



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**SUCCESSION CAUSE NO. 69 OF 2014**

**IN THE MATTER OF THE ESTATE OF WILSON ROTICH (DECEASED)**

**REUBEN ROTICH.....APPLICANT**

**VERSUS**

**NANCY JERUGUT BOWEN.....1<sup>ST</sup> RESPONDENT**

**KENNETH KIPSIR BOWEN.....2<sup>ND</sup> RESPONDENT**

**JANE TUIYOT TUITOEK.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The applicant filed the summons for revocation/annulment of grant dated 2/9/2016 seeking for orders that: -

a. The grant of letters of administration made to Nancy Cherugut Bowen and Kenneth Kapsir Bowen on 23/2/2016 be revoked and/or annulled.

b. The estate of the deceased be preserved from being subdivided and transferred to strangers.

2. The application is founded on the ground that the grant was obtained through non-disclosure of material facts. Secondly, that a large portion of LR NO. BARINGO/KEWAMOI 'A'/2220 was sold to strangers when the administrators *Nancy Jerugut Bowen* and *Keneth Kipsir Bowen* were still minors

3. The deceased's widow *Jane Toiyoi Tuitoek* and the mother to the administrators were responsible of intermeddling with the estate of the deceased and had no locus standi to sell the parcel in the name of the deceased.

4. The minors and the administrators will have nowhere to settle unless the strangers are evicted from the land.

5. The application was supported by an affidavit sworn by *REUBEN ROTICH CHELUGO* and the grounds that the said *Jane Tuiyoi Tuitoek* has been disposing off large portion of L.R NO. BARINGO KEWAMOI 'A'/2220 to purchasers who have started fencing and erecting permanent buildings.

6. That he has a share of the land since the land was registered in the names of the deceased *WILSON ROTICH* in the understanding that it was to be shared equally at a later time and this fact is known to the family members.

7. That he was not aware that a succession cause had been filed using the children of the deceased as he had been waiting and were in the process of agreeing who will administer the estate of the deceased.

8. That he had placed a caution over the said parcel of land but the registrar Baringo County has threatened to remove the caution and transfer the land as per the certificate of confirmation issued on 23/2/2016

9. That he has the interest of the children and the entire family at heart and will do everything possible to support them. Lastly, that it's wrong for the administrators to apportion the land to themselves without considering the issues discussed by the family.

10. The said application was opposed by the respondents through a replying affidavit sworn by NANCY CHELUGET on 24<sup>th</sup> October, 2016 and the grounds that the application ought to be struck out because the same was filed by a party who lacks locus standi.
11. The deceased left behind a widow and children who comes ahead of the applicant in the order of consanguinity and are capable of protecting the deceased's estate on their own.
12. That prior to filing the succession cause, she conducted a search at the Baringo lands registry and noted that no registrable interest or court order had been entered in the registry.
13. That the applicant claim that he has an interest in the said land is an afterthought because when he filed Eldoret E&L No. 283/2013, he clearly stated that the land was registered in the name of the deceased, and he was acting in the interest of the deceased's children and that he did not state that he had an interest in the said parcel of land.
14. That as the administrators, they have ensured that no estate is lost and that all the beneficiaries including the minors have equal share of the deceased estate and as such, none of the deceased's beneficiaries has been disadvantaged in any manner.
15. Lastly, that there is no justification for revoking and or annulling the grants herein and that the prayer for preserving the deceased's estate is misplaced in the circumstance of this case.
16. In their submissions, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the deceased estate had three administrators namely Nancy, Kenneth and Jane Toiyoi Cheluge. The main reason for this application is that the widow, JANE TUITOEK has sold plots out of the estate land to strangers and the deceased's children risk being thrown out of their only inheritance.
17. That a look at the certificate of confirmation of grant issued on 23/2/2016 indicates that all the deceased's heirs have been provided for equally.
18. Secondly, no grant of letters of administration were made to Nancy Bowen and Kenneth Bowen but the record is clear that the grant of letters of administration intestate were issued on 28/4/2015.
19. Thirdly, that a prayer for revocation of grant is not synonymous to that for annulment. A grant can be annulled if the process was defective or fraudulent from the start.
20. A grant can be revoked if the process was lawful but the administrator subsequently acts in such a manner as to defeat the cause of justice.
21. Further, that the applicant sought additional prayer for preservation of the deceased's estate, which prayer is not contemplated under rule 44 of the Succession rules.
22. The applicant's claim that he seeks for revocation/annulment orders allegedly because the deceased's heirs have been disinherited is only a pretext to his true intention which is a claim of half of the deceased's estate.
23. That if it is true that the applicant was entitled to the ½ share of the deceased's property, then it cannot be visible that the applicant had not taken possession of the suit land since 1985 when the land was registered.
24. Lastly, that the duty of a succession court is to distribute the undisputed estate of the deceased amongst his heirs but the applicant has moved this court seeking for annulment of the grant allegedly because he has an interest in the suit land.
25. The objector on the other hand submitted that the respondents are the widow and children of his deceased brother. That they are utilizing the whole parcel of land/estate of the deceased with the exclusion of the applicant.
26. The respondents have been intermeddling in the estate of the deceased by secretly selling part of the land belonging to the deceased in contravention of the provision of Section 45 and 47 of the Law of Succession Act.
27. The applicant has a share in the estate of the deceased since he is a dependant within the meaning of *Section 26 of the Law of Succession Act*.
28. The deceased died intestate leaving behind the respondents and the applicant as depend ants and the applicant was appointed by the family to be the next of kin.
29. Lastly, that pursuant to Section 76 of the Law of Succession Act, the court should revoke/annul the grant since the same was obtained fraudulently.

The main issues for determination are;

- a). Whether the petition for Grant of letters of representation and the grant issued to Nancy Jerugut Bowen and Keneth Kipsir Bowen were fraudulently obtained, due to material non-disclosure and/or concealment of facts.

b) Secondly, who between the Applicants and Respondents has priority in law to be issued with the Grant of letters of representation of the deceased's estate?

30. Section 66(a)-(d) provides: -

*“ When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-*

*(a) surviving spouse or spouses, with or without association of other beneficiaries;*

*(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*

*(c) the Public Trustee; and*

*(d) creditors”*

31. Part VII, which deals with making of grants under **Rule 26(1) and (2) of the Probate and Administration Rules** provides: -

*“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.*

*(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”*

32. In Nairobi Succession Cause No. 2015 of 2012 In the matter of the Estate of Joshua Orwa Ojode (Deceased), discussing the issue of who ought to benefit from the estate of a deceased, Musyoka J opined that:

33. *“6. Going by the above provision, where a deceased person is survived by spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and child are entitled to the estate to the exclusion of all the other relatives. The excluded relatives include the parents of the deceased. Parents are only entitled where there is no surviving spouse or child.”*

34. At paragraph 13 of the said judgement, Musyoka J went on to hold that:

*“13. This duty to maintain a wife and children extends to protection of widows and orphans following the death of the person who is legally bound to maintain them. The law ensures that widows and orphans are given first priority in terms of access to the property of a dead husband and father. The other relatives, including parents, are relegated to a secondary position, and only access the property in the event that there is no widow or child, or if they convince the court in a proper application that they were dependent on their dead child or sibling or other relative and that the court should then make provision for them out of the estate of the dead child. These provisions are designed to obviate the possibility of widows and orphaned children being rendered destitute, as they would be if they are forced to share their inheritance with the parents and siblings of the deceased. Quite clearly therefore under succession law, parents are not in the same footing with widows and children.”*

35. It is clear that under Part V, Section 66(b), the persons given priority are the surviving spouse and children.

36. The next issue is whether grant issued to the Respondents ought to be revoked.

37. The law on revocation of grants is **Section 76 of the Law of Succession Act** which provides:

**Section 76 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 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

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

38. The Objector's bone of contention is that the grant obtained by the Respondent was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case.

39. Section 51 of the *Law of Succession Act* deals with the information that should go into an application for grant of representation. Under Section 51(2) (g) it is stated:-

*"51(2). An application shall include information as to\_\_\_...*

*g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased..."*

40. Nairobi Succession Cause No. 1642 of 2010 *In re Estate of Laurent Ntirampeba (Deceased) [2017] Eklr*, Achode J held as below:

41. *"24. On the question of revocation of the grant issued, 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. A duty is owed to the court to bring out all the facts and refrain from suppressing any material facts. If one 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 the duty to deny relief to such person. This was the expression of the court in R. v. Kensington Income Tax Commissioner [1979] 1 KB 486 by Viscount Reading, Chief Justice of the Divisional Court.*

42. The applicant is a brother to the deceased. He was not able to establish to the satisfaction of this court that he is entitled to half share of the deceased's parcel No. LR No. Baringo Kewamoi "A"/2220. He was also not able to establish that he was a dependent of the deceased. Given that the Respondents are the widow and children of the deceased, the applicant is a stranger to the said estate and lacks the locus standi to bring up the current application.

43. The application therefore lacks merit and is dismissed with costs to the Respondents.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 21<sup>st</sup> day of November, 2019.**

In the Absence of:-

Mr. Nyekwei for the petitioner

Mr. Kagunza for the Objectives

Ms Abigael - Court clerk

**S. M GITHINJI**

**JUDGE**