



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.727 OF 2009

THE MATTER OF THE ESTATE OF MULEI MUTISYA MBUA (DECEASED)

MUTUA MUTINDA.....APPLICANT

-VERSUS-

BENJAMIN MUTUNGA KYULA....RESPONDENT

RULING

1. The applicant claims that he is a son of the deceased and entitled to a share of the state of the deceased and in failing to disclose the same to court, the petitioner concealed material facts and hence the certificate of confirmation issued on 27.7.2010 be revoked.
2. The applicant approached this court vide the application dated 16.1.2019 that was supported by an affidavit seeking revocation of grant. Vide supplementary affidavit deponed on 29.7.2019 the applicant averred that he cultivates on **Masii/Kithangani/504** and **508** together with his mother.
3. Vide replying affidavit deponed on 22.3.2019, the respondent averred that the applicant's mother was married to the deceased as a concubine and the applicant came with his mother hence no child was begotten with the deceased. The deponent averred that the applicant's mother was chased away with her children before the death of the deceased and hence the applicant is not a beneficiary of the estate.
4. Learned counsel for the applicant submitted that the applicant is entitled to the orders sought and reliance was placed on the cases of **Munyasya Mulili & 3 Others v Sammy Muteti Mulili (2017) eKLR** and **Madison Maroko Nyamweya v Bernard Magara Maroko & Another (2016) eKLR**
5. The respondent vide submissions filed on his behalf dated 8.8.2018 submitted that the applicant lacks locus standi to claim any part of the estate of the deceased. Reliance was placed on the case of **In Re Estate of Jackson Mugo Mathai (Deceased) Nakuru Miscellaneous Succession Cause 284 of 2008 [2010] eKLR**.
6. The issues I have to determine are; whether the applicant has raised sufficient grounds for revocation of grant and whether the court may grant the orders sought.
7. 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

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

8. The applicant's application imputes semblance of the following grounds:-

(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; or

(c) 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.

9. Applying the test of law in section 76 of the Law of Succession Act, the applicant alleges that he is a dependant of the deceased. This being a civil matter, the burden of proof lies with the applicant. To decide in his favour, the court has to be satisfied that the plaintiff has furnished evidence whose level of probity is such that a reasonable man, even in a case such as this where the defendant has not adduced any evidence, might hold that the more probable conclusion is that for which the plaintiff contends, since the standard of proof is on the balance of probabilities / preponderance of evidence (see **Lancaster v. Blackwell Colliery Co. Ltd (1918) WC Rep 345**).

10. Non-disclosure of material facts to the succession court is another ground that the applicant imputes against the petitioner. The substance of those material facts and the proof that the applicant is a dependant of the deceased have not been satisfactorily demonstrated to this honorable court. The applicant's affidavits are just mere assertions as there is no other corroborating evidence from his relatives to back his claim that his mother was a wife to the deceased. The burden was upon him to discharge but he did not do so. His feeble claim that he and his mother reside on the suit land did not pass muster since not even his mother who ranked higher on consanguinity did not file an affidavit explaining her relationship with the deceased. Again none of the applicant's neighbours came forward to corroborate the applicant's assertions. In any event the applicant's mother is the first in priority regarding the estate of the deceased if at all she had been married by the deceased. Despite the applicant claiming that he resides on the suit land with his mother he has not explained why she has kept her out of the picture. This kind of conduct depicts a person who is not candid. The respondent has availed a document prepared by wife to the deceased who later bequeathed the property to the respondent herein. I find the applicant lacks locus standi to institute the application. As the properties have been transferred to the respondent pursuant to a confirmed grant the only recourse for the applicant is to pursue his claims if any before the Environment and Land Court.

11. Applying the above legal test, I find the application dated 16.1.2019 lacks merit and is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 4th day of December, 2019.

D. K. Kemei

Judge