



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Miscellaneous Succession Cause 137 of 2009**

**IN THE MATTER OF THE ESTATE OF ELIZABETH ALEX – (DECEASED)**

**AND**

**IN THE MATTER OF: MAKULATA KALE MSHILA ..... PETITIONER**

\*\*\*\*\*

**RULING**

This is the Notice of Motion dated 17<sup>th</sup> July 2009 by which the inter alia following orders:-

- “(2) *That ALEX GOMANS, CAROLINE BAHATI, ROSEMARY MSHILLA, MARIETA SHIGHARE, MWANASHA TEMBO, GRACE M. MWAMBINGU, HELEN CHAO and ROSELINE CHAO be allowed to participate as parties to the proceedings as they are directly affected.*
3. *There be a temporary stay of the orders issued by the Honourable Court herein on the 17<sup>th</sup> day of June 2009 granting a limited Grant of Letters of Administration Ad Litem to Makulata Kale Mshila of P.O. Box 88157 Mombasa pending hearing and determination of the application.*
4. *The Letters of Administration Ad Litem to Makulata Kale Mshila in respect of the estate of the late Elizabeth Alex be discharged and thereby revoked forthwith.*
5. *Costs of this application be borne by the Petitioner.”*

Mr. Mogaka Advocate appeared for the Applicant herein and made oral submissions in support of the application. Ms. Abdul appeared and made oral submissions on behalf of the Respondent opposing the application. Basically this present application seeks a revocation of the limited Grant of Letters of Administration Ad Litem to one **MAKULATA KALE MSHILA** following her application dated 8<sup>th</sup> June 2009 made under Certificate of Urgency seeking the said limited grant. The court did allow that application on 8<sup>th</sup> June 2009. The Applicants herein however claim that the Petitioner in her application of 8<sup>th</sup> June 2009 failed

to disclose to the court certain material facts.

The Estate in dispute in this case is that of the late **ELIZABETH ALEX** who passed away on 5<sup>th</sup> May 1988 at Coast General Hospital in Mombasa. The Petitioner is a daughter to the deceased and it was in this capacity that she brought Chamber Summons dated 8<sup>th</sup> June 2009 seeking to be granted letters ad litem. The present Applicant **ALEX GOMANS** in his affidavit dated 17<sup>th</sup> July 2009 states that he is a grandson to the deceased being the son of the deceased's daughter **JULIANA ALEX KITENGELE** and as such is entitled to inherit from the estate of the said deceased. The Petitioner has sought the grant of letters ad litem in order to file suit to recover the property of the deceased **PLOT NO. 13421 CHAANI MIKINDANI**. As it now transpires the said property was actually transferred to and is now registered in the name of Alex Gomans the Applicant herein.

Mr. Mogaka in his submissions argues that whilst the Applicant did disclose one sister namely Grace Mwambungu, with whose authority she claimed to have filed the petition for limited Grant, the Petitioner failed to disclose to the court that there were in existence several other beneficiaries who were also entitled to inherit from the estate of the deceased. These included the children of the deceased two late sisters **JULIANA ALEX KITENGELE** and **NAOMI ALEX**. All these undisclosed beneficiaries are of the age of majority and none of them granted authority to the Petitioner to file her petition of 8<sup>th</sup> June 2009 on their behalf. In her application of 8<sup>th</sup> June 2009 the Petitioner claimed to have been acting with the authority of only one beneficiary i.e. **GRACE MWAMBINGU** who allegedly signed a Consent to making of a Grant of Administration Intestate to a Person equal or lesser priority (Form No. 38) which consent was filed in court on 8<sup>th</sup> June 2009. The said Grace swore an affidavit dated 17<sup>th</sup> July 2009 and filed on 17<sup>th</sup> July 2009 in which she states at clause 11 –

***“THAT I have not authorized the said Makulata Kale Mshila to seek a grant and I am not agreeable to any powers in respect of the estate of our deceased mother being granted to my sister Makulata Kale Mshila ...”***

This clearly controverts what was contained in the consent filed in support of the said Petitioner's application for Grant of Letters ad Litem. It is becoming quite apparent to this court that the Petitioner did not come to court with clean hands. Why did she willfully fail to disclose the identities of the several other beneficiaries whose existence she was well aware of? Even if as Ms. Abdul for the Respondent claims Grace has only as an afterthought now disowned her earlier consent it is quite clear to me that the Petitioner is not acting in concert with the rest of the deceased's beneficiaries. Of further concern is that in her affidavit filed on 8<sup>th</sup> June 2009 the Petitioner refers to **ALEX GOMANS** to whom the suit property is now registered as a ***“stranger”***. Yet it comes to light that the said Alex is actually her relative and is well known to her as he is the deceased grandson and the son of the Petitioner's own sister Julianna. This fact has been averred to by both Alex and Grace in their supporting affidavits. Why would the Respondent refer to her own sister's child as a ***“stranger”***? The Respondent came before this court and obtained orders in her favour by way of non-disclosure of certain facts and by misrepresenting other facts for example she failed to disclose that the person to whom the suit property was now registered is actually a beneficiary to the deceased estate. Had this information been made available to the court on 8<sup>th</sup> June 2009 when the application seeking letters ad litem was argued it is more than likely that this court would have reached a different decision. The court takes a very dim view of the Respondent's attempts to hoodwink the court into making orders in her favour. Whilst the Respondent is quite at liberty to institute court action to conserve or preserve property she believes rightfully belonged to her late mother, this can only be done in an honest and transparent manner. The Respondent's actions amounted to a total abuse of the court process and as I have stated earlier her non-disclosure was calculated to hoodwink the court into believing that she and Grace were the only bona fide heirs to the deceased estate. All the while the Respondent failed to disclose that she had two other sisters Juliana and Naomi both now deceased who were equally entitled to a share of their deceased mother's estate. She also failed to disclose that her late sisters Juliana and Naomi had children who equally had an interest in the deceased's estate. The Respondent came

to court in bad faith. It is trite law that he who comes to equity must come with clean hands. The Respondent did not approach this court with clean hands at all. She cannot be allowed to benefit by orders obtained through deceit and misrepresentation. For the above reasons I do hereby allow this present application and I do revoke my orders of 8<sup>th</sup> June 2009 granting Letters of Administration ad litem to the Respondent. In addition I do hereby allow prayer (2) of this present application. I further strongly censure the Respondent for her dishonest actions. In view of the Respondent's ill-conceived attempt to deceive the court I do order her to bear the costs for this present application.

**Dated and Delivered at Mombasa this 9<sup>th</sup> day of December 2009.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:

Mr. Matheka holding brief for Mr. Mokaya for Applicant

Ms. Kipsang holding brief for Ms. Abdul for Respondent

**M. ODERO**

**JUDGE**

**9/12/2009**