



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.343 OF 2013**

**IN THE MATTER OF THE ESTATE OF ANDREA MUTUKA - DECEASED**

**ELISHA MAKOKHA SHAMALA ..... PETITIONER/RESPONDENT**

**VERSUS**

**REUBEN MUTUKA KOMBO ..... OBJECTOR/APPLICANT**

**RULING**

1. **Reuben Mutuka Kombo**, (the Objector) took out summons dated 25<sup>th</sup> April, 2016 and file on the same day seeking revocation or annulment of the Grant made to **Elisha Makokha Shamala**, the petitioner on 14<sup>th</sup> March, 2014 and an order that a new grant of representation for the estate of the late **Andrea Mutuka** (deceased) be made to him (objector). He also seeks costs of the application.
2. The summons is based on the grounds appearing on the face of the summons. In principal the objector laments that the petitioner has sat on the grant for more than four years without seeking to have it confirmed; that the petitioner has become unco-operative with other beneficiaries in moving the court for confirmation of the grant, and that the petitioner's interest is only that of a purchaser.
3. The objector filed an affidavit sworn on 25<sup>th</sup> April, 2016 in support of his summons for revocation of Grant. The gist of the affidavit just like the grounds in support, is that the petitioner has not acted prudently to have the grant confirmed despite the deceased's family having allowed him to petition a grant of representation of the deceased's estate. He also complains that the petitioner has become unco-operative and evasive in pushing to have the grant confirmed. He further states that the petitioner has even allocated himself a bigger share than he is entitled.
4. The petitioner has opposed the summons through an affidavit sworn on 18<sup>th</sup> October, 2016 and filed in court on the same day. The petitioner denies that he has refused or failed to take steps to have the grant confirmed. According to the petitioner, the objector is the hindrance in having the grant confirmed. The petitioner states in his affidavit that the objector has been unwilling to have daughters of the deceased included as beneficiaries of the deceased's estate and does not want them to get a share of their father's estate. According to the petitioner, the summons for revocation was prompted by the inclusion of daughters of the deceased among those who are to get shares in the estate. The petitioner stated that he is ready and willing to seek confirmation of the grant and that summons for confirmation has already been prepared and is ready for filing.
5. When the summons came up for hearing on 3<sup>rd</sup> November, 2016, **Mr Manyone** appeared for the petitioner, while the objector was in prison. The objector moved his application and urged the court to allow it as prayed. **Mr Manyoni**, learned counsel for the petitioner, opposed the summons and relied on

the petitioner's affidavit and that of *Elimina Masitsa* and *Philistr Shisinde*, a daughter of the deceased. They opposed the summons saying that the objector has been interfering with the work of the petitioner and pleaded with the court to allow the petitioner conclude his duties under the grant of representation. Mr Manyoni in a nutshell, told the court that the summons is not merited and should be dismissed with costs.

6. I have considered the summons for revocation, the affidavits both in support and opposition and submissions by parties. The petitioner petitioned for a grant of representation which was made in his favour on 10<sup>th</sup> March, 2014 and issued on 14<sup>th</sup> March, 2014. The petitioner was appointed by beneficiaries of the deceased by consensus although he is not a member of the deceased's family but has now been accused of delaying the process and confirming the grant.

7. The power to revoke or annul a grant whether confirmed or not is given under **section 76** of the law of Succession Act. It is a discretionary power that the court must exercise judiciously and with great caution lest it draws parties backwards in terms of administering a deceased's estate. The grounds for revocation of Grant are well stated under section 76 of the Act and one of the grounds is where a legal representative has failed to proceed diligently in seeking to have the grant confirmed after it has been made to him.

8. The objector has accused the petitioner that he has taken too long to move the court to have the grant confirmed. The grant was made on 10<sup>th</sup> March, 2014 but up until now, the petitioner has not filed summons for confirmation of Grant. This is a long period and the petitioner has an obligation in law to move the court to confirm the grant and conclude administration of the Estate.

9. **Section 76(d)(1)** states that the court can revoke or annul a grant whether confirmed or not on its own motion or on application by an interested party where the person to whom the grant was made has failed after, due notice and without reasonable cause, to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow.

10. The objector has not told the court if at all, he gave the petitioner notice requiring him to take steps to apply for confirmation of Grant. Furthermore, **section 71** of the Act, requires the legal representative to ascertain beneficiaries and their respective shares before a grant of representation can be confirmed. The objector has not indicated that beneficiaries had agreed on the mode of distribution but the legal representative had failed to apply for confirmation of Grant.

11. The legal representative has defended himself from the accusations labelled against him and instead blamed the objector as the one who has delayed the process by insisting that daughters of the deceased should not get a share from the deceased's estate. That accusation is in the affidavit but the objector has not denied this or even tried to rebut this allegation. There are on record affidavits by *Elimina Masitsa Andalo* and *Philisters Shisinde Andalo*, daughters of the deceased, who have opposed the objector's move and have instead blamed the objector as the one who has been interfering with administration of the estate. The two are categorical that the objector's intention is to take over administration of the estate and exclude them from getting a share of the estate of their late father. They are in support of the petitioner to continue with the administration of the estate until its conclusively delt with.

12. The petitioner has also attached to his replying affidavit a copy of summons for revocation which is due for filing intimating that he is ready to proceed and confirm the grant thus bring administration of the estate to conclusion.

13. The court must remind itself on the fact that the order sought is discretionary and that it is not bound to grant revocation even where a case is made out for it. The court must act to ensure that the deceased's estate is delt with in accordance with the law and guard against a party who may seek revocation of a grant just to achieve a certain aim or even settle a score against the legal representative.

14. It is true that the petitioner has taken longer to apply for confirmation of Grant but the court is also not lost on the reasons advanced which lay blame squarely on the objector. In my respectful view, the wider interest of justice for all parties will be served if the petitioner is allowed to proceed and conclude

administration of the deceased's estate.

15. From the foregoing reasons, I decline to allow the revocation of Grant sought and I make the following orders:-

- 1. The summons for revocation of Grant dated 25<sup>th</sup> April, 2016 is hereby dismissed.*
- 2. The petitioner do file and serve the objector with summons for confirmation of Grant within fourteen (14) days from the date of this ruling.*
- 3. Each party do bear costs of the summons.*

**Dated at Kakamega this 15<sup>th</sup> day of November, 2016.**

**E.C. MWITA**

**JUDGE**