



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1866 OF 1998

IN THE MATTER OF THE ESTATE OF KAMUYU NJIRI

JUDGMENT

1. The applicant herein filed an application dated 30th July 2008 seeking for an order of revocation of grant of letters of administration intestate issued to administrator and confirmed on the 2nd July 2001. The application is premised on the grounds that the same was obtained through misrepresentation. The administrator on his part denied the allegation vide his replying affidavit dated the 8th September 2008.
2. It was directed that the application be disposed of by way of affidavit and oral evidence.
3. The applicant's first witness was Kabui wa Hiuhu. She stated that her mother, Wambui wa Gachihi was the wife to the deceased. She stated that she was brought up by the deceased her father, and that she had lived with her mother and the deceased in Ngando on land parcel Dagoretti/Riruta/3099. She testified that they stayed with the deceased until his death, when some people came to claim the land. She said that they had been on the land for fifty-three (53) years when one Chege Gatauwa came and claimed ownership of the same. She stated that they had built a house on the said parcel of land where she stayed with her four sisters and one brother. She testified that the deceased died in 1968 while their mother passed on in 2004. She further stated that she lost all three of her siblings; Nduta in 1955, Lucy in 1997 and Robert Kibatha Hiuhu, the initial applicant, in 2003. She stated that she and her siblings had been staying on the land. She emphasized that even at the time of her testimony she was staying on the said piece of land. She identified that the administrator as her cousin, adding that he claimed to have rights over the said parcel of land. During cross-examination, she confirmed that her identity card bore the name Hiuhu, but said that she did not know the said Hiuhu as she was brought up by the deceased. She stated that her mother was married to the deceased and that they were brought up by him. She, however, could not tell exactly when the two got married. She clarified that the administrator never informed them of his intention to administer the estate. She further stated that the deceased had two houses one where they stayed and another where he stayed. however, both houses were on the land. In re-examination, she confirmed that she was the first born daughter of the deceased and that she did not know anyone by the name Hiuhu. She also stated that the interested party had bought part of their land and that was where the applicant was buried. She also confirmed that she was not cited. She stated that the deceased kept cattle and therefore would leave and go and sleep where the cattle was for security reasons.
4. Lucy Wangui Kibatha was the applicant's second witness. She stated that she was the widow to the dead initial applicant, Robert Kibatha Hiuhu. She testified that they had been living on Dagoretti/Riruta/3099 since she got married to him. She stated that Wambui, her mother-in-law, had built a house on the land and that that was where she stayed till her demise. She stated that the deceased was her father-in-law, and that he and Wambui were buried on the said parcel of land. She further stated that her husband was also buried on the same parcel of land upon his death. She stated that she got to know of the interested party when he came and notified them that the land had been sold to him and that they were to move. She testified that the administrator was the one who sold the property to the interested person without their knowledge. She stated that Wambui was first married to Hiuhu and had two children with him, namely Kabui and her husband. The said Hiuhu later died and Wambui thereafter got married to the deceased with whom she had three children. She stated that the deceased lived with Wambui in the same house. In cross-examination, she confirmed the said Wambui was married to the deceased and that she stayed with him till his death. She stated that at the time she married the applicant, the mother was staying with the deceased. She also confirmed that before the deceased died he had sold a portion of the land to some other people. She also confirmed that the deceased had children with Wambui and that they stayed on the land. She stated that the deceased had a hut where he slept and Wambui also had a house on the land where she stayed with her children. She clarified that during those days the husband would not go where the children slept. She stated that Wambui told her that both houses were hers as the deceased had constructed them for her.
5. Veronica Muthoni testified next. She stated that she knew the deceased very well. She said that the deceased married Wambui when she had two children and that they were later blessed with three more. She stated that the two stayed together till the deceased's death. She clarified that Kabui and the applicant were Hiuhu's children and that the deceased took them in as his own children. Rahab Nduta followed. She testified that the deceased was her uncle. She stated that the deceased was married to Wambui who had two children from a previous marriage. She stated that the two were blessed with three more children, all of whom the deceased stayed with on his land. She stated that the deceased had two parcels of land Dagoretti /Riruta /3099 and Karai/Gikambura/800. She stated that the deceased was staying with his wife until he met his death and that the deceased, his wife Wambui and her son the applicant were all buried on the said land. She stated further that the deceased took Wambui's two children as his own and was living with them in his home. In cross-examination, she confirmed that Wambui and the deceased lived as husband and wife. she stated that the deceased had a house where his family lived and that the children still live on the parcel of land.

6. The administrator testified that he was a nephew of the deceased, who at the time of his death, had two parcels of land namely Dagoretti/Riruta/3099 and Karai/Gikambura/800. He stated that he did not know Wambui Gachihi and her children and that she was not a wife to the deceased. He stated that he only got to know of them after the suit was filed. He stated that the deceased used to live alone and that he did not have any family. He testified that the deceased lived in a wooden house alone and that Wambui and her children were never seen in his compound. He stated that he was aware that the applicants had the name Hiuho as their surname. When referred to the applicant's identity card, he confirmed that the name Hiuho had been indicated as the father's name while Wambui was indicated as the mother's name. He stated that if the applicant was a child to the deceased, he ought to have had the name Kamuyu. He further stated that the said Wambui was married to one Gachihi and that they lived in Dagoretti he thus stated that it would have been impossible for her to have been married to the deceased. He further stated that he attended the deceased's funeral, and that the said Wambui did not attend the funeral. He testified that the funeral costs were taken care of by one Kamuyu Karogo, who also took away the deceased's livestock as there was no one else to take care of them after his demise. He stated that during the funeral no one claimed to be a beneficiary. He said that he filed for the letters of administration intestate in 1998 and that his petition was not opposed, even when he sought confirmation of his grant. He stated that the estate was distributed equally between him and his brother and they later sold their portion to the interested party. He stated that the applicant had no claim on the land and that their evidence was not true and ought to be disregarded. During cross-examination, he confirmed that the deceased was his uncle, an elder brother to his father. He stated that in his petition he indicated that he was the only son to the deceased a fact that he admitted was not true. He stated that he only came to know the applicant after the application had been filed. He, however, stated that he knew Wambui as she had been buried in Dagoretti/Riruta/3099. He stated that the same sparked a burial dispute in 2004. The same was, however, not brought to court and he said he wanted the body of Wambui to be exhumed. He stated that his parents were alive at the time of the deceased's death. He stated that he knew the applicant and that he had agreed to give him a piece of land from the estate but he declined the offer.

7. He called Edward Kigundu, a businessman and a retired Chief and a resident of Dagoretti, as his first witness, who stated that he knew the deceased very well as he was his neighbor. He stated that the deceased had no family, for he never married and did not have any children. He testified that the deceased had two parcels of land Dagoretti/Riruta/3099 and Karai/Gikambura/800. During cross-examination, he stated that he was only twenty-seven (27) years old when the deceased died. He stated that the deceased moved to Ngando in 1958 and that he never visited him after he moved. He also clarified that he could not tell who the deceased lived with in Ngando. He also confirmed that he did not know the applicant. He further said that Agnes Wambui was buried in one of the deceased's parcels of land. In re-examination, he confirmed that he did not know the said Agnes Wambui, asserting that the deceased did not have a family.

8. Pius Njogu Nguo, a businessman, followed. He stated that he knew the deceased very well, and that he was not married. He testified that Agnes Wambui was his aunt. He stated that she was not married to the deceased neither did they have children. He stated that the said Agnes Wambui was married to one Gachihi with whom they had children. He stated that the deceased stayed alone in a mud house. In cross-examination, he said that Agnes Wambui was married to Hiuho. He stated further that according to Kikuyu customs a wife is buried on her husband's land next to her husband's grave. He, however, said he did not know where Agnes Wambui was buried. In re-examination, he clarified that the deceased was staying alone and that the house he lived in could not accommodate more than one person.

9. Mary Wangari Kamuyu, a resident of Riruta and a wife to the administrator herein, came next. She stated that she knew the deceased to be an uncle to the administrator. She stated that the deceased was never married neither did he have children. She stated that after his death, his personal property was given to her and his cattle taken to their home as per the customs. His farm was also to be shared amongst his brother's wives. She further stated that the house he lived in collapsed as there was no one to take care of it. During cross-examination, she confirmed that she was born in 1952 and that at the time of the deceased's death she was fifteen (15) years old. She stated that she did not know Agnes Wambui. She, however, confirmed that the said Wambui was buried on the deceased's parcel of land.

10. The interested party, on his part, stated that he met the administrator herein in 2011. He stated that the administrator approached him with a proposal to sell land to him. He stated that the proposal was for the sale on land parcel Dagoretti/Riruta/5865 whose title he had. He testified that vide a sale agreement dated 27th January 2011 he bought the land at a price of Kshs. 4,000,000.00 and title of the same was passed to him. He stated that at the time of the purchase, the parcel had no inhibitions or encumbrances. He later erected a store on it which he leased out. He further stated that he also charged the property with equity bank. He emphasized that he bought the land legally and that the title was clean. He testified that he had one day visited the said parcel of land only to be told that the applicant herein had been buried on the said parcel. In cross-examination he confirmed that the applicant was buried on the land without his consent. He stated that he only knew the administrator from whom he bought the land. He stated that nobody had challenged the title to date as he bought the land legally.

11. From the material placed before me the issues for determination are whether the applicant had capacity to file the application herein and whether he had availed sufficient grounds to warrant revocation of the subject grant.

12. It was the administrator's and the interested party's position that the applicant was a stranger to the estate and thus had no capacity to file the application for revocation. It was the applicant's position that he was a son of the deceased and thus had the capacity to file the suit. All of their witnesses stated that the dead applicant was taken in by the deceased as his own child and that his mother was married to him. The administrator led evidence that the deceased was not married, and that he was not aware of the existence of the children they had. It is clear that for one to establish whether the applicant had capacity, one would have to establish whether the applicant's mother Wambui was married to the deceased and whether the applicant was a child of the deceased.

13. In the suit herein, the applicant held the position that his mother was married to the deceased. There was no allegation of a customary marriage as the union took place when the parties herein were very young, and it was accordingly difficult for them to prove existence of a customary law marriage between them. The court is therefore left to determine whether there was a presumption of marriage.

14. In establishing whether a party was in a marriage with another arising from cohabitation, the courts are guided by the decision in *Hortensiah Wanjiku Yawe vs. The Public Trustee* CACA No. 13 of 1976 in which the former Court of Appeal for East Africa identified the principles to be applied to be that the onus of proving customary law marriage is generally on the party who claims it; the standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities; evidence as to the formalities required for a customary law marriage must be proved to that standard; long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it; only cogent evidence to the contrary can rebut the presumption; and if specific ceremonies and rituals are not fully accomplished

this does not invalidate such a marriage.

15. The Court of Appeal in *Phyllis Njoki Karanja & 2 Others vs. Rosemary Mueni Karanja & Another* [2009] eKLR stated that -

‘Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.’

The same was emphasized in *Anastasia Mumbi Kibunja & 4 Others vs. Njihia Mucina* [2013] eKLR: where court stated that -

‘Having children and naming them after some man’s relatives is not itself proof of marriage of any sort.’

It was stated in *Mary Njoki vs. John Kinyanjui Muthuru* [1985] eKLR stated that -

‘in my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the Yawe and in Mbiti (supra). To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law.’

16. The above positions were adopted in *Eva Naima Kaaka & Another vs. Tabitha Waithera Mararo* [2018] eKLR where the court was of the view that -

‘Acts of general repute, are synonymous with the impression, or assessment of the couple as perceived by the general public, including relatives and friends. By their nature they are a determinant of whether a presumption of marriage can be found to exist’

17. In *KO & Another vs. JO* [2018] eKLR, the court was of the view that -

‘The upshot is that the Respondent did not prove by way of evidence that he married the deceased in accordance with the Luo customs. The matter however does not end there. A Court of law in such a situation must endeavor to consider whether the prevailing circumstances of the case when taken into consideration can be a basis of presuming a marriage under the common law doctrine of presumption of marriage. In this position I take refuge in the Court of Appeal decision in Beth Nyandwa Kimani vs. Joyce Nyakinywa Kimani & others (2006) eKLR where the Court held as follows: -

“For it matters not whether statutory or customary marriage requirements are strictly proved in marriage. The Court must go further and consider whether, on the facts and circumstances available on record, the principles of presumption of marriage was applicable in the appellant’s favour. Such was the situation following the predecessor of this Court in Hortensiah Wanjiku Yaweh vs. Public Trustee, Civil Appeal No. 13 of 1976 where Mustafa J.A in his leading judgment stated:

“I agree with the trial Judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on the issue, the trial Judge omitted to take into consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such a presumption.”

28. The doctrine of presumption of marriage has its genesis in Section 119 of the Evidence Act, Cap. 80 of the Laws of Kenya which states that: -

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”.

29. Adding its voice on the doctrine, the former Court of Appeal for Eastern Africa in the case of *Hortensiah Wanjiku Yawe -versus- The Public Trustee, Civil Appeal No. 13 of 1976 (unreported)* stated as follows: -

“The presumption does not depend on the law or a system of marriage. The presumption is simply is an assumption based on very long cohabitation and repute that the parties are husband and wife.”

30. More recently, the Court of Appeal in the case of *Joseph Gitau Githongo vs. Victoria Mwhiki* (2014) eKLR stated as follows: -

“It (presumption of marriage) is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing that union by going through a recognized form of marriage, then a presumption of

marriage arises. If the woman is left stranded either by cast away by the “husband”, or otherwise he dies, occurrence which do happen, the law subject to the requisite proof, bestows the status of “wife” upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased “husband.”

31. Again the Court of Appeal at Nyeri in the case of *Joseis Wanjiru vs. Kabui Ndegwa & Ano.* (2014) eKLR expressed itself thus: -

“14. The existence or absence of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage can't be presumed in favour of any party in a relationship in which one of them is married under a statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife...”

32. In this case the Respondent contends that he cohabited with the deceased and were blessed with two children. Could that cohabitation, if any, have resulted into a marriage? Since there are many other considerations to be made in the application of the doctrine of presumption of marriage there is no doubt that the issue of cohabitation takes a central stage.

33. What is cohabitation? The Black's Law Dictionary, 9th Edition at page 296 defines 'cohabitation' as follows: -

“The fact or state of living together, esp. as partners in life, usu. with the suggestion of sexual relations.”

34. The Marriage Act defines to 'cohabit' in Section 2 as follows:

“means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.”

35. Cohabitation therefore entails the long-term continuous living together of a couple holding themselves out as a husband and wife but in the absence of any formal marriage.”

18. From the foregoing, it is clear that for there to be a presumption of marriage, one has to prove that there was long cohabitation.

19. The applicant's first witness testified that the mother of the applicant, Wambui, stayed with the deceased on his land until his death. Her evidence was corroborated by that of the next three witnesses who stated that the deceased and Wambui lived like husband and wife and were blessed with three children. The administrator on his part insisted that the deceased stayed alone and had no wife and children. He insisted that the said Wambui was married to another man and not to the deceased. He actually insisted that he did not know Wambui neither did he know her children. It, however, emerged from the evidence that the applicant and his siblings were living on land parcel Dagoretti/Riruta/3099 at the time of hearing of the application. It is also clear that the deceased, the said Wambui and the applicant were also buried on the said piece of land, facts that the administrator confirmed.

20. The fact that the objector and his siblings were staying on the land, corroborated the evidence that the deceased indeed cohabited with the said Wambui on the land until their death. The applicant's witness Kabui wa Hiuhu stated that they stayed with their mother and the deceased on the land until his death. That evidence was corroborated by that of the applicant's fourth witness who confirmed that Wambui married the deceased and that they were staying on the said land. It is my conclusion that there was cohabitation between the deceased and Agnes Wambui from which a marriage could be presumed, and I hereby make the presumption that the two were married. That position is reinforced by the fact that the deceased left the said Wambui and her children on his land, and when she and her son Kibatha died, their remains were interred on the said land.

21. It is the administrator's evidence that the applicant was a stranger to the estate as he was not the child of the deceased. He insisted that if he was a child then he would have had the deceased's sir name. The applicant's witness testified that her mother married the deceased after she and the applicant were born and that he took care of them. The second and third witnesses confirmed that by the time the said Wambui married the deceased she had two children from a previous marriage to one Hiuhu. The fourth witness stated that the two children that the said Wambui had before her marriage to the deceased were Kabui and Kibatha and that the deceased took them in as his own children. The applicant's witness stated that she and her brother lived with the deceased on his parcel of land and even at the time of his death they were still staying on the said parcel of land.

22. Section 3 (2) of The Law of Succession Act defines a child for purposes of succession as follows -

‘References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.’

23. In view of the above provision, and the conclusion that I have come to above, that the mother of the applicant was a wife of the deceased by dint of their prolonged cohabitation, it is my conclusion that Kibatha and his sister were children that the deceased had taken into his family as his own, and therefore they were children for the purposes of succession to his estate.

24. It is the administrator's and the interested party's contention that the applicant herein was a stranger to the estate and had no capacity to file the application for revocation.

25. Revocation of grants is provided for by section 76 of the Law of Succession Act. The provision states that -

‘A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion.’

Rule 44 (1) of the Probate and Administration Rules, which provides the process states as follows: -

‘Where any person interested in the estate of the deceased seeks pursuant to the provisions of Section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that Resident Magistrate’s registry.’

26. In *Musa Nyaribari Gekone & 2 Others vs. Peter Miyienda & Another*, [2015] eKLR the Court of Appeal stated that -

‘The expression ‘any interested party’ as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate.’

27. From the above, it is clear that anybody who has any interest in the estate of the deceased can make an application for revocation of the grant. The applicant being a stepchild of the deceased established through her evidence that she has interests in the estate of the deceased and therefore she had capacity to file the application.

28. Section 76 of the Law of Succession Act provides that

‘A grant of representation, whether or not confirmed, may at any time 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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either -

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.’

29. In *Jesse Karaya Gatimu vs. Mary Wanjiku Githinji* [2014] eKLR, the court was of the view that;

‘The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of these grounds, whatever the case may be.’

The Court of Appeal in the case of *Matheka and Another vs. Matheka* (2005) 2 KLR 455, laid down the following guiding principles: -

‘A grant may be revoked either by application by an interested party or by the court on its own motion. Even when the revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.’

30. The same court affirmed the position in *Joyce Ngima Njeru & Another vs. Ann Wambeti Njue* [2012] eKLR where it held that -

‘The central core of the ingredients required to be established under section 76 of the Law of Succession Act is that it is meant to be

used as a vehicle to attack and fault the process of either obtaining the Grant or in active use of the Grant after being lawfully obtained in circumstances where it has become useless. It is not meant to fault the decision on the merits.'

31. The applicant herein, made the application on the grounds that there was misrepresentation and concealment of facts. He urged that the administrator did not disclose that the deceased had a wife and children, and, more so, the administrator lied to the court that he was a son of the deceased. The administrator, on his part, denied the allegation and claimed that his grant had been properly acquired. He further stated that the revocation application was time-barred as it was brought seven (7) years after confirmation of grant.

32. In *Patrick Mwangemi Wanjala & 3 Others vs. Jackson Ngoda Jumwa*, [2016] eKLR the court held as follows-

'There is therefore no limitation as to the time for filing summons for revocation of Grant. The law does not even provide that a party must explain any delay in seeking revocation of a grant. Consequently, this Court makes nothing of the fact that the Summons herein was filed 8 years after the grant was issued.'

Similarly, in *Jane Wambui Wahuga & 4 Others vs. Ruth Njoki Mwangi* [2016] eKLR, it was stated-

'The said section states that a grant of representation, whether confirmed or not, may at any time be revoked by the court if it was obtained by fraud, or concealment. It may also be revoked if the proceedings were defective in substance and/or it was obtained by means of untrue allegation of facts essential in point of law to justify the grant. An application for revocation of grant cannot therefore be claimed to be time barred. Thus, the Applicants' grounds for revocation of grant as set out in the summons for the revocation or annulment of the grant cannot be dismissed based only on the ground of limitation. The court has an obligation to determine the application on the basis of the provisions of the law.'

33. In *Re Estate of Charles Ngotho Gachunga (Deceased)*, [2015] eKLR the court also rejected the argument that the claim was statute-barred holding that Section 76 of the Act does not impose any time limitations within which an application for revocation of grant ought to be filed. It also held that the office of administrator is for life and he can be called to account at any time so long as he is still alive.

34. From the foregoing, it is clear that an application for revocation of grant cannot be time-barred and thus the administrator's argument cannot stand.

35. As stated in *Matheka and Another vs. Matheka* (supra) a grant can be revoked on the basis that there is evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.

36. In *Re Estate of Wahome Mwenje Ngonoro Deceased* [2016] eKLR the court held that.

'It is settled law that a person who approaches the Court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have a bearing on the adjudication of the issues raised in the case. In other words, he/she owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material facts within his/her knowledge or which he/she could have known by exercising diligence expected of a person of ordinary prudence. If he/she is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in R. v. Kensington Income Tax Commissioner [5] by Viscount Reading, Chief Justice of the Divisional Court.

The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the judge to know in dealing with the issues before the court. The duty of disclosure therefore applied not only to material facts known to him but also to any additional facts which he would have known if he had made inquiries. The question that inevitably follows is whether the non-disclosure was innocent, in the sense that the fact was not known to the Respondent or that its relevance was not perceived. Though innocence or relevance has not been cited by the Respondent, I find that the non-disclosure in this case was not innocent at all but deliberate.'

37. In *HWM vs. KM* [2017] eKLR the court stated that -

'It is trite law that if a grant was obtained fraudulently, making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled.'

38. In the instant cause, the administrator stated that he was a son of the deceased. It was on that basis that the grant was made to him in the first place, and confirmed, and the estate distributed to him and others. It has, however, emerged, during the oral hearing, that he was not a son of the deceased but a nephew. It has also emerged from the evidence that the deceased had married one Wambui, with whom he had children who were still staying on his land. The administrator concealed that information, and even insisted during the hearing that they did not exist yet they resided on the land. It is my humble conclusion that the administrator made false statements to court by saying that he was the deceased's son. I also find that there was a deliberate concealment of information on his part when he denied the existence of Kibatha and his siblings, who were staying on the deceased's land.

39. In the end I shall dispose of the application dated 30th July 2008 in the following terms -

- (a) That I declare that the deceased was married to Agnes Wambui;
- (b) That I declare that the deceased had taken in the two children of Agnes Wambui, that is to say Kabui wa Hiuhu and Robert Kibatha Hiuhu, from a previous marriage, as his own children, and the two were children of the deceased for the purpose of succession to his estate;
- (c) That applicant herein had the requisite locus to file the application herein for revocation of grant;
- (d) That administrator made false statements in his application for the grant and also concealed important facts while making the said application therefore the said grant ought to and is hereby revoked;
- (e) That as a consequence the orders made herein in (d) above, the orders made on 2nd July 2001 confirming the said grant are hereby set aside and the certificate of confirmation of grant issued upon the said orders is hereby cancelled;
- (f) That as a consequence of the orders in (d) and (e), above, all transactions carried out on the strength of the said grant and certificate of confirmation of grant are hereby nullified;
- (g) That to move the matter forward I hereby appoint Kabui wa Hiuhu and Lucy Wangui Kibatha administrators of the estate of the deceased and a grant of letters of administration intestate shall issue to them accordingly;
- (h) That the new administrators shall hereafter move forthwith to apply for confirmation of their grant;
- (i) That the applicant shall have the costs of the application; and
- (j) That any party aggrieved by the orders made herein has a right of appeal to the Court of Appeal within twenty-eight (28) days.

DATED AND SIGNED AT KAKAMEGA THIS 24th DAY OF April, 2019

W MUSYOKA

JUDGE

DELIVERED DATED AND SIGNED AT NAIROBI THIS 10th DAY OF May 2019

A ONGERI

JUDGE