



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO. 230 OF 2007

**IN THE MATTER OF THOMAS KENYATTA GICHANA.....DECEASED**

**FRIDAH MORAA NYAKUNDI .....OBJECTOR**

**-VERSUS-**

**JACKLINE NYABOKE GICHANA**

**BOCHABERI NYAKUNDI .....PETITIONERS**

RULING

There are two applications dated 25<sup>th</sup> September 2009 and 1<sup>st</sup> March, 2010 respectively. They all seek the revocation of grant issued herein on 29<sup>th</sup> February, 2009. Whereas the application dated 25<sup>th</sup> September 2009 was filed by **Jackline Nyaboke Gichana**, a widow to **Thomas Kenyatta Gichana**, deceased, the application dated 1<sup>st</sup> March, 2010 was filed by **Fridah Moraa Nyakundi**, a sister-in-law to the deceased being a wife to the brother of the deceased. As the two applications sought the revocation of the grant issued and confirmed to **Jackline Nyaboke Gichana** and **Bochaberi Nyakundi** jointly on 22<sup>nd</sup> February, 2009, and were based on more or less the same grounds, it was found convenient that the two applications be consolidated and heard together. It was so ordered.

When the two applications came up before me for interparties hearing, **Mr. Bosire**, learned counsel for respondents in both applications intimated that he wished to raise and argue a preliminary objection. He submitted that with respect to the application dated 25<sup>th</sup> September, 2009 the objection was misconceived and incompetent. It contravened section 30 of the Law of Succession Act since the grant had been confirmed. Objection proceedings could not be entertained once a grant had been confirmed.

With regard to the application dated 1<sup>st</sup> March, 2010 it was his contention that the application deals with the concept of trust. Trust can only be ventilated in a suit and not on an application for revocation of grant. The applicant too had no *Locus standi* to bring the application since she did not obtain a grant of letters of administration of her deceased husband's estate.

In response **Mr. Masese** for both applicant's submitted that the applications were brought under section 76 of the **Law of Succession Act** and **Rule 44 of the Probate and Administration Rules**. The deceased died intestate leaving the 1<sup>st</sup> applicant together with her two children. Section 30 of **Law of Succession Act** deals with situations where a person dies leaving a will. The applications herein are for revocation of a grant.

For anybody who cares to know it has been held repeatedly since **Mukisa Biscuit Manufacturing Company Limited V West End Distributors Limited (1969) E.A 696** that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained. With regard to the application dated 25<sup>th</sup> September, 2009, the respondent faults the same on the ground that it contravenes section 30 of the **Law of Succession Act**. That section merely provides that no application for provision for dependants can be brought once the grant has been confirmed. It is true that the grant herein has been confirmed. However the two applications filed are not on the basis that the applicants are dependents and therefore provisions for them as such dependants ought to have been made out of the estate of the deceased. All that the applicants are seeking is to have the confirmed grant revoked on grounds that the same was obtained

fraudulently by making a false statement and or by concealment from the court of facts material to the case. The applications were filed pursuant to section 76 of the **Law of Succession Act**. Under this section 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. So it matters not that the grant is confirmed. It also matters not that the person making the application has not obtained a grant in respect of her husband's estate. She can easily fit in the description of an interested party. It also matters not that her claim is anchored on a trust. This section of the law provides the grounds upon which a grant whether or not confirmed can be revoked. All that the applicant needs to do is to bring himself or herself within any of the stipulated 5 grounds. From the applications, it would appear that they are anchored the grounds 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. Clearly this preliminary objection has been raised on the basis of misinterpretation or misapprehension of the law. Strictly speaking therefore it was not argued on a pure point of law nor on the assumption that all the facts pleaded are correct.

With regard to the application dated 1<sup>st</sup> March, 2010 whereas the respondent may be right in questioning the basis of the application i.e trust, however besides trust, the applicant is also claiming that the respondent is guilty of making false statement, untrue allegation and that she did not obtain consent from other dependants to the confirmation of grant. In any event whether or not the concept of a trust can be ventilated in application for revocation of a grant is a moot point.

The respondent also questions the *locus standi* of the applicant in the instant application. That she does not have a grant of letters of administration of her late husband's estate. How does the respondent know that as a fact. She may after all have obtained the same without disclosing that fact to the respondent. It is therefore a matter of evidence. Besides even if she did not have such a grant nothing stops her from prosecuting the application on the basis that she is an interested party to the estate of the deceased.

The upshot of all the foregoing is that the preliminary objection was unmerited and is accordingly dismissed with costs to the applicants.

**Ruling dated, signed and delivered** at Kisii this 30<sup>th</sup> July 2010.

**ASIKE MAKHANDIA**

**JUDGE**