



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 68 OF 2008**

**IN THE MATTER OF THE ESTATE OF MARY MBULA MUINDI (DECEASED)**

**MUNGUTI MUINDI**

**MUKULU MUINDI.....ADMINISTRATORS/RESPONDENTS**

**VERSUS**

**JAMES MUSYOKA MUINDI.....OBJECTOR/APPLICANT**

**RULING**

1. By Summons dated 31.8.2009 the Applicant sought revocation of grant of letters of administration that was issued to **Munguti Muindi** and **Mukulu Muindi** on 20.8.1999 and confirmed on 20.4.2009 on the ground that the said grant was obtained by concealing material facts by failing to indicate that the objector is the son of the deceased; further that the Plot 39 Kitanga Settlement Scheme was not solely owned by the deceased but jointly with him; that the application excluded other properties of the deceased. The application was supported by the affidavit of the Applicant filed on 8.9.2009 wherein he stated that when the petitioners filed the petition, they did not disclose that the objector is a son to the deceased, the grant was obtained fraudulently and by concealment of material facts and the objector never consented to the petition for he was never cited thus the same ought to be revoked.
2. The application was not opposed by the Petitioner who failed to file a Replying Affidavit or any response at all but however the applicant appears to refer to an affidavit that was sworn by Munguti Muindi on 11.3.2010 which incidentally does not appear on the court record.
3. Parties took directions that the objection be heard by way of viva voce evidence.
4. The applicant testified that he is one of the owners of Plot 290/39 because he gave the deceased money to purchase the plot. He also stated that he did not know that the petitioner applied for letters of administration and he did not consent to the application. He further testified that the petitioners used the death certificate of his late father to obtain letters of administration for the deceased. On cross-examination, he stated that all he wants is to be given his right as one of the owners of the plot.
5. The 1<sup>st</sup> Petitioner testified that he had included the protestor as one of the children of the deceased in the petition. Further that he has included the protestor as one of the persons in the scheme of distribution of Plot 39 Kitanga that belonged to the deceased and that the said plot is to be shared equally. He testified that the objector was present during the confirmation and did not raise any objection and the sharing should be as per the confirmed grant. He further denied that the objector contributed to the purchase of Plot 39 Kitanga and should not be entitled to half of the share of the said property. He denied selling the deceased property. On cross-examination, he admitted selling part of Plot 39 Kitanga to Wambua Masila and using the death certificate of the deceased's husband while petitioning for the letters of administration. On re-examination he testified that the death certificate of the deceased was brought to court.
6. The objector submitted that the 1<sup>st</sup> Petitioner indicated the wrong date of death of the deceased and also did not disclose the fact that the deceased had sold a part of the estate before she died. In addition, that the objector never consented to the petition and thus the proceedings to obtain the grant were defective and thus the grant be revoked. He relied on the case of **Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR** where a grant was revoked because the property that was included was not available for distribution as it had been sold to a third party. Similarly in the case of **Musa Nyaribari Gekone and 2 others n Peter Miyienda and Another (2015) eKLR**, the grant was revoked on similar grounds.
7. I have carefully read and understood the contents of the application and the Affidavits and annexures thereto. I have also perused the court record on which the confirmation proceedings were undertaken and the annexures thereto. The main issue for determination here is whether the Administrators concealed material facts from court so as to warrant a revocation of grant.

8. The legal basis for confirmation of grants is provided in **Section 71 of the Law of Succession Act, Cap. 160** of the Laws of Kenya. In cases of intestacy, like in this case, *'the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.'*

9. I have noted that the Petitioners have made no explanation or response to challenge the averments of the applicant in his testimony. The applicant drew the attention of court to the fact that part of the estate of the deceased had been sold and though there is no evidence to that fact, the 1<sup>st</sup> Petitioner admitted the same. In addition, there is the fact that the death certificate that was used in filing the petition was not in respect of the deceased. With such actions I am satisfied that indeed there was information that was concealed from the court by the petitioners. I am inclined to find that the petitioners obtained the grant fraudulently and through concealment of material facts.

10. In **Uhuru Highway Development Limited vs Central Bank of Kenya & 2 others [1995] eKLR**, the Court of Appeal approved and applied the case of **Brink's-MAT Ltd vs Elcombe (1988) 3 All ER 188** where the Court set out the principles as follows:

*"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:*

*(i) The duty of the applicant is to make a full and fair disclosure of the material facts.*

*(ii) The Material facts are those which it is material for the Judge to know in dealing with the application made; materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers.*

*(iii) The applicant must make proper enquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such enquiries."*

11. From the foregoing, the test to be applied is whether or not the non-disclosure is relevant and what court ought to make of it in weighing the scales of justice bearing in mind that this is a 2008 matter. The 2<sup>nd</sup> Petitioner **Mukulu Muindi** has since passed on leaving only the 1<sup>st</sup> Petitioner to administer the estate. No application for rectification of the grant has been made so as to factor the issue of the death of the other petitioner to call for substitution and/or an order that the surviving Petitioner do continue alone to administer the estate. The Objector/Applicant and the surviving Petitioner have been litigating all along regarding the manner the estate of the deceased was being administered and/or managed. It has also transpired from the oral evidence that the Petitioners had used the certificate of death of their father and not the deceased herein who is the subject of these succession proceedings. It is not in dispute that the suit property belongs to the deceased herein and not any other person. As the Petitioners had used a certificate of death of a different person while instituting this cause and proceeding to obtain a grant as well as confirming the same, I am satisfied that the process was clearly flawed. No wonder the Objector herein has relentlessly taken the Petitioners to task all this time. It is quite clear that the grant was obtained fraudulently by the making of a false statement of fact or concealment of material fact from the court. The Petitioners have not explained as to the whereabouts of the certificate of death of the deceased herein. The certificate of death belonging to someone else could not be used to legitimize an irregularity. The certificate of death for the deceased herein is a pre-requisite as evidence that she is indeed deceased. Even if the Objector's name has been indicated in the chief's letter as one of the beneficiaries, this does not absolve the Petitioners from ensuring that they file the deceased's certificate of death. These discrepancies leave this court with no option but to agree with the Objector's request for the revocation and/or annulment of the grant that had been issued to the Petitioners so that a fresh one would be issued once the requisite certificate of death in respect of the deceased is filed herein.

12. In the result it is the finding of this court that the Objector/Applicant's application dated 31/08/2009 must succeed and the same is allowed in the following terms:-

***(a) The grant issued to the Petitioners on 20/08/1999 and confirmed on the 20/04/2009 is hereby revoked.***

***(b) A fresh grant be issued in the names of MUNGUTI MUINDI and JAMES MUSYOKA MUINDI.***

***(c) The new administrators are directed to file an amended petition correcting the error in the date of the deceased and disclose the liabilities of the deceased as well as filing a certificate of death in respect of the deceased MARY MBULA MUINDI.***

***(d) The administrators or any of them to file fresh summons for confirmation of grant within 30 days of the issuance of the grant.***

***(e) The summons for confirmation of grant shall be served upon all the beneficiaries.***

***(f) Munguti Muindi is directed to file accounts on the running of the estate of the deceased with effect from the date of appointment to date.***

***(g) A conservatory order is hereby issued barring any sale or transfer of Plot No. 39 Kitanga Settlement Scheme pending the confirmation of the fresh grant issued herein.***

***(h) Matter be mentioned on the 5<sup>th</sup> April, 2019 for further directions.***

***(i) As this is a matter involving family members, I make no order as to costs.***

Orders accordingly.

**Dated and Delivered at Machakos this 6<sup>th</sup> day of February, 2019.**

**D.K. KEMEI**

**JUDGE**