summons for Revocation of Grant seeking an order that **“the Grant of Letters of Administration Intestate made on the 24<sup>th</sup> June 2010 and confirmed on the 21<sup>st</sup> August 2009 be revoked and or annulled”** on ground principally that the grant was obtained fraudulently and secretly by making a false statement and concealment of material facts essential to the making of the grant.

(2) The Summons for revocation of Grant were supported by the Applicant's supporting affidavit of 28<sup>th</sup> July 2010 and supplementary affidavit of 28<sup>th</sup> October 2011. The Respondent filed a replying affidavit sworn on 24<sup>th</sup> May 2012 along with a document entitled Reply to Summons for Revocation of Grant on the same date. Counsel for the Applicant and the Respondent in person then made their respective oral submissions on 12<sup>th</sup> July 2012 and ruling was reserved.

(3) The Applicant's case is that the Respondent, who is her stepson and with whom she had obtained a Limited Grant for collection of rent and debts to the Estate, had without her knowledge and consent applied in their names for a Grant of Letters of Administration to the Estate of the deceased husband (and father of the Respondent) and using the said grant fraudulently transferred estate properties without the knowledge of the Applicant and other beneficiaries to the estate. The Applicant learnt of the sale of the assets in April 2010 from the Respondent's wife and subsequently established that the Respondent had used a photograph of another person purporting it to be the Applicant; a fake personal identification number for the Applicant who had not taken out a PIN Certificate and forgery of the Applicant's signature to effect the transfer of one of the properties LR 2847/I/MN on 16<sup>th</sup> October 2009. The Applicant further averred that the Respondent had received part payment of the Kshs.500,000/= in respect of sale of the same property to another purchaser on 9<sup>th</sup> March 2009. As a result of the fraudulent dealings with the estate, the Respondent had been charged with fraudulent disposal of trust property contrary to section 327 (1) (d) of the Penal Code in Criminal Case No. 2130 of 2010. The Applicant further complained that the Grant of Letters of Administration was made on the basis of a false affidavit by the Respondent in which he omitted some of the children of the deceased as beneficiaries.

(4) The Respondent's replying affidavit of 24<sup>th</sup> May 2012 largely confirmed the facts as set out by the Applicant in her two affidavits and merely denied the allegation of fraud and alleged that the Applicant was a party to the transactions leading to the sale of the estate assets and that she had received an equal share of the proceeds of sale of all three properties. He deponed:

***“9. That the Respondent [Applicant] herein absolutely had knowledge that I had filed a High court Succession Case No 294 of 2008 jointly in his name. I consulted her and she authorised me to file a succession case. She supplied all the documents and affidavits relating to this succession case and we received a grant of letters of Administration Intestate relating to the estate of the deceased father and even made a copy of that Grant available to her.***

***10. That the Respondent herein was a party to the sale of the property and parcel NO 2847/1/MN at Shanzu to Mr. Henson Nipel Graham and Stephen Fawell and the entire transfer documents were not forgery as the Respondent had signed and availed a photograph to be fixed to the document.***

***11. That we equally shared the proceeds of sale of the three (3) properties left by my deceased father at Shanzu, Magongo and Birikani Estate.”***

(5) The issue before the Court is therefore whether the Respondent is guilty of making false statements and concealment of material facts essential to the making of the Grant. Section 76 of the Law of Succession Act provides so far as material that:

***“76. 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)....***

***(b) that the grant was obtained fraudulently by the making 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.”***

(6) I have considered the application for revocation of grant and I find as follows:

***(a) In omitting from the list of survivors under the affidavit in support of the Petition in P & A of 294 of 2008 (Form 5) of 29<sup>th</sup> September 2008 he names of up to 9 surviving children of the deceased, which the Respondent concedes at paragraph 3 of the replying affidavit of 24<sup>th</sup> May 2012, the Respondent denied opportunity to these beneficiaries to consent to the Petition or make objection to the Grant of letters to him.***

***(b) There is no conclusive evidence that the Applicant's purported signature on the Petition and affidavit in support of the Petition in P & A of 294 of 2008 is a forgery. The mere allegation by the Applicant denied by the Respondent does not provide a basis for holding that the signatures are forgeries.***

***(c) The subsequent transfer of the suit property LR. 2847/1/MN allegedly by the Respondent and the Applicant in which it is alleged that the Respondent forged the Application's signature and attached a photograph belonging to another person is not relevant to the Summons for revocation of Grant as it took place allegedly on 9<sup>th</sup> October 2009 while the Grant was issued on 24<sup>th</sup> June 2009 and confirmed on 21<sup>st</sup> August 2009. The alleged fraudulent transfer of the parcel of land LR 2847/1/MN does not have a bearing to the prior making of the Grant of representation to the estate. The allegation of fraudulent transfer of the properties of the estate are properly the subject of the criminal charges against the Respondent for fraudulent disposal of trust property contrary to section 327 (1) (d) of the Penal Code and it is upon the criminal court to determine the matter.***

**(d) *The application for Grant of letters did not list all the assets of the deceased now conceded by the Respondent.***

(7) However, I find that the concealment on the existence of the beneficiaries whose consent to the making of grant as persons in equal degrees of priority is necessary before the making of a grant, and whose consent was therefore not obtained brings the matter within the provisions of section 76 (b) of the Law of Succession Act. The court was thereby also misled into confirming the Grant of Letters of Administration for the distribution in equal shares only of the 4 beneficiaries listed in the application while disinheriting 9 survivors of the deceased which is conceded by the Respondent. The Respondent also failed to include assets that he now agrees to have disposed.

(8) Accordingly, for the reasons set out above, I make an order for the revocation of the Grant of Letters of Administration to the Estate of Jasper Aliwa Ongor (Deceased) made in names of the Respondent and the Applicant on 24<sup>th</sup> June 2009 and confirmed on 21<sup>st</sup> August 2009. Costs in the cause.

**Dated and delivered this 16<sup>th</sup> day of October 2012.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence:

Mr. Oguk for the Applicant

Respondent in person

Miss Linda Osundwa - Court Clerk