



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**(Coram: Ojwang, J.)**

**SUCCESSION CAUSE NO. 249 OF 2008**

IN THE MATTER OF THE ESTATE OF KILANGO CHARO CHULA

(DECEASED)

**in the matter between**

ABDALLA KILANGO CHARO.....PETITIONER

-AND-

JOHN KILANGO CHARO.....APPLICANT/OBJECTOR

**RULING**

The objector moved the Court by his summons for revocation or annulment of grant dated and filed on **9<sup>th</sup> September, 2010**. The summons carries one main prayer, namely:

“THAT the grant of Letters of Administration Intestate to **Abdalla Kilango Charo...** on **27<sup>th</sup> July, 2010** be discharged and thereafter revoked and annulled forthwith”.

The application is based on the grounds that —

1. the grant was obtained fraudulently through false representation and/or concealment of material facts;
2. the petitioner concealed from the Court the fact that the deceased had two wives;
3. the petitioner is misusing the grant of Letters of Administration Intestate to “intimidate, harass and ... antagonize the family of the deceased’s second wife ...”

The applicant has sworn a supporting affidavit deponing that he is a son of the deceased, **Kilango Charo Chula**, and that the deceased had two wives: **Kavue Kilango** and **Nyevu Kilango**. He deposes that his mother, who is the second wife, has five children: himself (**John Kilango Charo**), **Julius Kilango**, **Eunice Kilango**, **Joseph Kilango**, and **Kahindi Kilango**. The deponent avers that the petitioner (**Abdalla Kilango Charo**) is the son of the deceased's first wife, alongside the following: **Mwenda Kilango**, **Riziki Kilango**, **Fatuma Kilango**, **Ramadhan Kilango** and **Sammy Kilango**.

The deponent avers that he came to learn that the petitioner had, on **21<sup>st</sup> August, 2008** sought the grant to himself of Letters of Administration Intestate, and his prayer was granted on **21<sup>st</sup> July, 2010**; but the objector's family had not been aware, in time, of the said petition even when it was published in the **Kenya Gazette of 4<sup>th</sup> June, 2010**.

The applicant states that if he had known of the petition, he would have raised an objection, especially for the reason that the petitioner was seeking the grant to himself alone, and he had kept the family of the deceased's second wife in the dark.

The applicant deponed that the petitioner had, for some time, resisted a broader family-base to petition for Letters of Administration, by refusing to produce the deceased's death certificate.

The applicant deponed that the deceased's estate included properties which had been committed to subdivision in equal parts for the two households, notably Plot No. 393, Mtwapa Settlement Scheme, comprising 10 acres; District Surveyors had, on **3<sup>rd</sup> July, 2010** visited the said plot and prepared a subdivision plan. The applicant deponed that the petitioner had resisted the intentions represented in the surveyors' plan, and a complaint was made before the Location Chief.

The applicant asked that the grant made to the petitioner be annulled, and the succession process be conducted anew, involving both households of the deceased.

**Abdalla Kilango Charo** filed a replying affidavit on **1<sup>st</sup> October, 2010**, deponing firstly, that he was the administrator of the deceased's estate, and secondly, that it was true, the objector was his half-brother, and son to the deceased.

While admitting that he had obtained the Letters of Administration Intestate, the petitioner acknowledged that the same had not yet been confirmed, and so he at this stage, lacked authority to deal with the estate of the deceased.

The petitioner contested the apportionment of the deceased's estate as suggested in the applicant's supporting affidavit: on a ground which was not entirely within the realm of evidence — that apportionment “has not been done as required by law and all those dependants in the petition ... given their respective shares”.

The petitioner acknowledged that Plot No. 393, Mtwapa “is one of the major assets which the deceased left behind and which the dependants of the deceased [live] on”; but he denied that the deceased's dependants have come together and agreed on the mode of division of Plot No. 393, Mtwapa.

The petitioner denied the objector's averment that the deceased had two wives; in the petitioner's words: “the mother of the applicant/objector herein deserted our father a long time ago and is now married to [a different] husband”; he goes on to make a statement falling outside the ambit of evidence, that the objector's mother “ceased to have an interest in the estate of the deceased”.

The petitioner depones that he has in no way interfered with the objector's utilization of Plot No. 393, Mtwapa.

On **15<sup>th</sup> November, 2010** when this matter came up for consideration before me, the objector appeared in person, while the petitioner was represented by learned counsel, **Mr. Okanga**.

The objector made his case, precisely in the manner detailed in his supporting affidavit; and he asked that the grant of Letters of Administration Intestate, made to the petitioner, be cancelled.

In response, **Mr. Okanga** urged that the objector's main allegation is that "his mother was left out of the Letters of Administration Intestate". **Mr. Okanga** relied on the petitioner's evidence, and urged that "the mother of the objector divorced the deceased a long time ago, and got married elsewhere". Counsel urged that the objector and his siblings "should be grateful the administrator [the petitioner] took out Letters of Administration"; and he submitted that once the grant was confirmed, the objector and his siblings would have a share in the deceased's estate. Counsel urged that there were no good grounds for the grant to be cancelled.

The objector's response was that his mother had not been divorced and, indeed, was still living on the same land that forms part of the deceased's estate. The objector restated his objection to the grant of Letters of Administration Intestate to the petitioner: "On our side, nobody was asked to sign; we were not aware".

Section 76 of the Law of Succession Act (Cap. 160, Laws of Kenya) states the grounds upon which a grant of representation may be revoked or annulled: that the proceedings were defective in substance; that the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case; 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 [s. 76 (a)-(c)].

In certain respects, the conduct of this matter has fallen short of expectations; in particular there are rather subdued claims made on both sides about the **status of the deceased's second wife** who is, however, acknowledged to be the mother of five of the deceased's dependants (including the objector).

It emerges from the evidence that the deceased left behind issue in the order of 11 persons, and two widows. It emerges, in the circumstances, that at least **a dozen** members of the deceased's household would, in a normal situation, have signed the "Consent to Petition for Letters of Administration"; that did not take place, and it is clear that only members of the first wife's household gave their signatures. Why would that be so? It lends credence to the objector's statement, that the petitioner accessed the Court's jurisdiction through a **darkened path**. That blot on *bona fides* is not cured, I would hold, by the fact that the petitioner secured the publication of his intention in the **Kenya Gazette of 4<sup>th</sup> June, 2010**.

From all the evidence on file, there is absolutely no question that the deceased's children, of **both** houses, are recognized to be beneficiaries. Therefore, to approach the Court in the dark, to make grant of Letters of Administration Intestate, by the petitioner alone, is good cause for nullification under **s. 76 of the Law of Succession Act**.

I hereby revoke and nullify the grant of Letters of Administration Intestate made to the petitioner on **27<sup>th</sup> July, 2010**.

I direct that members of both households of the deceased shall, **peacefully** and in a **lawful** and **orderly manner**, come together and reach agreement on arrangements for seeking Letters of Administration Intestate, in respect of the estate.

The costs of the instant application shall be borne by the petitioner.

**Orders accordingly.**

**DATED and DELIVERED at MOMBASA this 4<sup>th</sup> day of February, 2011.**

**J. B. OJWANG**

**JUDGE**

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Objector/Applicant:

For the Petitioner/Respondent: