



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 41 OF 2016**

**IN THE MATTER OF THE ESTATE OF THE LATE:**

**MAGANGI OBUKI ..... (DECEASED)**

**BETWEEN**

**PATRICK ARASA MAGANGI ..... OBJECTOR/APPLICANT**

**AND**

**JOHN GATI BOKE ..... PETITIONER/RESPONDENT**

**RULING**

1. Upon the death of **MAGANGI OBUKI** (referred to as the deceased), **JOHNES GATI O'BOKE** (the respondent) applied for grant of letters of administration in respect of the deceased's estate in **MIGORI SPM SUCCESSION NO.408 OF 2005** and the same was issued to him on 25/11/2005 and subsequently confirmed on 08/09/2006.
2. The asset comprising the estate was parcel **NO. L.R. BUGEMBE/ MASABA/III** which was distributed in favour of the respondent and subsequently registered in his name.
3. At the time of applying for the grant of letters of administration, the respondent described himself as a son of the deceased and attached a death certificate whose serial number is BNo.883790 showing that the deceased died in 1980.
4. The respondent also presented a letter dated 24/08/05 written by the Assistant Chief of Masaba location which listed him, Mongere Boke and Makorre Boke as the sons of the deceased. Alongside this was a burial permit issued by the chief of Central Kanyamkago despite the fact that the respondent hailed from **KURIA**.
5. After transferring the parcel belonging to the deceased into his name, the respondent then sub-divided the same asset to be distributed to persons who were not heirs to the estate.
6. The applicant laments that the grant of letters of administration and the subsequent confirmation were obtained through fraud, misrepresentation and material concealment by the respondent who is neither a son nor a beneficiary of the deceased. Further, that the grant was issued without consent of the rightful beneficiaries entitled to apply for it, thereby disinheriting the rightful heirs who were not taken into consideration when the estate was distributed.
7. The applicant now urges this court to direct that fresh grant of letters of administration of the

deceased's estate be issued to him. In the supporting affidavit, the applicant deposes that the deceased was the biological father who passed away on 5<sup>th</sup> August 1999 as per the annexed death certificate. He had sired the following sons –

- Samwel Ayuka Magangi – Deceased
- Thomas Osano Magangi
- Bernard Ongeru Magangi
- Julius Ongeru Magangi
- Dandi Barasa Magangi
- Moses Ondieki Magangi

8. The applicant laments that the respondent failed to disclose the true and full identities of the beneficiaries and falsely claimed that the deceased was his father.

9. He urges for cancellation of the registration of the land which is in the respondent's name and that the same ought to revert to the deceased's name. To support his assertion, the applicant relies on the letter dated 08/06/2016 written by the Chief of Kisii Township which lists the names of the beneficiaries of the deceased's estate.

10. The respondent whilst admitting that he is the administrator of the deceased's estate by virtue of confirmation of grant which he obtained nonetheless requests this court to stay the current proceedings on grounds that he is currently facing criminal charges in Migori Criminal case No.387 of 2016 where he is accused of obtaining registration of title **NO. BUGEMBE MASABA/III** by false pretence and forgery of documents related to his proprietorship thereto. He points out that the applicant is the complainant in that case which is pending hearing.

11. He further states that the very documents the applicant relies on in this matter are the same ones he will be relying on in the criminal case. He contends that he will not be able to properly defend himself if the succession cause and the criminal case proceed at the same time. He therefore requests to be allowed to proceed with the criminal case to conclusion first.

12. Such a move is totally opposed by the applicant who says the respondent has already commenced a project on the deceased's subject land, and the suggestion to delay this matter and await the outcome of the criminal case is mischievous.

13. The matter was canvassed by way of written submissions and the applicant's counsel argued that the respondent presented forged documents to obtain the grant – namely the letter by the Assistant Chief, and the death certificate.

14. It is his contention that irrespective of the outcome of the criminal case this court can still determine whether the grant was obtained fraudulently.

15. The respondent's counsel submitted that there is a possibility of the two courts reaching conflicting decisions and the most rational thing to do is to stay the present proceedings pending the finalization of the criminal case as the criminal case was commenced earlier. He invites this court to consider the provisions of **Section 6** of the **Civil Procedure Act** which prohibits the trial of two suits simultaneously.  
**Section 6 of the Civil**

**Procedure Act** provides:-

**“No court shall proceed with the trial of any suit or proceedings in which the same matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties ... where the suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”**

16. To the extent that there are allegations of fraud in this case – the same is also the subject of the

criminal proceedings. Yet that is not the only issue in this matter. **Section 76** of the **Law of Succession Act** provides as follows:-

**“A grant of representation, whether or not confirmed may at any time be revoked or annulled if the court decides either on an application by any interested party or of the own motion.**

**(a) That the proceedings to obtain grant were defective.**

**(b) That the grant was obtained fraudulently by making a false statement or by concealment of something material to the case.**

**(c) That the grant was obtained by means of an untrue allegation of facts essential in a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inordinately.”**

17. In this regard then the allegation of fraud is not the only basis for seeking revocation of the grant. Indeed the issue as to whether the contents of the chief’s letter, and whether the respondent is or is not a son to the deceased cannot be determined by the brief affidavits herein – this would require detailed viva voce evidence and certainly the criminal outcome would go a long way in establishing the credibility or otherwise of the impugned documents.

18. Yet that is not all – **Section 76 (b)** refers to concealment of something material to the case – in this instance the other surviving beneficiaries of the deceased’s estate. I take note that in his reply the respondent does not deny that the applicant and his named siblings are biological children of the deceased or that he deliberately left them out in the list of beneficiaries or the proposed distribution of assets.

19. That concealment is an aspect which will not necessarily fall within the purview of the criminal proceedings and in my view does not offend provisions of **Section 6** of the **Civil Procedure Act**.

20. I am persuaded that the application herein is merited on grounds that there was concealment of material information – namely the surviving beneficiaries of the deceased’s estate. Consequently the application is allowed and **(1)** the grant issued to **JOHNES GATI O’BOKE** on 25/11/2005 and subsequently confirmed on 08/09/2006 be and is hereby revoked.

**(2)** The County Land Registrar Migori is directed to rectify the register by cancelling the name of the respondent who is shown as the registered proprietor of **LR NO. BUGEMBE/MASABA/III** and the same revert to the original owner namely **MAGANGI OBUKI** (the deceased).

The applicant is at liberty to file for grant of letters of administration relating to the deceased’s estate.

**Written and dated this 21<sup>st</sup> day of February, 2017 at Homa Bay**

**H.A. OMONDI**

**JUDGE**

**Delivered and dated this 20<sup>th</sup> day of February, 2017 at Migori**

**A.C. MRIMA**

**JUDGE**