



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

SUCCESSION CAUSE NO 153 OF 2011

IN THE MATTER OF THE ESTATE OF ADRIANO WELEKHE MULIALE.

AND IN THE MATTER OF AN APPLICATION FOR REVOCATION ANNULMENT OF GRANT

BETWEEN

EUNICE NASIMIYU MUMARAKI.....OBJECTOR/APPLICANT

VERSUS.

LUKAS WAMALWA WELIKHE.....PETITIONER/RESPONDENT

RULING.

The objector/applicant filed summons for revocation and annulment of grant dated 23rd January 2015 together with supporting affidavit of Eunice Nasimiyu Mumaraki, on the grounds;

- i. That the grant of letters of Administration issued to Lukas Wamalwa Welikhe on the 28th day of September 2011 be revoked.**
- ii. That a fresh grant be issued the herein EUNICE NASIMIYU MUMARAKI**
- iii. That the grant was obtained fraudulently by concealment of material facts namely the Petitioner/Respondent lied to chief that he is the only surviving beneficiary**
- iv. That the intention is to grab 5 acres which was allocated to the Objector/Applicant.**
- v. That the procedure of which the petitioner/Applicant used to petition this was fraudulent and forgery.**

The application was supported by supporting affidavit of EUNICE NASIMIYU MUMARAKI in which she briefly stated she is 3rd widow of the deceased and she sired with him one daughter Susan Nanjala Welekhe and that the petitioner forcefully constructed a permanent house on the deceased Land Parcel Number **E.BUKUSU/E.Sang'alo 50** and that the said portion had been allocated to the objector herein by the deceased. The petitioner wants the objector vacate the said parcel of land. That in 2015 she did a search and discovered that petitioner had transferred the said parcel of land to his name after filing a succession cause in court.

The Petitioner herein file a replying affidavit stating that the application had be brought to court in bad faith and that the petition was gazetted in Gazette Notice.7840 and there was no objection and that the applicant does not have any supporting document to show that she was married to the deceased. He avers that he filed the succession cause after the chief perused all documents before he filed the cause and obtained the letters of administration. He further stated that the his late father married the objector when he the petitioner was already in occupation of the suit land and deceased had no child with the petitioner in the said marriage.

The matter was fixed for hearing on the 9.10.2018 and the application was canvassed by viva voce evidence where the objector called 6 witnesses.

Ow1 the objector Eunice Nasimiyu Mumaraki stated that she knows the deceased and he had 3 wives and she was 3rd wife and she married the deceased in suit land and they had 2 daughters in the said marriage but one of the kids died and was buried in the same land she buried her husband. She testified that after deceased funeral the petitioner herein beat her to get out of the suit land and stated that she currently stays in the suit land. On cross examination she stated that she got married to deceased in 1983 and the deceased died in 1997.

Ow2 Pius Kimwani and he stated that he knew the deceased he was his uncle and that he knew the objector as his wife.

Ow3 Samson Wekesa and testified that he knew the deceased who was his in-law and that the objector was her wife and he know the petitioner as son of his brother in-law.

Ow4 Charles Wanjala Toyi and he stated that he is a pastor and know deceased as his uncle and he knows the objector as wife of the deceased.

Ow5 Anori Tundwe and he knows the deceased as his father's brother and knows objector as younger wife of the deceased.

Ow6 Susan Nanjala Welekhe and she testified that she knew the deceased and her father and the objector is her biological mother and petitioner her step-brother and she stated that she wish to adopt her statement dated 29.1.2018.

The petitioner Lucas Wamalwa Weluke gave evidence and adopted his Further Affidavit sworn on 14th August 2018 as evidence in chief. He deponed that he does not know the objector as a wife of his father the deceased. He deponed that he has been stealing staying on the parcel of land and that he knows that his father had only one wife Anyusi Namarome Welekhe. On being cross examined by Wamalwa, the Petitioner admitted that the objector stays on the land. He however denied that the deceased was buried in front of the home where the objector stays.

I have carefully considered the application, affidavits, witnesses statement and also the supporting documents filed by all parties in this application and it is my finding that the main issue for determination is whether the confirmation of grant issued to LUKAS WAMALWA WELIKHE the petitioner herein was obtained fraudulently and if the grant should be revoked by this honorable court.

The substantive issues before me is determination of validity of grant issued to petitioner herein. I wish not to re-invent the wheel. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the Law of Succession Act as follows:

“Revocation or annulment of grant 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 order or allow; 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***
 - iv. that the grant has become useless and inoperative through subsequent circumstances.***

After hearing the arguments of the parties, I should determine, whether:-

- a) 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;***
- b) 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***

Applying the test of law in section 76 of the Law of Succession Act, the primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. I have analyzed the succession cause no.153 of 2011 that was filed by the petitioner herein in the Bungoma High Court for issuance of letter of administration and grant to the petitioner who indicated to the court that he was the only surviving beneficiary of the deceased estate in his application. Upon hearing he was did issued with the letters of administration and finally confirmation of grant on the 9th February 2011.

It is my finding that the Petitioner concealed material evidence to the court with regard to other surviving beneficiaries including the objector who was married to the deceased and their surviving child Susan Nanjala who through evidence adduced are beneficiaries of the deceased's estate.

The witnesses called by objector have indeed testified to have known the deceased and that the objector herein was his wife and it will be absurd for the Petitioner to claim he only came to know of the objector in 2015 and that she was not related to the deceased in any way. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice.

The analysis above leads me to this. The Applicant has satisfied this provisions of Section 76 of the Law of Succession Act for revocation of this grant. In the result, the said application dated 8.10.2013 is granted. The court orders on 2.9.2011;-

The grant of letters of administration issued and confirmed to the petitioner on 2nd September 2011 be and is hereby revoked, and any transaction entered in pursuance to that grant is null and void.

No orders as to costs.

Dated, Signed at Bungoma this 11th day of June, 2019.

S.N. RIECHI

JUDGE