

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
HIGH COURT CIVIL MISC. 48 OF 2003**

JULIUS KITHIKII MUEMA ::: APPLICANT

VERSUS

PRISCILLA NDUMI MUEMA ALIAS

NDUMI MUEMA NGALI ::: RESPONDENT

R U L I N G

Before me is a preliminary Objection raised by the Respondent in this case Priscilla Ndumi Muema Alias Ndumi Muema Ngali. It is an objection to the application dated 20/6/03 as amended. The said application of 20/6/03 is brought pursuant to Section 76 of the Law of Succession Act whereby the applicant seeks prayers of revocation or annulment of Grant on grounds that it was obtained fraudulently by the making of a false statement or by the concealment from the court of material facts.

The grounds upon which the Preliminary Objection is grounded are as follows: That the application is incompetent since it does not state whether the applicant seeks to have the grant issued to the Respondent revoked or wants it annulled and that the application, therefore, offends Rule 44 (2) (a) of the Probate and Administration Rules; That the application is bad in law, incompetent as it does not comply with Rule 44 (2) (b) Probate and Administration Rules that it does not disclose any reasonable cause of action.

Mr Musyoki for the Respondents submits that under Section 76 of the Law of Succession Act, one can either move the court to revoke the grant or annul it and that the two are alternatives but not complimentary to each other and that the applicants prayer does not show which prayer is sought and the application is, therefore, defective. He further submitted that the application does not conform with Rules 44 (2) (a) and (b) of the Probate and Administration Rules in that the specific prayer is not indicated as required by Rule 44 2 (a) and the extent to which the estate has been administered has not been indicated as is required by Rule 44 (2) (b).

The Preliminary Objection was opposed for reasons that provisions of Rule 44 (2) Probate and Administration Rules have been complied with. It is counsel's view that the two remedies of annulment and revocation are pleaded in a complimentary manner and pleading both as he did does not render the application incompetent as revocation and annulment basically mean to render void. They mean the same thing. Mr Mwalimu for applicant urged the court to dismiss the Preliminary Objection. Section 76 of Law of Succession Act provides that a grant of representation whether confirmed or not may at any time be revoked or annulled if the court decides either on application by an interested party or on its own motion. Rule 44 provides the procedure to be followed when one applies for annulment or revocation. I looked up the meaning of the words annul and revoke in two different dictionaries. In the concise English Dictionary the two words annul and revoke mean one and the same thing which include "cancel, abolish, destroy validity of."

However, in the dictionary of English Law by Earl Jowitt the two words have slightly different meanings. Revocation means "to recall; the undoing of a thing granted or destroying or making void of some deed which had existence until the act of revocation made it void" In the same dictionary annul a judicial proceedings is to deprive it of its operation either respectively or as to the future. In my view the line between the two terms is very thin. Indeed the framing of the Section 76 and Rule 44 in my view is that the remedies have to be sought in the alternative and hence the use of the word 'or'. If the legislature intended that they compliment each other, then the word 'or' would not have been used – may be the word and or a coma would have been used. I do agree with Mr Musyoki, counsel for the Respondent that

Rule 44 (2) does confirm the fact that the two remedies be sought singly. It provides that the affidavit in support for an application under those rules shall indicate;

(a) Whether the applicant seeks to have the grant revoked or annulled, the grounds and facts upon which the application is based.

(b) The extent to which the estate has been administered or remains unadministered.

The applicant has not specifically stated which remedy he seeks so that the Respondent cannot know what to reply to. There is an affidavit of 16 paragraphs and from it, it is not clear what the applicant seeks. At Paragraph 15 he prays for the application to be granted without stating whether it is an annulment that is sought or revocation. I do agree with counsel for Respondent that the application does not comply with Rule 44 (2); is incompetent and there are really no orders sought that the court can grant. The Preliminary Objection is upheld.

The application dated 20/6/03 is struck out. Applicants, however, still have chance to file another application. Costs to the Respondents.

Dated at Machakos this 30th day of November 2004

Read and delivered in the presence of

R.V. WENDOH

JUDGE