



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

**AT MERU**

**Succession Cause 125 of 1999**

**CHARLES MUTUA M'ANYORO ..... PETITIONER**

**VERSUS**

**MARIA GATIRIA ..... OBJECTOR**

**RULING**

The application before me seeks five main prayers with one being in the alternative. It seeks leave to object out of time or alternatively enlargement of time for the applicant to lodge a protest. The application further seeks revocation of the grant, inhibition of certain properties comprising the estate of the deceased and maintenance of *status quo* of the estate.

Learned counsel for the applicant indicated that he would not argue the first and alternative prayers. This means that the applicant only seeks the revocation of the grant, an order of inhibition and *status quo* to be maintained with regard to the estate of the deceased.

The application is premised on some six grounds as follows:-

- (i) That the grant was obtained pursuant to proceedings which were defective in substance.
- (ii) That the petition was filed secretly
- (iii) That material facts were concealed from the court
- (iv) That the grant was made and confirmed by the Deputy Registrar
- (v) That consent of the dependants were not obtained
- (vi) That given the above, the petitioner is likely to alienate the estate and render the application nugatory

I may also add that it is the applicant's contention that the petitioner is an adopted son of the deceased. The petitioner has sworn two affidavits and has categorically stated that he is the deceased person's son with his widow, Beatrice Karaikwa and that the applicant is his step sister being the daughter of Martha Kanuu, another widow of the deceased. That the applicant and her other sisters are married and also much older than the petitioner. That only Celina Nkirote has since left her husband and returned home.

The petitioner has further averred that the clan members under the chairmanship of the local chief met the

deceased's family and agreed that the petitioner files this cause for a grant as the only heir to the deceased.

The application is expressed to be brought under section 76 of the Law of Succession Act and Rules 44, 67 and 73 of the Probate and Administration Rules. The only relevant provisions are section 76 and Rule 44 aforesaid, dealing with revocation of grant. Rule 67 deals with enlargement of the time while Rule 73 is the saving provision of the court's inherent powers.

The court may on its own motion or on application by an interested person revoke the grant on several grounds contained in section 76. The applicant relies on the grounds which can be summarized as follows:-

- (i) that the proceedings to obtain the grant were defective in substance:-
- (ii) that the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case.

The applicant's grounds are not in the same language as provided for under section 76 and as set out above. It is the duty of the applicant to prove these grounds on a balance of probabilities.

The first allegation the applicant has made is the paternity of the petitioner. It is her contention that the petitioner is not the biological son of the deceased. That allegation has been denied by the petitioner who has given the name of his mother and other details. The same has not been challenged.

The applicant has further alleged that the proceedings to obtain the grant were defective in substance as:-

- (i) no consent of family members was obtained and filed
- (ii) the petition is not signed by the petitioner and attested
- (iii) the guarantee of personal sureties is not commissioned
- (iv) the affidavit in support of the petition is not signed and commissioned
- (v) the affidavit of justification is not signed and commissioned
- (vi) the declaration is not signed and commissioned.

I have perused the record and can confirm that the petition is not signed by the petitioner although it is commissioned. I confirm that the affidavit in support of the petition and the declaration are similarly not signed by the petitioner.

Section 51 of the Law of Succession Act provides in mandatory language that an application for a grant of representation shall be made in the prescribed form, signed by the applicant and witnessed in the prescribed manner. As the petition is the basis of a succession cause and the affidavit being the facts relied upon failure to sign both is a grave matter and indeed fatal.

While still on this ground, it is contended that the grant was issued by a Deputy Registrar. I have once again looked at the record and pleadings and it is clear from the record of 13<sup>th</sup> March 2000 that the temporary grant was issued by Mr. N.H. Oundu, Deputy Registrar. I also take judicial notice that in March 2000 there was a High Court at Meru and the Deputy Registrar therefore had no jurisdiction to issue a grant. Indeed it was irregular for the Commissioner of Assize to confirm that grant.

The second ground is that the grant was obtained fraudulently and by making of false statement or by concealment from the court of something material to the case.

The applicant is alleging that the dependants were not involved in the filing of the cause and that their consent regarding distribution was also not sought and obtained. When the petition was presented it was accompanied by the chief's letter in which, apart from the petitioner, the other dependants were listed. Three of the dependants are females and the petitioner is the only male. But according to the letter, after a meeting of family members it was resolved that the petitioner petitions for letters of administration as the sole heir. It is, however, not clear whether the applicant was in attendance and whether she concurred with that resolution. But the more important question is whether her consent was obtained before the grant was confirmed.

Again, in mandatory language, the proviso to section 71 of the Law of Succession Act enjoins the court, in case of intestacy, to confirm the grant only if it is satisfied as to the respective identities and shares of all persons beneficially entitled to the estate. Another safeguard in ensuring that only the deceased person's dependants benefit from the estate is in Rule 40(3) of the Probate and Administration Rules which requires that before a grant can be confirmed the particulars of the dependants must be disclosed.

Further Rule 41 requires that the court, at the hearing of the application, the grant, and a protest, if any, hear the parties and any person interested before confirming the grant.

It is imperative under the rules that all the dependants be in attendance during the hearing of the application for confirmation save where the dependants have signed a consent in writing. See Rule 40(8).

No consent in the prescribed form or at all of the petitioner's three siblings is filed on record. The record of the court on 4<sup>th</sup> December 2000 before Omwitsa, Commissioner of Assize when the application for confirmation came for hearing only reflects the presence of the petitioner.

For these reasons, I come to the conclusion once again that the grant was obtained by concealment that the other beneficiaries are living and may have been interested to share in the estate.

In the result, the grant issued by the Deputy Registrar without jurisdiction on 15<sup>th</sup> March 2000 and confirmed by the High Court on 4<sup>th</sup> December, 2000 is revoked.

Costs of this application to the applicant.

Dated and delivered at Meru this day of 2009.

**W. OUKO**

**JUDGE**