



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Succession Cause 245 of 2000

IN THE MATTER OF THE ESTATE OF CHARLES MUITA NDEGWA – DECEASED

AND

MUMBI MUITA APPLICANT

VERSUS

ESTHER WACEKE MUITA RESPONDENT

R U L I N G

Mumbi Muita, hereinafter referred to as “*the applicant*” on 3rd May 2002 filed an application for the revocation and or annulment of a grant pursuant to the provisions of Section 76 of the Law of Succession Act as well as rules 44 and 73 of the Probate and Administration rules. Apparently following the death of one, **Charles Muita Ndegwa** on or about 21st March 2000 hereinafter referred to as “*the deceased*”, **Esther Waceke** as a widow of the deceased hereinafter referred to as “*the respondent*” petitioned for a grant of letters of administration intestate in respect of the estate of the deceased through **Messrs Lucy Mwai & Co. Advocates**. On 25th January 2001, a temporary grant was duly issued to her. That grant was subsequently confirmed by this court on 19th April 2002 and the estate of the deceased consisting of **Magutu/Murigu/41, 5118/154 Narumoru Township, Laikipia/Tigithi/Matanya Block 3, Nyeri/Waraza/747, Plot No. 64 Ragati Township, Shares, Insurance policies, Bank accounts and two motor vehicles** distributed to the beneficiaries named therein.

This is the grant that the applicant now seeks to have revoked and or annulled on the grounds that the same was obtained fraudulently by making of a false statement or by concealment from the court something material to the cause or that it 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 and or inadvertently and finally that the proceedings to obtain the grant were defective in substance.

In support of the above grounds, the applicant swore an affidavit. She claimed that the respondent in pursuing the grant as aforesaid failed to disclose that she too was a wife of the deceased. Accordingly the grant was obtained fraudulently and secretly by making of a false statement and or by concealment of material facts. It is for this same reason that the applicant claims that the proceedings were defective in substance. That she was entitled to seek such grant, a fact which had always been known to the respondent as she ranked in priority with her. The applicant also complains that the grant was confirmed without her knowledge despite the fact that she had lodged a caveat. In the process she had been excluded from the list of beneficiaries and she had effectively been disinherited.

In answer to the application, the respondent swore and filed a replying affidavit dated 16th October

2006. In essence the respondent denied all the applicant's allegations that the grant was obtained fraudulently or by concealment of material facts and or by means of untrue allegations. She also denied that the proceedings leading to the issuance of the grant were defective in substance. She swore that at the time the chief wrote a letter dated 25th May 2000 to this court, the applicant was present and that thereafter she acted in accordance with the law until the grant was issued and confirmed to her as aforesaid. She went on to depone that she was unaware of the caveat lodged by the applicant as the same was never served on her and or her advocates nor was it brought to the attention of the judge at the time that the grant was confirmed.

On 16th February 2006, the application was placed before **Okwengu J** for directions. The judge directed that the application be determined by way of oral evidence. However pending the hearing aforesaid the respondent suffered serious sickness that led to infirmity of her mind. Vide an application dated 25th March 2008, she was substituted in this cause by her son, **Joseph C. M. Muita** on 22nd April 2008. He is the one who testified during the hearing of the cause on behalf of the main respondent. He also relied on the pleadings earlier filed by the substituted respondent.

The hearing commenced before me on 21st May 2009. The applicant was first to testify. She stated that the deceased was her husband. They had met at Magutu and married in 1965. Upon marriage they moved to Warazo. The deceased had another wife, the respondent who was staying at Mathira. Theirs was a Kikuyu customary marriage. Her parents were paid a goat (mwati) and thereafter Kshs.20,000/= representing Ruracio. They had five children – **Ngima, Wamaitha, Wangu, Muriithi** and **Muthoni**. She came to know about this succession cause the same year the deceased passed on when she went to the chief for an introductory letter. She could not however remember having filed a caveat. But it could have been done by her lawyer. According to her the deceased had 3 wives, herself, respondent and one, **Wanjiru**. The respondent did not notify her of this cause. Though they knew each other, they had disagreed and never visited each other. The deceased had cattle which was shared between them upon his death. She got 10 heads of cattle whereas **Wanjiru** got 11 and the respondent got 17. She denied that the deceased had chased her away and or that she was merely his employee. The deceased had left her on the land. The sharing of the livestock had been witnessed by the deceased's brother, **Dickson Gatura** and was reduced into writing. Her son, **Joseph Muriithi Muita** had been given a portion of the estate. Finally she testified that the elders who accompanied her husband during the payment of dowry were **Migwi** and **Githui** all of whom had since passed on.

Cross-examined by **Ms Mwai**, learned counsel for the respondent, she stated that when dowry was paid her side was represented by her father, brother and stepbrother all of whom were deceased. Her mother too was present. Her witnesses **Gatura** and **Kimani** were not present. She did not know that **Gatura** and **Kimani** had cases in court with the deceased. She was not present when the cattle were shared as per kikuyu custom. She did not know that **Gatura** and **Kimani** had forced themselves into the deceased's home and shared out the cattle. She maintained that she was married to the deceased at Warazo and had never been to Mathira. She conceded though that the deceased had his own house at Warazo and was staying 150 metres or so away from hers. She was not aware that the deceased had subdivided and transferred some portions of land to his children. However she just heard that the land had been subdivided. **Wanjiru** too was staying on the land as well but not with the deceased as she had passed on. Whereupon the deceased took her children to the respondent and bypassed her. Though the deceased used to have family parties he never invited her to the same. She conceded however that she was present when the chief gave the respondent a letter of introduction to this court and that she was all along aware of these proceedings. The deceased passed on at Kenyatta National Hospital. She only visited him thereat 3 times though he was hospitalised for 3 months. He attributed this to lack of transport. She did not also know that the deceased was suffering from terminal cancer.

PW2 **Dickson Gatura Ndegwa** testified that the deceased was his younger brother. The deceased had 3 wives, the respondent, applicant and **Wanjiru**. **Wanjiru** had passed on before the deceased. The respondent and applicant were staying separately at Magutu and Warazo respectively. The respondent was married in church whereas the applicant and **Wanjiru** were married in accordance with kikuyu customs and rites. The applicant had 5 children with the deceased who all stay at Waraza. After the death of the deceased they distributed the deceased's cattle according to the 3 houses. The estate of the

deceased should therefore be distributed according to the 3 houses as well. To him, the respondent was not a straightforward person as she never involved other beneficiaries in the petition and did not even bother to inform him about this cause. She wrongly described the applicant as a farm hand.

Under cross-examination he stated that he did not witness the payment of dowry in respect of the applicant. When deceased married **Wanjiru**, he put up a house and moved in with her. However the applicant was staying on the same land. **Wanjiru's** children were brought up by the respondent when she passed on. Whilst at Waraza, those children used to stay with the deceased and not the applicant though she resided nearby. He was not aware that the deceased had already subdivided his land at Waraza. He claimed that he saw the deceased at Mathari hospital once. However the deceased was later smuggled out of Mathari hospital to Kenyatta National Hospital by the respondent and her children. He denied that he had any disagreements with the deceased though he had been sued by the deceased in Nyeri PMCCC No. 157 of 1990. He denied that the deceased had determined how his estate should be distributed in his lifetime.

The last witness called by the applicant was **Geoffrey Kimani Ndegwa**. He was also a brother of the deceased. He confirmed that the deceased had 3 wives. The applicant was staying at Waraza whereas the respondent was at Magutu. Whereas the respondent was married in church, the other 2 wives were married traditionally. He could not tell whether upon marrying **Wanjiru**, the deceased abandoned the applicant. He confirmed that he never witnessed the payment of dowry though he had been invited for the occasion. He also maintained that the estate of the deceased should be distributed among the 3 houses.

Cross-examined, he responded that he could not tell whether the applicant was present when the chief issued the letter. He could not tell whether the deceased had in his lifetime decided on how his estate should be distributed.

With that the applicant closed her case.

The respondent testified as follows:- The deceased was his father and was only married to his mother. However he was aware of **Wanjiru's** marriage to the deceased as he used to stay in her house at Magutu. When she died her children were brought up by his mother. He knew the applicant though. When he went to Waraza, he found her there. She had a house which she still occupies to date. The deceased had a separate house. He was not in a position to tell whether the applicant was deceased's wife or not. The applicant was however all along aware of this cause as when he took his mother to get the chief's letter, the applicant was present with her son. DW2 never attended deceased's funeral. Indeed they were not on good terms as the deceased had sued him in court. In his lifetime the deceased expressed his wishes as to how his estate should be distributed. He gave him 20 acres, **George Ndegwa** 18 acres, Catherine **Wangu** 7 acres and **Monica Nyawira** 4 acres all out of Waraza land. He tendered in evidence the respective title deeds. However the Magutu land was to be inherited by his mother's daughter. As far as he was concerned, the succession cause was conducted above board.

Cross-examined by **Mr. Mugo**, learned counsel for the applicant he stated that he had been seeing the applicant on Waraza land. He could not tell whether she was a farmhand. The deceased was then staying with **Wanjiru** in a separate house. He could not tell as well whether the applicant had been married by the deceased. He conceded though that the deceased's cattle were shared out between the 3 houses – him from respondent's house, **Ndegwa** from **Wanjiru's** house and **Muriithi** from the applicant's house. He knew applicant's children some of whom were named after his grandmother. When they went for the chief's letter, the chief requested for a certificate of marriage. His mother had one and gave it to the chief. The applicant did not have and that was the reason why the chief considered his mother as the sole and lawful wife of the deceased.

The 2nd witness called by the respondent was **Joseph Kanyi Kibuchi**. He testified that he was a cousin to the deceased. As far as he was concerned, the deceased had only 2 wives, the respondent and **Wanjiru**. Under cross-examination he stated that the deceased used to stay at Waraza. When he visited him, he found **Wanjiru** and the applicant. However the deceased never told him that the applicant was

his wife.

The last witness called by the respondent was **Lucy Mumbi**, a daughter of the deceased as well as the respondent. She denied that the applicant was her stepmother since the deceased never told her about it. When Wanjiru died, her children were brought up by the respondent. The deceased subdivided Waraza land in his lifetime and gave out the titles. All along, the applicant knew about this cause. Cross-examined she stated that the deceased stayed at Waraza for a long time. She could not have known what he was upto at Waraza she had seen the applicant at Waraza and had a house thereat. She has not been evicted. The deceased's cattle was distributed. When her mother got the chief's letter, the applicant was present.

With that the respondent closed his case. Parties thereafter agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered the written submissions aforesaid.

Having considered the application, the supporting affidavit, the replying affidavit, the oral evidence tendered as well as the written submissions tendered I am on the overall not satisfied that the applicant filed the instant application bonafides. I do not also think that she and her witnesses were truthful or candid. It is on record by the applicant that she was all along aware of these succession proceedings. Indeed she testified that **"I came to know about this succession cause the same year the deceased passed on"** It is also on record that when the respondent went to collect the chief's letter to enable her commence the succession proceedings as required, the applicant was present. Apparently she had also gone to see the chief over the same purpose. However since the chief was not sure who among the two was the lawful widow of the deceased, he asked for documentary proof. The applicant was unable to produce any evidence to show that she was the deceased's wife. On the other hand, the respondent produced a marriage certificate between herself and the deceased. It was on that basis that the chief issued his letter to the respondent. It is also on record that on or about 6th September 2001 the applicant filed a caveat in this cause pursuant to rule 15 of the Probate and Administration rules. The grant had then not been confirmed. Only the temporary grant had been issued. She could have moved the court to revoke the grant at that stage but she did not. It must be assumed that before filing the caveat, she had perused the court file and knew the status of the proceedings. She could have intervened at that stage but she did not. Subsequent thereto, an application for confirmation of grant was filed. Again it was open to her to intervene at that stage and file a protest if she felt that her interests in the estate of the deceased had not been catered for. Again she did not. No reasons at all have been advanced by the applicant why she did not intervene in the proceedings at those two stages well aware of the consequences of her inaction. It would appear also that having filed the caveat, she did not follow up the matter with any concrete steps to secure and protect her interest. As it is she merely sat back. She did not even bother to serve the caveat either on the respondent and or her advocates.

The applicant having failed to take steps to secure her interest in the estate aforesaid, the respondent moved in accordance with the law and had the grant confirmed. Pursuant to the confirmed grant, the estate was distributed. The grant was confirmed on 19th April 2002. Subsequent thereto the applicant filed the instant application on 3rd May 2002. The application then came before **Juma J** on 19th September 2002. The record shows that on that day **Juma J** remarked **"Order – S.O.G. Objector to come forward with some tangible evidence....."** As can be seen as early as 19th February 2002, the applicant's position stood on shaky grounds. The applicant had been directed to provide the court with credible evidence that she was a widow of the deceased, but failed to do so and actually temporarily abandoned her application. She only reactivated the same in 2005. To date I do not think that the applicant has brought forth credible evidence to establish the fact of her marriage to the deceased. In her evidence in court on this score left a lot to be desired. Apart from her assertion that Ruracio was paid she brought forth no tangible evidence to back up that claim. I am also saying all these to show that the applicant has been indolent. Courts aid the vigilant and not the indolent. Secondly, in applications of this nature, the conduct of the applicant before, during and after the succession proceedings is worth of consideration. The applicant's conduct all along cannot endear itself to this court. She all along knew of these proceedings but sought not to intervene at an appropriate time. As a consequence the grant was confirmed and the estate distributed. Indeed part of the estate had even been distributed by the deceased

in his lifetime to his sons and title deeds issued. It would in the circumstances be unfair to disturb the status quo currently obtaining with regard to the estate of the deceased for no apparent reason other than that the applicant slept on her rights.

I have no doubt in my mind that the deceased had some sought of relationship with the applicant. She could have been a wife, a fiancée, a friend and or even a companion. She may have even been entitled to a share of the estate of the deceased. However, I am unable to accept going by the pleadings and evidence on record that the grant was not properly obtained. Certainly on this, the applicant is not being truthful and or candid with the court.

Much as section 76 of the Law of Succession Act provides that a grant of representation, whether or not confirmed may at any time be revoked and or annulled, that power can only be exercised judicially and not capriciously. It is for this reason that the conduct of the applicant comes to the fore. Her conduct going by the record cannot be said to have been above board. She knew all along that her name had been excluded from the petition but waited until the grant was confirmed before she raised the issue. She knew right from the day they appeared before the chief that she was not going to be treated as a wife of the deceased and she did nothing to secure her rights if any. Having known right from her encounter with the chief in the presence of the respondent that she was not being looked at as a wife of the deceased how could she then accuse the respondent for not considering her as a wife of the deceased and that therefore the grant was obtained fraudulently and or by concealment from the court of something material to the cause.

The process that led to the confirmed grant being issued to the respondent was in accordance with the law. The respondent followed the necessary steps outlined in the Law of Succession Act and the rules made thereunder. The applicant's only intervention was to file a caveat. However there is no evidence that she served a copy thereof on the respondent and or her counsel. She cannot therefore hold the respondent to account for non-compliance with the terms of the caveat when she did not serve it on her.

Much of the applicant's evidence I must say, was devoted on the issue of distribution of the deceased estate. For purposes of this application that evidence was therefore irrelevant. The estate had been distributed as per the confirmed grant. The applicant was expected to show that the grant was not obtained as per the requirements of the law. Sadly no credible evidence was tendered on that account.

On the whole, I find the conduct of the applicant wanting and it is on that basis alone that I must refuse this application. As already stated, the applicant all along knew of the existence of the cause. She knew all along that her status as a wife of the deceased was in challenge and yet she took no steps when required during the proceedings to assert her right and or claim to the estate. She could have applied for the revocation of the temporary grant or even filed a protest. She did neither. Instead she waited for the grant to be confirmed and distribution undertaken before she filed the instant application. That smacks of malafides. In the end she has to pay the price for her malafides as well as indolence.

The application is dismissed with no order as to costs considering the relationship of the contestants.

Dated and delivered at Nyeri this 30th day of November 2009

M. S. A. MAKHANDIA

JUDGE