



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 83 OF 1998**

**IN THE MATTER OF THE ESTATE OF ESTHER NDIVO KITHII (DECEASED)**

**PAUL KITHUKA KITHII .....ADMINISTRATOR**

**VERSUS**

**DAVID MUTHIANI KITHII.....OBJECTOR**

**RULING**

A grant of letters of administration intestate was issued on 27<sup>th</sup> August 1998 to the Administrator herein, with respect to the estate of Esther Ndivo Kithii (hereinafter referred to as “the Deceased”). The Administrator is a son of the Deceased. The Objector herein who is also a son of the Deceased filed a summons for revocation of grant dated 23<sup>rd</sup> December 2010 seeking orders that the grant issued to the Administrator be revoked. The grounds for the application are that the proceedings to obtain the grant were defective in substance; the grant was obtained fraudulently by making false statements, or by the concealment from court or something material and by means of untrue allegations of a fact essential in point of law; and the Respondent has failed to proceed diligently with the administration of the estate

The Objector averred that the Administrator petitioned for the letters of administration without informing him, notwithstanding that the Objector had not renounced his right to participate in administration of their late mother's estate. Further, that the Administrator gave the wrong date of the death of their mother the correct date being 11th December 1994, and that after being granted the letters of administration, the Administrator has not faithfully administered the estate but has proceeded to dispose of the land belonging to the estate of the deceased to third parties without taking into account the interests of other beneficiaries and/or dependants. Lastly that the Administrator has not made any reasonable steps to have the grant confirmed.

These averments are found in the said summons and in a supporting and sworn on 23<sup>rd</sup> December 2010, as well as in submissions dated 14<sup>th</sup> November 2016 filed by Mulwa Isika & Mutia Advocates, the Objector's legal counsel. Reliance was placed on section 76 of the Law of Succession Act as applied in the decisions in **Lucy Wangui Kabaiko & Another vs Jane Wangari Kabaiko & 3 Others (2014) e KLR** and **Mumbi Mwathi vs Stephen Ndung'u Mwathi (2012) e KLR**.

**The Response**

The Administrator filed a replying affidavit he swore on 29th January 2015 in response to the Objectors application. The Administrator's learned counsel, D.M Mutinda & Company Advocates also filed submissions dated 13th October 2016. The Administrator stated that he disclosed all the rightful beneficiaries of the deceased's Estate and that the Objector herein duly consented to the filing of this

succession cause, and was all along aware of the same. The Administrator attached a copy of the said consent. Further, that he has since faithfully and diligently administered the estate of the deceased.

Reliance was placed on the decision in **Rosina Nawekulo Wafula & Another vs Nikasio Makokha Wafula [2015] eKLR** where the Court declined to revoke the grant issued in a similar situation on the ground that the applicant had not proved the grounds for revocation. The Administrator submitted that the Objector has the burden of proving any or all grounds affirmatively before the Court can revoke the grant. Further, that the Administrator has demonstrated that the Objector was involved in the succession proceedings and even signed the consent form

Reliance was also placed on the decisions in **Re Micheal Mwangi Githinji (Deceased) (2009) e KLR** and **In Re the Estate of P.W.M. (Deceased), (2013) e KLR** for the position that the burden was on the Objector to prove that his signature was a forgery, and that he had not tendered any forensic evidence from a document examiner in this regard, particularly since the allegation bordered on an accusation of commission of a criminal offence. Lastly, it was urged that the Objector had not particularized which parcel or portion of land has been disposed and the 3rd Parties involved.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made by the Administrator and Objector. The issue to be decided is whether the grant issued to the Administrator should be revoked. The Objector asks for revocation of the grant on account of his non-participation in the Petition for grant. The grounds for revocation of a grant are provided in section 76 of the Law of Succession as follows:

**“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 has ordered or allowed; 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.”**

I have perused the Petition for grant herein and note that the Objector was included in the list of beneficiaries. The Administrator has also provided evidence that the Objector's consent given, which was not controverted by the Objector, who did not deny, or bring any evidence to show that the signature on the consent was not his consent. The Objector in addition did not provide any evidence of his allegations of the wastage of the deceased's estate. Lastly, given that the grant herein was issued in 1998, it is my

view that revocation of grant is not the appropriate remedy in the circumstances, as the administration of the deceased's estate needs to proceed to a close in the interests of justice and of the beneficiaries. The Objector is also culpable of inordinate delay in bringing his application in this respect.

The concerns raised by the Objector as regards his interest in the deceased's estate can in my view be adequately addressed in confirmation proceedings by way of an affidavit of protest, as provided for by Rule 40 (6) and (7) of the Probate and Administration Rules, which provides as follows in this respect:

**“(6) Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.**

**(7) The registrar shall without delay forward to the applicant a copy of each protest filed in the cause under subrule (5) or (6).**

**(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.”**

The Objector therefore still has an opportunity to canvass and prove his claims and interest over the deceased's estate during confirmation proceedings.

The prayers sought in the Objector's summons for revocation of grant dated 23<sup>rd</sup> December 2010 are accordingly denied. This Court however orders as follows pursuant to section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules:

1. The Administrator herein shall file and serve the Objector with a Summons for Confirmation of Grant within 30 days of the date of this Ruling.
2. The Objector shall file and serve his Affidavit of Protest if need be to the said Summons for Confirmation of Grant within 30 days of service of the said Summons, failing which the Summons for Confirmation of Grant shall proceed to hearing.
3. The *status quo* that shall obtain as regards the properties and assets belonging to the estate of Esther Ndivo Kithii (Deceased) pending the confirmation of grant of administration shall be that the Administrator, Objector and Beneficiaries shall continue to be in possession and occupation of the properties and assets they currently occupy; and that the Administrator, Objector and Beneficiaries of the estate of the deceased shall not sell, transfer, lease, undertake any further developments on, or in any manner dispose of or waste the said properties and assets, nor in any manner interfere with the current occupation and possession of the same by any party.
4. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 1<sup>st</sup> day of March 2017.

**P. NYAMWEYA**

**JUDGE**