No. 186
REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 142 OF 2007

IN THE MATTER OF: THE ESTATE OF MIDHUNE WAGANDA(DECEASED)
AND
IN THE MATTER OF: AN APPLICATION FOR REVOCATION OF GRANT
BETWEEN
PAUL ORIMA ONIALA
JOHN AKUMU
JACOB ORIMA
OTIENO JAKOYO…….... APPLICANTS

AND
SIMON JAKOYO MIDHUNE……....
….RESPONDENT

RULING

The 1st applicant allegedly filed on behalf of the other 3 applicants an application by way of summons for Revocation of Grant dated 8th April, 2008. The application was expressed to be brought under section 76 of the **Law of Succession Act** and rules 44, 49 and 63 of the **Probate and Administration rules**. Among the prayers sought in the application were that the Grant of Letters of Adminstration issued to **Simon Jakoyo Midhune** on 8th May, 1995 and confirmed on 30th may, 1995 in the Senior Resident magistrate's court at Homa Bay in Succession cause number 39 of 1995 be revoked and corresponding but fresh grant be issued to the applicant. Secondly, that the Registration of **LR No. Kamagambo/ Kamwango/510R 515 *"the suit premises"*** in the name of the respondent be revoked and or rescinded. Finally, the applicant prayed that the respondent be condemned in costs of the application.

The grounds in support of the application were that the grant was obtained by fraud, concealment of material facts and or deliberate misrepresentation of facts by the respondent and that he, had forged the death certificate upon which he premised the Succession proceedings in the subordinate court. The respondent further failed to disclose his true relationship with the deceased, that the grant was obtained by means of untrue allegation of fact essential in point of Law to justify the grant, notwithstanding that the allegation was made in ignorance or inadvertently, that the respondent was unable owing to existing grudge and or vendetta between him and the rest of the beneficiaries to administer the estate, that the grant was issued and confirmed prematurely before the lapse of the statutory 6 months period without any sufficient cause whatsoever, that the respondent omitted to include the names of all the beneficiaries of the estate of the deceased, that the respondent had misappropriated to himself the assets of the deceased, that he had killed the widow of the deceased and therefore he was not a fit and proper person to administer the estate of the Deceased.

In support of the application, the applicant deponed where pertinent that **Midhune Waganda. *" the deceased"*** passed on sometimes on 9th June, 1991 as opposed to 25th July, 1993 which was the date alleged by the respondent in his Homabay SRM Succession Cause number 39 of 1995. The deceased was only married to one wife, **Anastasia Owetu Midhune** now deceased. Both deceased had no son except 2 daughters, namely, **Consolata Anyango** and **Mary Akinyi**. They are also both deceased. The deceased whose estate is the subject of these proceedings had only one brother, **Owino Hundi Waganda** who predeceased him. On the other hand, the father of the deceased, also deceased, had 2 brothers, **Oniala Akumu** and **Jakoyo Ooro.** Again they were all also deceased. **Oniala Akumu** deceased had 2 sons namely the applicant and **Samuel Onyango** both alive. He was thus closest to the deceased in terms of proximity and consanguinity as opposed to the respondent. He was thus a cousin of the deceased. The respondent obtained the grant fraudulently and through non-disclosure of material facts to wit:-

(i) That he was a son of the deceased.

(ii) That Anastasia Owetu Midhune was his mother.

(iii) Forged the death certificate.

(iv) Doctored the date of death of the deceased.

(v) Failed to disclose the full names and identities of all the beneficiaries.

The applicant went on depone that the respondent was not a fit and proper person to administer the estate of the deceased in so far as he is the person who killed the widow of the deceased. He was subsequently arrested and charged with the offence of murder vide Kisii HCCRC .No. 43 of 2007.

As expected, the application was opposed. In a replying affidavit dated 9th September, 2008, the respondent deponed where relevant that he did not claim to be the son of the deceased in the petition in the subordinate court. However, the deceased was his father having sired him in a relationship he then had with his mother, **Flora Ogalo Jakoyo** whom he inherited pursuant to Luo customary rights. His mother was the wife of the deceased's brother, the late **Jakoyo Ooro** who died long before the respondent was born. Otherwise the deceased and his first wife, **Anastasia Owetu Midhune,** were blessed with only 2 daughters, **Consolata Anyango** and **Mary Akinyi**, both deceased. In their life time the deceased and his wife had embraced the respondent as their own son in view of the fact that they had no son of their own and allowed him to utilize the suit premises. That he had good relationship with deceased and his wife. However following the death of the deceased, the respondent's relationship with the deceased's wife deteriorated due to incitement by the applicant who had interest in the suit premises. **Anastasia Owetu Midhune** resisted their machinations and permitted him to petition for the grant of letters of Administration intestate instead. Later the applicant prevailed upon her to file an application for Revocation of grant in this court dated 9th October, 2002. Sometimes in 2002, the said **Anastasia Owetu Midhune** died under mysterious circumstances. However the applicant caused him to be arrested and charged with the said death vide Kisii HCCRC.NO. 43 of 2007. The charge was a clever machination by the applicant to ensure that he was locked out of the inheritance of the deceased's estate. This application was thus mischievous, stale, ill-advised and brought in bad faith, the applicant having slept on his rights for well over 15 years, when he knew all along that the respondent had taken out a grant of letters of administration intestate with regard to the estate of the deceased. That he adopted the name of **Midhune** since his biological father was the deceased. It was therefore not true that the applicant ranks in priority as against him with regard to the estate of the deceased. Finally he denied having forged the death certificate as he was not an employee of the Registrar of persons.

On 13th November, 2009, the application came before **Muchelule J.** for directions. It was agreed and directed that the application be heard by way of oral evidence.

The applicant in his testimony before me stated that he knew the deceased who passed on in 1991. He was married to **Ansatasia Owetu Midhune** who died on 27th October, 1991. The deceased was his cousin as his father and the witness's father were brothers. The deceased passed on leaving the suit premises. The respondent was his cousin being a son to his father's brother. He obtained a grant of letters

of Administration from HomaBay court. He was not entitled to the grant as he was not the son of the deceased. He had a letter from the local chief indicating that him and not the respondent was entitled to inherit the estate of the deceased. He therefore prayed that the suit premises be shared equally between him and the respondent.

Cross-examined, he stated that he was conversant with Luo customs, rites and traditions. He was aware that in Luo custom if man passed on, his wife could be inherited and the inheriter brings up the family. That the respondent was his cousin though sired by one, **Dede Ongata**. The deceased inherited the respondent's mother when the respondent was already born. If one inherits a wife, then the inherited wife's children are deemed to be his children. In the circumstances of this case since the deceased inherited the respondent's mother, then the respondent became his son and was therefore entitled to inherit his estate.

The respondent testified and called one witness. His testimony was that the deceased was his father. His mother was initially married to **Simon Jakoyo.** When **Simon Jakoyo** passed on in 1967 she was inherited by the deceased. The respondent was born in 1972. The deceased had no sons other than him. The late **Anastasia Owetu** accepted him as her son after the death of **Midhune**. That was the basis upon which he petitioned for the grant of letters of Administration intestate in HomaBay court. As the only son of the deceased, he was entitled to inherit the estate of the deceased.

Cross-examined, he stated that the deceased had 2 wives, **Anastasia Owetu** and his mother who was the 2nd wife. The 1st wife gave birth to only daughters. Before going to court as aforesaid he was staying with the **Anastasia Owetu** and taking care of her. Though he had been charged with murder of **Anastasia Owetu**, he was found not guilty and acquitted. Currently he was staying on the land belonging to **Simon Jakoyo,** the 1st husband of his mother.

The only witness called by the respondent was his mother, **Flora Ogalo.** She confirmed that she was first married to **Simon Jakoyo** and when he died she was inherited by the deceased. Together with the deceased they had one child, the respondent. The deceased had no other son.

Cross-examined, she stated interlia that she only had one child with the deceased. When inherited by the deceased, she stayed in the same compound with **Anastasia Owetu**. She had 2 daughters with the deceased both of whom have passed on. When the deceased passed on she went back to stay on **Simon Jakoyo's** land. According to her the estate of the deceased should be inherited by the respondent according to Luo customs and traditions.

With the testimonies closed, parties agreed to file and exchange written submissions. They subsequently did so and I have carefully read and considered them alongside cited authorities.

The applicant wants the confirmed grant issued to the respondent revoked and or annulled on the grounds that it was obtained fraudulently and through concealment and non-disclosure of material facts. Fraudulent acts attributed to the respondent were that he forged the death certificate, he described himself as a son of the deceased when he was not, the grant was confirmed prematurely before the lapse of 6 months statutory period, that the respondent had failed or omitted to include the names of all the beneficiaries in the petition and by virtue of having killed **Anastasia Owetu Midhune,** he was not entitled to administer the estate of the deceased.

Grounds upon which a grant whether confirmed or not can be revoked and or annulled are clearly set out in section 76 of the Law of Succession Act. Fraud concealment of material facts and untrue allegation of fact are some of the grounds. The applicant having elected to justify the above grounds by way of viva voce evidence, one would expect that he would be armed with cogent evidence to back up those allegations. From the evidence on record adduced by the applicant I do not think that he has made out a case to warrant the revocation or annulment of the grant on any of the above grounds. Nowhere in his evidence does he touch on the acts of fraud or concealment of material facts he attributes to the respondent. If anything his entire testimony was dedicated to showing that him and not the respondent was entitled to inherit the estate of the deceased. This application was for revocation or annulment of the grant and not the distribution of the deceased's estate. The distribution was done when the grant was confirmed. The evidence of the applicant is thus of no assistance at all in this regard. Ift is a cardinal rule of evidence that he who alleges must prove. The applicant miserably failed in this regard. Small wonder then that at the end of his testimony he even prayed that the estate be shared between him and the respondent equally. This was a complete departure from his initial position.

It is also instructive that under cross-examination, the applicant turned out to be less than a candid witness. He became unnecessarily evasive in his answer. For instance, he initially had stated that the respondent's mother was never inherited by the deceased. He immediately changed his position and stated

categorically that he now knew that the respondent's mother was infact inherited by the deceased. To my mind, the applicant was not a honest and truthful witness at all.

It is also not lost on me that initially the application was filed jointly by the applicant and his cousins namely, **John Akumu, Jacob Orin**a and **Otieno Jakoyo.** However and as it subsequently turned out, the application had actually been filed solely by the applicant and he roped in the co-applicants without their knowledge and or consent. Indeed the co-applicants were surprised that the applicant had used their names in the application. Subsequent upon the discovery that their names had been misused, the 3rd and 4th applicants swore affidavits which they filed in these proceedings confirming that they were not party to the proceedings, had never consented to the applicant using their names in these proceedings and the signatures appended to the documents lodged in court by the applicant as authority to plead, act and swear affidavit dated 8th April, 2008 on their behalf were all forged. By then the 2nd applicant had passed on. The 1st applicant had no answer to this serious allegations of fraud attributed to him by his alleged co-applicants. Indeed on 25th September, 2009 **Musinga J** made an order removing the names of the co-applicants in the application on that basis. If the applicant can go the whole length of dragging people in an application who were least concerned or bothered and without their knowledge and consent and even forge their signatures, can his oral evidence be trusted. I do not think so.

The applicant claimed that the death certificate which formed the basis upon which the respondent lodged his petition for a grant of letters of Administration intestate was a forgery. He made that allegation in the application. However he tendered no evidence at all to back it up. Apart from annexing it on his application, the death certificate showing that the deceased died on 9th June, 1991, there was no other death certificate purportedly relied on by the respondent showing that infact the deceased died on 25th July, 1993 as claimed. If indeed such death certificate existed, what was so difficult for the applicant to obtain it form the SRM's court at Homabay. I cannot think of any! Perhaps the applicant opted not to introduce it in evidence out of the realization that perhaps the contents would be adverse to his case or that it did not exist at all.

The applicant too claimed that the respondent described himself in petition as a son of the deceased knowing it to be false. Once again the evidence in this regard is wanting. The record of the proceedings in the SRM's court at Homabay was not availed. Had the petition in HomaBay court been availed, it may have proved that allegation. However, since it was not produced and it was the duty of the applicant to do so, we cannot assume that his allegation aforesaid is true. Courts do not act on suppositions, speculations and or assumptions. In any case there is unchallenged evidence that the respondent's mother was subsequently inherited by the deceased when her first husband and who was the brother of the deceased passed on. Parties were all agreed that under Luo Customary Law a wife can be inherited. Once so inherited as in this case, the respondent became the son of the deceased. In any case, the evidence on record suggests that the respondent was actually sired by the deceased. That being the case, the respondent cannot be accused of fraud, concealment and or misrepresentation of material facts if he described himself in the petition before the SRM's court at HomaBay as a son of the deceased. Indeed by all accounts he was such a son.

Yes, the grant was confirmed before the statutory period of 6 months. However, that perse is no evidence of fraud, concealment or misrepresentation. There must have been reasons why it was done. In any event, the Law of Succession Act allows for the confirmation of a grant before the expiry of the 6 months statutory period.

The applicant also takes the view that since the respondent had failed to include all the names of the beneficiaries then the grant should be revoked. The applicant did not give out the names of the alleged beneficiaries that were left out. It was his duty to do so. He may perhaps have had in his mind, the alleged co-applicants which as we have already seen disowned him. From the evidence, it would appear that the respondent discribed himself and **Anastasia Owetu Midhune** as the only ones surviving the deceased. That was the reality then. The applicant could not have been listed as a beneficiary of the estate of the deceased when he was not. There is no evidence either that the applicant was a dependant of the

deceased in his life time.

During the pendency of this application, **Anastasia Owetu Midhune** was killed. The respondent was suspected to have had a hand in her death. He was arrested and prosecuted for the offence of murder. However he was subsequently acquitted. To the applicant and by virtue of section 28(e) of the **Law of Succession Act**, the respondent could not inherit the estate of the deceased as he is the one who murdered **Anastasia Owetu Midhune.** This submission cannot be possibly correct. That submission could only hold had we been dealing with her estate pursuant to the provisions of sections 96 of the Law of Succession Act. As it is these proceedings relate to the estate of the deceased and not **Anastasia Owetu Midhune**. In any event the respondent was acquitted of the charge.

Finally, the applicant raised the issue of jurisdiction. That the value of the estate of the deceased was in excess of the jurisdiction of the subordinate court in probate and administration matters which is limited to estates whose gross value does not exceed Kshs. 100,000/= in terms of section 48 of the Law of Succession Act. However there was no evidence both oral or documentary to show that indeed the estate of the deceased was valued in excess of Kshs. 100,000/=. We cannot therefore speculate that indeed that was the case.

In the end I have come to the inescapable conclusion that this application has no merit at all and I order that it be dismissed with costs to the respondent.

Judgment dated, signed and **delivered** in Kisii this 16th September, 2010.

ASIKE-MAKHANDIA
JUDGE