



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**SUCCESSION 97 OF 2011**

**EMK.....DECEASED**

**AND**

**MBS.....PETITIONER/RESPONDENT**

**VERSUS**

**J O O**

**D M O.....OBJECTORS**

**P O O**

**JUDGMENT**

**Background**

1. **EMK**, (hereinafter “the deceased”), died intestate on 24<sup>th</sup> August 1999. Representation of her estate was obtained by her daughter **MBS**, the petitioner herein, who was issued with grant of letters of administration on 29<sup>th</sup> June, 2011. On 5<sup>th</sup> July 2012, a certificate of confirmation of the grant was issued in which the estate of the deceased was distributed as follows:

<u>Name</u>	<u>Description of property</u>	<u>Shares</u>
<b>MBS</b>	<b>NYANSIONGO/S/[particulars withheld]</b>	<b>to be registered in</b>
<b>PAS</b>	<b>NYANSIONGO/S/[particulars withheld]</b>	<b>the joint names of</b>
	<b>NYANSIONGO/S/[particulars withheld]</b>	<b>the two beneficiaries</b>
	<b>NYANSIONGO/S/[particulars withheld]</b>	
	<b>NYANSIONGO/S/[particulars withheld]</b>	
	<b>NYANSIONGO/S/[particulars withheld]</b>	

2. During her lifetime, the deceased was married to one **O M** with whom she had 5 children including the objectors herein. She divorced her first husband and later on married one **C.W. S** with whom she had 3 children including the petitioner. These objection proceedings therefore pit the deceased’s children of the

first marriage against her children of the second marriage.

### **Application**

3. On 10<sup>th</sup> June, 2015, the objectors herein, filed summons for revocation of grant under **Section 76 of the Law of Succession Act, (hereinafter “the Act”) and Rules 44, 49, 59, 63 and 73 of the Probate and Administration Rules.**

4. The said summons is the subject of this judgment. The objectors/applicants seek the following orders.

**1. Spent**

**2. Pending the hearing and determination of the summons herein, the honourable court be pleased to issue a prohibitory order of injunction restraining the petitioner/Respondent from disposing of, selling alienating and or appropriating the assets of EMK the deceased herein more particularly LR Nyansiongo settlement [particulars withheld] in any manner whatsoever and/or howsoever.**

**3. Pending the hearing and determination of the summons herein, the honourable court be pleased to grant an order inhibiting any transaction, sale, charge and/or any other dealing with land parcel No. Nyansiongo settlement [particulars withheld] in any manner whatsoever and/or howsoever.**

**4. The grant of letters of administration granted to the petitioners/Respondent on the 29<sup>th</sup> day of June 2011 be revoked and the names of the petitioner/Respondent be rescinded and/or revoked and the original titles do revert to the name of the deceased.**

**5. The objectors/applicants be included as petitioner a fresh and allocation of titles be done according to succession rules.**

**6. The Petitioner/Respondent, do tender accounts in respect of the estate of EMK , the deceased person herein more particularly the obtaining extent of the administration so far taken.**

**7. Costs of the application be borne by the petitioner/Respondent.**

**8. Such further and/or other orders be made as this honouralbe court may deem fit and expedient.**

5. The application was brought on the grounds that the grant of letters of representation was obtained by the petitioner through fraud, concealment of material facts, making of false statements and that the impugned succession proceedings were fraught with illegality as the petitioner had deprived the applicants of their rightful inheritance. The objectors reiterated that the petitioner was not fit to administer the estate of the deceased.

6. The summons were further supported by the affidavit of JOO, the 1<sup>st</sup> objector who reiterated the grounds already enumerated on the face of the summons for revocation of grant and added that the deceased was his mother and the mother of his co-objectors, albeit from a different father. The 1<sup>st</sup> objector contended that the petitioner excluded him and his co-objectors from their mother's estate's succession proceedings thereby disinheriting them of their entitlement as heirs. He contended that the petitioner did not seek or obtain the objectors' consent before filing the succession case.

7. The petitioner/respondent opposed the application through her replying affidavit sworn on 4<sup>th</sup> December 2015 in which she states that her mother, the deceased herein, was married to one S, also deceased and that 3 children were born from the said union namely;

**a) The petitioner, MBS.**

**b) JKS**

**c) PAS.**

8. The petitioner contends that her father, the said S bought for the deceased land parcel No. N. Nyansiongo Settlement [particulars withheld] which was later given a new number, Nyansiongo Settlement [particulars withheld] (hereinafter “the suit land”). She further states that the deceased later sub-divided the suit land into several portions with the intention of transferring the same to her children but was stopped by the land registrar who placed restrictions on the suit land, but not before the deceased transferred LR. Nos. Nyansiongo Settlement [particulars withheld] to the Petitioners elder brother JKS. She further states that the objectors are the sons of one OO who is also deceased and that they should claim the land of their said father which she noted was LR. No. Mugirango/[particulars withheld]

9. The petitioner’s case is that she was not under any obligation to inform or include the objectors as beneficiaries in this succession cause as they are not lawful beneficiaries to the estate of her late father since they were sired by a different father. She contends that the suit property was registered in the name of the deceased to hold in trust for the 3 children of the late S.

10. On 8<sup>th</sup> June 2016, the 1<sup>st</sup> objector filed a further affidavit in which he states that on 28<sup>th</sup> December, 1987, the deceased subdivided the suit land into different plots which she gave to each of her children as follows:

<b>JO</b>	<b>Plot No.[particulars withheld]</b>	<b>0.6Ha.</b>
	<b>Plot[particulars withheld]</b>	<b>0.36Ha</b>
<b>TS</b>	<b>Plot [particulars withheld]</b>	<b>260Ha</b>
<b>DM</b>	<b>Plot [particulars withheld]</b>	<b>0.90Ha</b>
<b>PO</b>	<b>Plot [particulars withheld]</b>	<b>0.60Ha</b>
	<b>Plot [particulars withheld]</b>	<b>0.04Ha</b>
<b>JK</b>	<b>Plot [particulars withheld]</b>	<b>160Ha</b>
	<b>Plot [particulars withheld]</b>	<b>020Ha</b>
<b>PAK</b>	<b>Plot [particulars withheld]</b>	<b>0.30Ha</b>
<b>MBS</b>	<b>Nil</b>	
<b>JO</b>	<b>No. NM/Boisanga/[particulars withheld]</b>	

11. He annexed copy of minutes of the Land Control Board indicating the said sub-division as Exhibit 2. He also attached Exhibit 4 being a copy of title deed for Land Parcel No. N. Nyansiongo Settlement [particulars withheld] 0.30Ha which he stated the deceased gave to the petitioner.

12. 15<sup>th</sup> June 2015, this court, differently constituted, issued Prohibitory Order of injunction restraining the Petitioner from disposing of, selling alienating and appropriating the assets of the deceased, more particularly the suit land, pending the hearing and determination of the summons herein inter partes.

13. On 16<sup>th</sup> May 2016, parties agreed to canvass the summons by way of affidavits and written

submissions. I have considered the written submissions filed by both parties and I note that the main issue that arises for determination is whether the objectors are entitled to inherit the property of the deceased. It was not disputed that the deceased was the mother of the objectors and the petitioner.

14. The deceased was initially married to one OO and got 5 children from the said union namely:

a) DMO

b) JOO

c) JOO

d) POO

e) MBK.

15. The deceased divorced her first husband and married one C.W. Stragen from whom she got 3 children namely:

a) MBS – Petitioner

b) JS

c) PAS

The petitioners claim was that the suit land was purchased by their late father C.W. S for their mother and therefore the deceased's children from the first marriage should not benefit from the said land since they have land from their own father OO.

17. I have however perused all the annexures to the petitioner's affidavit and I note that nowhere has it been shown that the suit land belonged to or was purchased by the said C.W.S. In any event, even if that was the case, the suit land was eventually registered in the name of the deceased herein thereby forming part of her estate that is supposed to be inherited by all her children irrespective of whether they are children from the first or the 2<sup>nd</sup> marriage. I find that the mere fact that the deceased divorced her first husband did not change the fact that the children from the first marriage still belonged to her. In fact, the objector deponed that the deceased still recognized her children from the first marriage and in December 1987, she subdivided the suit land and gave a portion thereof to the 2<sup>nd</sup> objector.

18. Section 76 of the Law of Succession Act stipulates as follows:

**“76. 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.”**

19. In the instant case, I find that by omitting the names of the deceased’s children from the first marriage from these proceedings, the petitioner concealed the names of some of the beneficiaries and this is a solid ground for revocation of the grant issued herein in terms the provisions of **Section 76 of the Act**. The Petitioner appears to have been operating under the mistaken belief that since the deceased divorced the father of the objectors, then it meant that the children from the first marriage would be excluded from benefitting from her estate. I find that the law is very clear on the rights of the children of the deceased to inherit his/her estate. The petitioner’s reasoning or decision to exclude the objectors could have been excusable had she been acting in person in these proceeding, but in view of the fact that she is ably represented by the firm of M/s Momanyi Aunga & Co. Advocates in this case, it is expected that she must have been advised on the legal position regarding the rights of the children of a deceased person who dies intestate. It is therefore my finding that omitting the names of the objectors in the succession proceedings/petition amounted to concealment of something material to the case.

20. In the case of **Matheka & Another vs Matheka [2005] IKLR 456 the Court of Appeal** laid down the guiding principles on revocation of grant as follows:

**“A grant may be revoked either by application by a interested party or on the court's own motion.**

**Even when the revocation of grant is upon court's motion there must be evidence that the proceedings to obtain grant were defective in substance or that grant was obtained fraudulently by making of a false statement or by the 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 Administration of the estate.**

**It must be shown to court that the person to whom the grant has been issued has failed to produce to court such inventory or account of Administration as may be required.”**

21. **Section 29 (a) of the Act** defines a dependant as **“the wife or wives, a former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.”**

22. Even though the above Section refers to the deceased in masculine terms, the said section can still be interpreted to fit a female deceased person as was the case in this instant proceedings. The objectors herein fit within the Acts definition of “a dependant.” And are therefore entitled to inherit the estate of their deceased mother.

23. **Section 38 of the Act** stipulates as follows:-

**“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”**

24. Under **section 51 Rule 7 of the Law of Succession Act and Probate and Administration Rules**, certain details and information ought to be disclosed. They require that there must be disclosure of all the surviving widows and children of the deceased.

25. In the instant case it is abundantly clear to me that **Section 51 of the Act and rule 7 of the Probate and Administration Rules** were not complied with. The process to obtain grant was defective to that extent.

26. The petitioner created the false impression that the deceased was survived by only her three children from the second marriage. This means that the grant made herein 29<sup>th</sup> June 2011 and confirmed on 5<sup>th</sup> July 2012 is available for revocation on grounds of a defective process to obtain the grant and concealment of important matter from court.

27. Consequently in exercise of this court’s discretion granted by section 76 of the Act, I do hereby revoke the grant made herein on 29<sup>th</sup> June 2011 and confirmed on 5<sup>th</sup> July 2012. A fresh grant of Letters of Administration intestate shall issue in the joint names of the petitioner and the 1<sup>st</sup> objector. All the children of the deceased from the first marriage shall accordingly be listed as survivors of the deceased.

28. Consequent to the revocation of the grant, it also follows that title to the suit property shall revert back to the name of the deceased pending the fresh application confirmation of the grant.

29. I also find it in order to issue, and I hereby issue, orders of inhibition inhibiting any transactions on the suit land pending the fresh confirmation of grant.

30. Each party shall bear his or her own costs of this application in view of the fact that the disputants are children of the same person (mother).

31. It is so ordered

**Dated, signed and delivered in open court this 15<sup>th</sup> day of February, 2017**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

Mr. Momanyi for the petitioner

Mr. Babu for Sagwe for the objector

Omwoyo: court clerk