



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO. 761 OF 2007

**IN THE MATTER OF ESTATE OF: HEZRON NYABOLA
OYANGE.....DECEASED**

AND

IN THE MATTER OF APPLICTAION BY: PENINA AKUMU

NYABOLA.....PETITIONER

VERSUS

**ROBERT MBAI NYABOLA & SHEM OGINGA
NYABOLA.....APPLICANTS**

RULING

The proceedings herein relate to the estate of one Hezron Nyabola Oyange who died on the 28th day of March 1990 at the age of seventy (70) years at Nyahera Health Centre. The proceedings were initiated by Penina Akumu Nyabola in her capacity as widow of the deceased. The authority to do so came from the area chief who listed Penina as the only widow of the deceased. The children listed are:-

- **Andrew Amatta 44 years son – deceased**
- **Sablon Odhiambo 34 years son – deceased**
- **George Obanda 27 years son – deceased**

- **Charles Muga 33 years son – deceased**

- **Kefa Otieno 27 years son – deceased.**

There is no mention in the said letter from the area chief regarding to the status of the other family members. There was no mention that the deceased was polygamous and had children with other widows. There was also no indication as to whether the children listed were children of Penina or other wives of the deceased.

Armed with the letter from the area chief as authority, Penina filed this cause naming herself as the widow and two sons **Charles Muga and Kefa Otieno**. Only one asset has been invented namely Plot number 22 / Kiboswa. The first grant was issued to her on the 30th day of April 2008.

The issuance of the grant in Penina's name attracted the filling of a summons under Section 76 (b) and (c) of Cap 160 Laws of Kenya. It was presented by one **Robert Mbai Nyabola and Shem Oginga Nyabola**. It is dated the 2nd day of September, 2008 and filed on the 2nd day of September 2008. The grounds relied upon are the statutory ones namely that **“the procedure to obtain the grant was defective in substance.**

- **The grant was obtained fraudently by the making of a false statement or by concealment from the court of things / information material to the case.**

- **That the grant was made by untrue allegation of facts essential to the case”.**

The application is supported by a supporting affidavit deponed by one Robert Mbai Nyabola on the 2nd day of September 2008, and the salient features of the same are as follows:-

- **That the deceased had five wives, four of whom are now deceased leaving one who is alive who is Penina. These are listed in paragraph 2 of the said affidavit. The deceased are listed as Damar Gari Nyabola, Sofia Okeyo Nyabola, Esta Opere Nyabola, Wifrida Omolo Nyabola. Whereas the living one is listed as Penina Akumu Nyabola.**

- **Vide paragraph 3 thereof there is listed the children of the deceased from all the five wives. Those living are listed as:-**

- **Osinde James Nyabola**

- **Ference Okito Nyabola**

- **Barrack Gumba Nyabola**

- **Robert Mbai Nyabola**
- **Gordon Otieno Nyabola**
- **William Otieno Nyabola**
- **Shem Oginga Nyabola**
- **Charles Muga Nyabola and**
- **Kefa Otieno Nyabola**

The dead are listed as:-

- **Gilbert Otange Nyabola**
- **Henry Amatta Nyabola**
- **Zablon Odhiambo Nyabola**
- **George Obanda Nyabola and**
- **Justo Ayieye Nyabola**
- **Vide paragraph 4 and 5 of the affidavit that being an estate involving many beneficiaries, the family was supposed to sit down and chart collectively the best way out to process the succession proceedings but the petitioner on the advise of her sons went to take out the grant objected to on her own.**
- **Vide paragraph 6 that the petitioner had presented herself and her two sons as the only heirs to plot No. 22/Kiboswa knowing that was not the correct position as there were many other sons of the deceased interested in the same property.**
- **Vide paragraph 8 of the said supporting affidavit that other properties belonging to the estate were listed as:-**

- (i) Kisumu East / Kiboswa / 22**

- (ii) Kisumu East / Nyahera / 1143**

- (iii) Kisumu East / Nyahera / 129**

- (iv) Kisumu Kogony / Bandari / 2050**

- (v) Kisumu West / Kadongo / 1828**

- (vi) Kisumu West / Kadongo / 1838**

- (vii) Kisumu West / Kadongo / 1845**

- (viii) Kisumu West / Kadongo / 300**

- (ix) Kisumu West / Kadongo / 1829**

Vide paragraph 9 of the affidavit that from the revelations on the lists of the beneficiaries to the estate and list of properties there is a clear demonstration that a lot of material information was concealed and or withheld from the court which is sufficient reason to warrant the grant issued herein being revoked and or annulled.

The Petitioner / Respondent was served with a notice dated 3rd day of September 2008. She responded by way of a replying affidavit deponed by her on the 8th day of September, 2008 and filed the same date. The salient features of the same are as follows:-

- (a) Vide paragraph 3 thereof concedes that the deceased had five (5) wives, she being one of the five.**

- (b) Denied the allegation that the grant issued to her was obtained fraudulently**

- (c) Vide paragraph five thereof, that the issue of the taking out of the grant was discussed at the family level but it is the applicants who are sons of the deceased who refused to co-operate and upon receiving un co-operation from the applicants is when she sought advise and assistance from**

the area chief who advised her to go ahead and apply for a grant of the letters of administration limited to the property she was interested in, as the deceased had distributed his estate before he died and the parcel of land given to her by the deceased what she listed for succession purposes.

(d) It is her stand, that if she intended to defraud the estate, then she would have listed all the properties belonging to the estate to the exclusion can of the other beneficiaries.

(e) Vide paragraph 9 that she was aware of the deceased's other sons but she listed only her sons because she was only interested in the property given to her and her sons by the deceased.

(f) That there is no dispute that she is a widow of the deceased and it is not proper for the applicants to seek her cooperation when infact they had withheld theirs from her when she needed it.

(g) That since the grant has not been confirmed they can apply to be included and there is no need for them to apply for its annulment and or revocation.

It is on record that in view of the content of their deponements, the court advised them to sit down, talk and discuss the matter with a view to recording a consent to dispose off the application, but this was not possible and parties asked the court to rule on the mater on the basis of the deponements filed in court.

This court, has given due consideration to the afore set out content of the deponements in support and against the application for revocation and or annulment of the grant and in this court's opinion, in order for the applicants to succeed ,they have to bring their complaints within the ingredients required to be established before one can earn the relief sought as set out by the provisions of Section 76 of the law of Succession Act Cap 160 laws of Kenya and as confirmed by the court of appeal and the superior courts that this court has judicial notice of. There is the case of **IN THE ESTATE OF: GITAU (DECEASED) (2002) 2 KLR 430** decided by Khamoni J as he then was now (retired) where his Lordship held inter alia that **"The relief of revocation of a grant is not available to a litigant who is complaining about distribution only"**.

There is also the case of **MATHEKA AND ANOTEHR = VERSUS MATHEKA (2005) KLR 455** decided by the Court of Appeal which laid down the following guide lines:-

- 1. A grant may be revoked either by application by an interested party or on the court's own motion.**
- 2. Even where revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance or that the grant was obtained fraudulently by making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegations of facts essential on a point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.**
- 3. That the grant may also be revoked if it can be shown to the court that the person to whom the grant has been issued has failed to produce to the court such inventory or account of administration**

as may be required.

4. When the deceased has died intestate, the court shall save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall in the best interest of all concerned, be made but 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 to intestacy, with priority according to their respective beneficial interest as provided by part (v) of the law of Succession Act.

(c) The public trustee and creditors”

This court has given due consideration to the afore set out ingredients derived from the afore set out case law, and the same applied on to the facts of the case herein and the court proceeds to make the following findings on the same:-

1. The applicants are rightly before the seat of justice seeking revocation and or annulment in their capacity as interested parties. They are interested parties by reason of them being sons of the deceased and ultimate beneficiaries to the estate of the deceased a fact admitted by the Petitioner or Respondent.

2. The complaint falls within the ingredients set by the provisions of law because it does not centre solely on issues of distribution. In fact there is no mention of distribution.

3. The respondent has denied fraudulent intention but concedes to have left out the mention and or enumeration of other beneficiaries besides members of her household and properties other than that which she and her family were interested in.

4. Since the provision of law does not give any exception to in advertence or excusable mistake the ingredients of concealment of something material to the case has been established in that the petitioner/respondent failed to disclose right from the letter from the area chief, that the deceased had more than one wife, namely five and has other children besides her own children and that she has omitted to mention them in the proceedings on account of lack of co-operation on their part.

5. By reason of what has been stated in number 4, above there is justification for the courts interference with the grant issued herein in order to allow other beneficiaries participate in the administration of the estate to protect their interest in view of the admission on the part of the petitioner that her interest is limited to realizing what the deceased allegedly gave to her house during his life time and not to what he had given to the other houses.

6. That the other 4 (four) houses have filed a consent signed before the area chief agreeing to the following four as joint administrators namely:-

- (a) **Serfina Auma Osinde**
- (b) **Robert Mbai Nyabola**

- (c) **Shem Oginga Nyabola**
- (d) **Penina Akumu Nyabola**

7. That the other proposed administrators and applicants recognizes the interests of the petitioner respondent as an administrator but have insisted that she should administer jointly with others. The applicants stand is reasonable as it is in line with the provisions of the law namely Section, 56 (1) (b) of Cap 160 laws of Kenya. It states:-

Section 56 (1) (b). No grant of representation shall be made to more than four persons in respect of the same properly”.

This provision also prohibits the issuance of multiple grants in respect of the same estate.

For the reasons given in the assessment the court proceeds to make the following orders in the disposal of this mater:-

- (a) For the reasons given in the assessment the grant issued herein to **Penina Akumu Nyabola on the 30th day of April 2008** be and is hereby revoked.
- (ii) The same is ordered to be surrendered to court upon the reading of this ruling for cancellation.
- (b) A fresh grant be and is hereby ordered to be issued in the joint names of:-
 - (i) **Serfina Auma Osinde**
 - (ii) **Robert Mbai Nyabola**

 - (iii) **Shem Oginga Nyabola**

 - (iv) **Penina Akumu Nyabola**

(c) That upon issuance of the fresh grant as it is stated in number 2 above, the said administrators either severally or jointly do present an application for confirmation of the grant and include prayers to have the same confirmed before the expiry of six months in view of the fact that there appears to be no contest on the list of beneficiaries and list of properties.

- (e) The several or joint administrators applying for confirmation also to show the mode of distribution

of the deceased's property.

- (f) The application for confirmation so filed to be served on all the beneficiaries of the deceased's estate.

- (g) Any beneficiary not satisfied with the mode of distribution suggested to file affidavits of protests and then show their own mode of distribution.

- (h) Upon complying with number 3, 4, 5, and 6 above parties to take directions on the mode of procedure for the disposal of the application for confirmation should the mode of distribution be contested by any party.

- (i) If the mode of distribution will not be contested, the grant shall be confirmed and thereafter parties will proceed according to law.

- (j) Each party to bear owns costs since they were each unrepresented and there was silence on either side as to whether there was a possibility to have costs paid by the estate.

Dated, signed and delivered at Kisumu this 20th day of May 2011.

R. N. NAMBUYE

JUDGE

RNN/aao