



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

P&A CAUSE NO. 603 OF 2010

**IN THE MATTER OF THE ESTATE OF STENSLOUS MUTUA KAWEA ALIAS STENLOUS MUTUA ALIAS KAWIA
(DECEASED)**

FINTAN MUKUTI MUTUAPROTESTOR/APPLICANT

VERSUS

PHILOMENA STANLOUS MUTUA (now deceased).....1ST PETITIONER

SERAPHINE MUTUA2ND PETITIONER/RESPONDENT

RULING

1. The Protestor herein filed an application dated 28/09/2015 seeking revocation of grant made on 27/10/2010 to the administrators be revoked and/or annulled on grounds *inter alia*; that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by making of a false statement or concealment of something material; that the grant was obtained by means of an untrue allegations of a fact essential in point of law. The Applicant also sought for costs of the application.
2. The application was supported by the affidavit of the Applicant sworn on even date in which he averred that the Petitioners failed to disclose the fact that there were other beneficiaries of the deceased and that it was erroneous for the administrators to have all the assets of the deceased registered in their sole names absolutely to the exclusion of genuine beneficiaries.
3. The 2nd Petitioner (now surviving after death of 1st Petitioner) filed a replying affidavit in which she vehemently opposed the application and averred that the estate is still intact for distribution to the beneficiaries. She further added that the Protestor has been a troublemaker in the family as he has purported to dispose of some of the family property and often refuses to attend family meetings. The 2nd petitioner further stated that she had been taking care of the 1st Petitioner who is mother to the 2nd Petitioner and the Protestor and that two parcels of land were sold to defray medical expenses incurred by the 1st Petitioner's prolonged illness. She averred that the chief's letter indicates all the family members of the deceased and none has been left out and further that she is ready to complete the administration process by distributing the assets to the beneficiaries. She finally urged the court to dismiss the protest.
4. Parties agreed to canvass the protest by way of viva voce evidence. The Protestor and 2nd Petitioner tendered their evidence and did not call witnesses.
5. **Fintan Mukuti Mutua** is the Protestor. He sought to rely on the several affidavits filed in support of the summons for revocation of grant. He also relied on his witness statement. He stated that the Petitioners while lodging the petition for grant of letters of administration failed to disclose the family members who are rightful beneficiaries to the estate. He added that there was no consent by the beneficiaries to the confirmation of grant. On cross-examination, he denied refusing to sign the petition forms. He also confirmed that he together with some beneficiaries have sold part of the lands earmarked for distribution. On re-examination, he confirmed that the confirmed grant gave the administrators absolute ownership of the properties of the deceased which he deemed unfair as the beneficiaries have been locked out and who are now seeking for revocation of grant.
6. The surviving Petitioner **Seraphine Kithia Mutua** relied upon the replying affidavits filed in answer to the protest. It was her case that she petitioned for letters of grant with her mother (now deceased) and that there was full disclosure of all family members who did not object to the issuance of the grant. She stated that the 1st Petitioner had been ailing and later died on 18/12/2012 and that some of the properties were sold to cater for the 1st Petitioner's medical expenses. She maintained that her mother being a widow had a life interest in the said properties. She added that the protestor has sold some of the family land even before confirmation and that there are intermeddlers on the land who should be ordered to vacate it so that the same could be distributed. She maintained that she is ready to distribute the family land to the beneficiaries and that the Protestor should not be made an administrator since he is not fit to be made one.

On cross-examination, the 2nd Petitioner confirmed that the properties were given to the administrators absolutely. She also admitted that the

affidavit in support of the petition only listed the administrators as the only surviving members of the deceased. She also confirmed that there was no consent by beneficiaries filed alongside the summons for confirmation of grant as well as a distribution schedule. She urged the court to dismiss the protest and allow her to continue with the administration.

7. Parties were directed to file and exchange submissions. However there is none on record.

8. I have considered the rival affidavits filed herein as well as the annexures thereto. I have also considered the evidence of both the Protestor and surviving administrator (2nd Petitioner). It is not in dispute that the grant herein has already been issued and confirmed vide the certificate of confirmation of grant dated 16/03/2012. It is also not in dispute that the estate is yet to be distributed to the beneficiaries despite the grant having been confirmed on 20/1/2012. The issue for determination is whether the Protestor has furnished sufficient reasons to justify revocation of the grant herein.

9. Revocation or annulment of grant is provided for under Section 76 of the Law of Succession Act. The Protestor herein has sought reliance under the Section (a), (b) and (c). The same provides as follows:-

“A grant of representation whether or not confirmed may at anytime be revoked or annulled if the court decides, either on application by any interested party or of its own motion:-

(a) that the proceedings to obtain the grant were defective in substance;

(b) 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;

(c) that the grant 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 or inadvertently.....”

10. The protestor has blamed the 2nd Petitioner herein for obtaining the grant fraudulently by the making of a false statement and concealment of material facts. The Protestor urged the court to peruse the initial petition forms including the affidavit in support of summons for confirmation of grant and find that the Petitioners had concealed the presence of other family members of the deceased and further that the assets were to devolve to the two Petitioners absolutely to the detriment of the Protestor and beneficiaries. I have perused the initial affidavit in support of petition for letters of administration dated 2/08/2010 and note that vide paragraph 4 thereof the Administrators averred that they were the only surviving dependants of the deceased. Again the introductory letter by the area chief dated 30/04/2010 merely indicated four properties of the deceased which it claimed that the 2nd Petitioner had legal ownership. The said letter did not list the family members of the deceased. Curiously vide a letter dated 24/03/2015 by the same chief it listed ten members of the deceased. It is thus quite strange and suspicious for the area chief to deliberately omit to list the names of the beneficiaries in 2010 and only turn around in 2015 and confirm the existence of family members after much prodding by the Protestor. Again the affidavit by the Petitioners in support of summons for confirmation of grant filed on 7/04/2011 listed the Petitioners as the only surviving dependants of the deceased and further indicated that there was no applications for provisions for dependant pending. The affidavit further indicated that the four properties listed were to be registered in the names of the administrators absolutely. It would appear from the above that the Petitioners herein had a hidden agenda in failing to disclose the correct number of the beneficiaries so as to smoothen the way during the confirmation of the grant. Indeed the court would not have known about the existence of other beneficiaries during the confirmation of the grant since the initial petition forms only indicated the two administrators as the surviving dependants of the deceased. Had there been evidence of other beneficiaries the court would not have hesitated in compelling the administrators to avail the beneficiaries before the court and who were to agree or disagree to the proposed mode of distribution of the estate. As there were no other beneficiaries disclosed, the court went ahead to confirm the grant. It has now transpired from the rival affidavits and evidence tendered that indeed there are other dependants. Both the Protestor and the 2nd petitioner agreed that the estate of the deceased had ten units. The 2nd petitioner was at great pains to explain why she and the other administrator did not disclose the other dependants. The 2nd Petitioner maintained that the list of beneficiaries had been filed together with the petition forms and she seemed to blame the probate registry for the missing list. However the 2nd Petitioner did not convince me that she had actually filed such a list because the affidavit in support of the summons for confirmation of grant did not allude to the existence of other beneficiaries. There was no consent filed in support of the summons for confirmation of grant. Again the Petitioner's proposal that the assets were to devolve to them absolutely left no doubt that they did not intend to include or incorporate other beneficiaries. The Petitioners claim at this stage that they are ready to distribute the estate among the beneficiaries sounds hollow since they had already decided themselves that the assets should be held by them absolutely to the exclusion of the other family members. Such a mode of distribution runs against the wishes and interest of the other beneficiaries who have literally been thrown under the bus. I have no doubt that the Petitioners had indeed not filed a list of beneficiaries at the beginning and further did not provide any list during the confirmation proceedings thereby leading me to conclude that the proceedings to obtain the grant were defective in substance and further that the grant was obtained fraudulently by the making of a false statement or concealment of material facts. The Petitioners had been aware that they were under obligation to list the dependants of the deceased and to ensure that they participated during the confirmation of grant by securing their consent to distribution and presenting them to court. The Petitioner's claim that the beneficiaries were aware of what was going on is not truthful at all. The conduct of the Petitioners left no doubt that they had something up their sleeves when they deliberately left out the beneficiaries and went on to have themselves registered as absolute owners of the assets of the deceased. They cannot now turn around and pretend that they had the interests of the beneficiaries. There is evidence that some of the assets have been sold to third parties by the Petitioners on the grounds that they needed money with which to cater for the medical bills of the 1st Petitioner who was then ailing. However the 2nd Petitioner on cross-examination failed to produce any medical notes or bills regarding the now deceased 1st Administrator. The 2nd Petitioner claimed that the family members had been aware of the illness of the 1st Petitioner but not a single beneficiary has come out to support such assertions. In fact a majority of the beneficiaries have signed a consent to the effect that they had not given their consent to the Petitioners herein to take out letters of grant and to dispose of any properties of the deceased. They all sought for the revocation of grant. Due to the fact that most of the assets had been registered in the names of the Petitioners and that some have been disposed of without the involvement of the beneficiaries, it is only prudent that the grant should be revoked so that the family members can get together and come up with a new way forward.

11. From the rival affidavits and the evidence presented what emerges out as the spark that kicked off the protest is the purported sale of the family properties. The 2nd Petitioner and the Protestor have traded accusations against each other over the sale of some of the properties. The 2nd Petitioner claims that the Protestor sold some property before the confirmation of grant while on the other hand the protestor claims the 2nd Petitioner sold property after confirmation without involving the family members. These two individual appears to be aware that two wrongs do not make a right as each has not done the right thing regarding the estate of the deceased. This state of affairs calls for the revocation of grant and that the properties of the deceased be reverted back in the name of the deceased so that the family can then start on a clean slate going forward. Such an order might be seen to be drastic and draconian especially with regard to the third parties who are alleged to have bought those parcels of land. Indeed the persons who bought from the beneficiaries before confirmation of grant will have to pursue the affected beneficiaries while those who purchased after the confirmation are at liberty to institute proceedings in the relevant court namely the Environment and Land Court (ELC) for redress as it has turned out that the proceedings leading to the issuance of the grant were flawed. This court has jurisdiction to determine any dispute under Section 47 of the law of succession Act and Rule 73 of the Probate and Administration Rules to pronounce such decrees and make such orders as may deem expedient for the ends of justice or to prevent abuse of the court process. I must point out that this is a Succession court and must be given the latitude to issue the requisite orders in order to protect the estate of the deceased. As the process of obtaining the grant has been found to be defective in substance and flawed, and the same having merited an order of revocation, I find that an order that all the properties be reverted back in the name of the deceased is the appropriate way to go as the family members are given an opportunity to begin the process on a clean slate. Meanwhile the affected third parties shall be at liberty to take such steps as are appropriate before the relevant court for redress if need be.

12. In the result the summons for revocation and annulment of grant dated 28/09/2015 has merit. The same is allowed in the following terms:-

(a) That the grant made to PHILOMENA STANSLAUS MUTUA and SERAPHINE MUTUA on 28/10/2010 and confirmed on 20/01/2012 is hereby revoked.

(b) That the family members of the deceased to sit down and come up with names of proposed administrators not exceeding four within the next thirty (30) days from the date of this ruling failing which this court will proceed to appoint administrators for the estate.

(c) The registration of Land Parcel Numbers namely MAVOKO TOWN BLOCK 3/2189, MAVOKO TOWN BLOCK 3/3214 and MAVOKO TOWN BLOCK 3/782 in names of Philomena Stanlaus Mutua and Seraphine Kithia Mutua are hereby revoked and ordered to revert back in the name of deceased Stenslous Mtua Kawea.

(d) The registration of land Parcel No. MAVOKO TOWN BLOCK 3/1235 in names of ANN MBULA WAMBUA and TIMOTHY MAHINDA MACHARIA is hereby revoked and ordered to revert in the name of the deceased Stenslous Mutua Kawea.

(e) The status quo obtained on LR. MASII/VULYA 1260 which are still registered in the names of the deceased Stenslous Mutua Kawea be maintained pending confirmation of grant.

(f) As parties are family member each party to meet their own costs.

It is so ordered.

Dated and delivered at **Machakos** this 21st day of **January, 2020.**

D. K. Kemei

Judge