



**REPUBLIC OF KENYA**

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

**HC P&A NO. 01 OF 2017**

**IN THE MATTER OF THE ESTATE OF JOSEPH KITHOME KISILU (DECEASED)**

**MARY KITHOME.....APPLICANT**

**VERSUS**

**JOSEPHINE WAVINYA KITHOME.....1<sup>ST</sup> RESPONDENT**

**JANET NDUNGWA KITHOME.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By an Application dated 16/04/2018 the Applicant seeks the following orders.

**a. Spent.**

**b. THAT the Respondents, their agents, servants and or employees be stopped from intermeddling with the Estate of the deceased forthwith pending the hearing and the determination of this application.**

**c. THAT the grant of letters of administration intestate issued on 16<sup>th</sup> January 2018 to the Respondents herein be revoked.**

**d. THAT any other orders that this Honourable Court may deem fit to grant.**

**e. Costs of this application.**

2. The same is based on the following grounds;

**i. THAT the Respondents obtained the grant of letters of administration intestate on 16<sup>th</sup> January 2018 fraudulently by the making of false statements or by the concealment from the court of some things and information material to the case.**

**ii. THAT the court was not informed of the existence of MARY KITHOME who is the widow of the deceased.**

**iii. THAT the court was not informed of the existence of all the survivors of the deceased who the Respondents knew.**

**iv. THAT the Respondents obtained the letters of administration without giving a full disclosure of the full assets that form the Estate of the Deceased.**

**v. THAT the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.**

3. The Application is supported by the Affidavit of Mary Munyao sworn on 16/04/2008 which reiterates the contents of the grounds on the face of the application.

4. The Application is opposed by the Respondents and a Replying Affidavit has been filed sworn by Josephine Wavinya Kithome on 06/06/2018 in which they categorize the properties of the estate into; those acquired by deceased and their mother prior to marriage of the Applicant and the properties acquired by Applicant and deceased during their marriage.

5. Thus succession was filed for the former category which the Respondents claims were stated would go to the 1<sup>st</sup> wife's side. Thus in the succession cause, they omitted Applicant and her children with deceased in the instant succession cause.

6. The parties advocate submitted orally as hereunder;

Mr. Chiggitti for applicant submitted that, the grants were obtained fraudulently. There was no disclosure of existence of the Applicant as widow of the deceased. The respondents only stated that the deceased left only 2 survivors.

7. The chief wrote a letter to court admitting that he misled court. The letter from Deputy County Commissioner disclosed all the deceased family members who are alive.

8. Sub-chief was used to mislead court. Still on Section 76 Laws of Succession Act, applicant argues that application failed to disclose some of the deceased properties. Huge list of properties of deceased was excluded.

9. Respondents chose what not to disclose to court. They have confirmed they misled court vide affidavit of 06/06/2018 paragraph 6 which discloses what properties deceased owned which were omitted in initial documents.

10. The above non-disclosure is adequate for ground for revocation. Paragraph 14 – 16 explain why they excluded applicant. They say they were entitled to lodge the matter. Section 66 of Laws of Succession Act gives widow higher priorities in administration of deceased estate.

11. Where there are 2 houses there is no reason why widow is to be excluded. They say they mistrust her. The conversation being raised has no bearing on issue of revocation as set out in Section 76 of Laws of Succession Act, Cap 160.

12. Mr. Mutune for Respondents submitted that the Respondents are children of the 1<sup>st</sup> wife Eunice Kithome now deceased. Prior to marriage of Applicant to deceased, the deceased had obtained properties jointly with Respondents' mother.

13. They acquired same together. On 19/09/2016, the deceased set out in his affidavit his priorities. See paragraph 5-9 of affidavit of 19/10/2016. Annexure JWK 2 talks of what he obtained with his 2<sup>nd</sup> wife.

14. The Respondents were pursuing their late mother's interest. They left 2<sup>nd</sup> family and pursued their mother's house interests. The Respondents were not able to include Applicant but opted to pursue their interest without her.

15. Respondents now state that the grants can be rectified to include other family. The widows can have children included.

16. Mr. Chiggitti responded that Section 76 of Cap 160 on revocation, sets out reasons for revocation of grant such as non-disclosure. Same has to be revoked in its entirety.

17. No justification has been tendered for the lapse by the Respondent in the application for grant. The grounds being advocated by respondents are not within the purview of the provisions of Section 76 of Laws of Succession Act and Section 51 (2) g & h.

18. Applicant must disclose spouse, children and all deceased person properties. In the instant case the disclosure was not done. A full inventory of assets is to be disclosed. The above provision justifies revocation. On chief's letter confessing lying, it has not been contested.

#### **ISSUES, ANALYSIS AND DETERMINATION**

19. After going through the pleadings ,affidavits and parties submissions, I find issues arising are;

***a. Whether the instant application has merit?***

***b. What is the order as to costs?***

20. The provision of **Section 76 LSA cap 160** is to the effect that non-disclosure of all beneficiaries and assets warrants revocation of grants.

21. The same provides for Revocation or annulment of grant in the following words;

**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.**

22. Section 51(2) Law of Succession Act Cap 160 dictates that Application of grant of representation shall include;

- *Surviving spouse.*
- *Children.*
- *Parents.*
- *Brothers and*
- *Sisters of deceased.*
- *Inventory of all assets and liability of deceased inter alia.*

23. In the case of **ALBERT IMBUGA KISIGWA V RECHO KAVAI KISIGWA, SUCCESSION CAUSE NO.158 OF 2000**, Mwita J. in a decision rendered on 15<sup>th</sup> November, 2016, noted thus:

*“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.*

*Therefore the beneficiaries of the estate of the deceased were excluded contrary to Section 51 (2) (g) of the Law Succession Act and Rule 7(1) Probate & Administration Rules.”*

24. It is admitted by the Respondents that the deceased had 2 houses and that the Applicant together with her children constitute the 2<sup>nd</sup> house of the deceased while the Respondents are units of the 1<sup>st</sup> house.

25. The Application for grant herein omitted a portion of the deceased assets and one of the deceased house thus offending the provisions of Section 52 and 76 Laws of Succession Act.

26. There is no legal justification for the omission aforesaid.

27. The court therefore makes the following orders;

**1. The grants are revoked.**

**2. The grant will be issued afresh jointly to Mary Itumbi Munya and Robert Musembi Kithome representing 2<sup>nd</sup> house and Josephine Wavinya Kithome and Janet Ndungwa Kithome representing the 1<sup>st</sup> house.**

**3. The parties either jointly or separately shall file application for confirmation of grant and schedule of all deceased properties and proposal as to the mode of distribution within 30 days.**

**4. If there will be no consent on mode of distribution, the court will hear the parties by way of viva voce evidence and distribute the deceased estate as per the provisions of Laws of Succession Act Cap 160.**

**5. Costs in the cause.**

**6. Matter to be fixed for directions within 30 days.**

**7. Status quo be maintained.**

**SIGNED, DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF JULY 2018, IN OPEN COURT.**

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**C KARIUKI**

**JUDGE**