

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Probate & Admin. Case 237 of 2002

CHRISTINE DIANA MAGANGA

LUCY EVA MAGANGA PLAINTIFFS

- Versus -

PAUL HENRY MAJALIWA DEFENDANT

R U L I N G

The Respondent herein was granted letters of administration intestate on 26th March, 2003, in Succession Cause No. 237 of 2002. the grant was confirmed on 6th May, 2005. By this application, the applicants seek a revocation or annulment of that grant on the ground that the same was obtained fraudulently. The application is made by a chamber summons dated 16th May, 2006 and taken out under Rule 44 of the Probate and Administration Rules and Section 76 of the Law of Succession Act, Cap 160 of the Laws of Kenya, and Section 3A of the Civil Procedure Act.

The application is supported by the annexed affidavit of Christine Diana Maganga, one of the applicants, sworn on 16th May, 2006 on behalf of herself and the second applicant. The grounds upon which it is based come out clearly from that affidavit. In a nutshell, the deceased was the father of both applicants and the Respondent. He passed away on 8th October, 1994. According to the Applicants, the deceased left behind the Respondent, the two applicants, and a grandson. But in his application for the Letters of Administration Intestate, the Respondent did not disclose this fact. He purported to be the only person surviving the deceased, and on that basis he was granted letters of administration intestate, which grant is challenged in this application.

In his replying affidavit sworn on 4th July, 2006, the Respondent concedes that the applicants are his sisters and that their father died on 8th October, 1994. It is his contention that when their father died, his sisters were married and living with their husbands. Upon seeking legal advice, he was informed that he had to petition for letters of administration either together with his sisters or obtain their consent allowing him to petition. When he approached them, they told him they were comfortable where they were and did not want to be involved in anything relating to their late father's estate. He thereafter promptly filed the petition and obtained the letters of administration. The first applicant returned to their home after the death of her husband, but the second applicant is still married. He finally avers that when their father passed away, the grandson, Isaac Henry Maganga, had not been born, and that was why the Respondent did not include the boy on the list of those who survived the deceased.

During the oral canvassing of this application, Ms. Ngigi appeared for the applicants and the respondent was represented by Mr. Mokaya. Counsel's arguments were in line with the respective affidavits sworn and filed by their respective clients. After considering the pleadings and the submissions of counsel, the main issue to be determined is whether there was concealment from the court of something material to the case.

Section 76(b) of the Law of Succession Act, so far as is relevant to this application, provides that –

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court

decides ... that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.”

In the instant case, the respondent candidly admits that he was advised that he had to petition for letters of administration either together with his sisters or to obtain their consent allowing him to petition for the same. But he followed neither of those options. He neither filed the petition together with his said sisters, nor did he obtain their consent before petitioning. And in his affidavit in support of the petition, he did not even disclose that he had any sisters. Instead, he gave the impression that he was the only person surviving his late father. If the presence of his sisters had been disclosed, and their consent had not been filed, it may well be that the court may not have made the grant. Secondly, the child Isaac Henry Maganga's existence was also not disclosed. Even though he had not been born by the time the deceased passed away, he had been born and was alive at the time of the filing of Petition No. 23 of 2002. In the circumstances, his presence should also have been disclosed.

For these reasons, I find that there was concealment from the court of some facts material to the petition, which constituted a breach of section 76 (b) of the Law of Succession Act. Consequently, the grant of letters of administration made to Paul Majaliwa Henry on 26th March, 2003 and confirmed on 6th May, 2005 is hereby revoked.

I therefore direct that all matters relating to the estate of the late Henry Maganga be henceforth ventilated in High Court Succession Cause No. 264 of 2004. It is so ordered.

Costs in the cause.

Dated and delivered at Mombasa this 13th day of June, 2008.

L. NJAGI

JUDGE