REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 272 OF 1998

IN THE MATTER OF THE ESTATE OF THE LATE SAMSON

NGABUCHA NDEGWA -DECEASED

Lucy Wakarima Ngabucha.....1st Applicant

Doris Wanjugu.....2nd Applicant

vs

George Mwangi Ngabucha.....1st Respondent

Edward Ndegwa Ngabucha.....2nd Respondent

RULING

Before me for determination are two applications each seeking to revoke the grant of letters of administration issued to the Respondents herein on 25th April 1990. The first application is dated 15th August 2011 and was filed by the first applicant herein while the second application is dated 3rd July 2012 and was filed by Doris Wanjugu, the second applicant herein.

I find it too disturbing to point out that this case has been in court for the last 26 years. The record shows that the deceased herein died on 2nd May 1987 and on 25th April 1990, the first Respondent petitioned for letters of administration is succession cause number PMCC 100 of 1990.The property listed in the petition as comprising the deceased's estate is **Nyeri/Endarasha/236**.

On 10th July 1990, the first applicant herein filed objection to making the grant claiming that she was not consulted at the time of filing the petition and insisted that the above land ought to be inherited by the three wives of the deceased. The first applicant also filed a petition by was of cross-petition.

In a replying affidavit filed on 5th July 1990, the first Respondent prayed that the matter to be referred to the D.O. Mweiga and clan elders for arbitration. The dispute was referred to the D.O who filed the award in court. The award was that the first applicant retains the left side bordering the forest and the right hand side to be taken by the first Respondent. The second Respondent was to be given one acre after sub-division with the first Respondent. The award also stated that the Respondents' would construct a house for the first applicant. Judgement was entered in terms of the said award on 6th August 1991.

A temporary grant of letters of administration was issued to the first applicant and both Respondents on 6th August 1991 and the same was confirmed on 19th July 1994 and it was ordered that the above land be shared as follows; the first applicant **2.70** acres, the first Respondent **4.08** acres and the third Respondent **5.08** acres.

By an application dated 19th July 1994, the first applicant applied to set aside the orders made on 19th July 1994 claiming that the application for confirmation was filed without her knowledge. The said application was dismissed on 16th November 1994. On 10th January 1995, the court allowed an application by the first Respondent and authorized the executive officer of the court to sign document to effect the sub-division and transfer of the land as per the grant.

On 3rd January 1997, the second applicant applied for eviction orders against the first applicant. The said application came up on 14th January 1997 and the same was adjourned at the request of the first applicants counsel. On 24th June 1997, the first applicants' counsel applied for an adjournment to enable her to record a consent but on 29th July 1997 the same advocate stated that they wished to record a consent but the first applicant was not present. At or about this juncture the file was transferred to the high court. On 11th July 2000 Juma J ordered the case to be heard *de novo*, but the said order was set aside by consent on 8th March 2007.

The first application dated 15th August 2011, the subject of this ruling was filed on 4th August 2011 by the first applicant seeking orders *inter alia* that the grant of letters of administration granted to the Respondents herein be revoked and that the Respondents be retrained from disposing off estates properties and in particular **Nyeri/Endarasha/1678**. The grounds in support of the said application are that the grant was obtained by making false statements, that the estate is not being administered to the benefit of the beneficiaries, that the petition was defective and that the grant was obtained by means of untrue allegations.

In the supporting affidavit, the first applicant alleges that the Respondents stated that they are sons of the two co-wives which was not true, that the deceased had three wives and that the first wife had no sons. She insisted that the only dependants of the deceased are herself, first wife Elizabeth Wangechi Ngabucha-deceased and the second wife Jelioth Wanjiru-deceased. She insisted that the grant was obtained by means of untrue allegations. She averred that the land has since been mutated into 2 parcels, namely **1677** and **1678** and that number **1677** is registered in the name of the second Respondent instead of the first wives children.

The first Respondent in a replying affidavit filed on 23rd November 2011 sworn on his own behalf and on behalf of his co-respondent averred *inter alia* that the grant of letters of administration was issued and confirmed to the first applicant and the Respondents, that the first applicant co-operated until the grant was confirmed when she refused to sign the requisite documents, that the executive officer was on application allowed to sign the requisite documents, that the transfers in question were registered by way of transmission and title deeds issued as appropriate and one of the Respondents sold to a purchaser, that the first applicant is being dishonest and further that the estate was competently administered. He also averred that the beneficiaries were properly identified during the distribution of the estate and there were no objections or claims then and simply the first applicant has refused to accept the outcome of the succession cause.

In the meantime on 6th June 2012 the first applicant filed an urgent application seeking to restrain a one **Stephen Ndei Wachira**, a purchaser from burying his wife in title number **1678** which application was heard an dismissed by **Sergon J** on 15th June 2012 citing the provisions of section 93 of the Law of Succession Act.[1]

The second application filed by the second applicant on 4th July 2012 also the subject of this ruling also seeks to revoke the same grant on grounds that the procedure used in obtaining the grant was defective and that the same was obtained by concealment of what the applicant refers to as "material things." The

second applicant claims that she is a daughter of the deceased, and that the deceased told her that she was to get a share of his estate and that she was disinherited, that she was not heard before the D.O. hence it is in the interests of justice that the grant be revoked. In her supporting affidavit, the second applicant avers that her father had 3 wives, that her mother had only two children among them herself, that the first applicant had 9 children, that prior to his death her father called a family meeting and stated she should be given a portion of his land and that she was not allowed to participate in the proceedings before the D.O. and further that she was not informed about the proceedings relating to the issuance of the grant. She claimed that she was married at Trans-Nzoia District and that during the tribal clashes she was displaced and currently relies on well-wishers.

The second Respondent in a Replying affidavit filed on 19th November 2012 averred that the applicant has been aware of these proceedings since 1990, that she has been accompanying the first applicant to court, that the deceased did not give her anything as evidenced by minutes dated 14th February 1987, that she was aware of the proceedings before the D.O, and that there was no concealment as alleged. Further, the second application is an afterthought brought after realizing that the first applicants' application has no chances and that the estate was distributed over 20 years ago.

Hearing proceeded before me on 22nd February 2016. The second applicant adopted her statement filed on 10th December 2014 which essentially reiterates the contents of her affidavit referred to above. Upon cross-examination by counsel for the Respondents she admitted that she was present before the D.O. but insisted that she was not allowed to speak. She also admitted that the arbitration award was adopted as a judgement of the court and a certificate of confirmation of grant issued. She also admitted that she never applied to set aside the arbitration award nor did she challenge the judgement after the award was confirmed by the court and that was close to 22 years ago. She also admitted that she applied to annul the grant after over 20 years.

The matter was adjourned for further hearing on 24.5.2016 and in the meantime the first applicant filed an application on 29th March 2016 seeking orders *inter alia* that the *status quo* be maintained pending determination of the application for revocation. I granted temporary orders in terms of prayer two of the said application but the order extracted was totally different from the interim order I grated, hence it did not conform to the court record, consequently I vacated the said orders on 24.5.2016 and expunged the offending order from the court record.

In her evidence in court, the first applicant's adopted her affidavit referred to above and witness statement filed in court. She stated that the case was heard before the D.O who made an award, that she did not agree with the award, that she was not served with the application for confirmation nor was she notified of the hearing, hence she did not attend court. She asked for the grant to be revoked because the first wife's children were not included in the distribution even though the deceased had given them part of the land, that she was not involved in the discussions leading to the distribution, that the distribution was not fair in that the first Respondent got **4.8** acres, the second Respondent **5.8** acres and herself **2.8** acres yet she was a wife to the deceased, and that the Respondents come from the same house. Her proposal was that the distribution be in accordance with the houses. It was also pointed out to her that she was present in court when the first Respondent asked that the matter be referred to the DO and she agreed.

Upon cross-examination she was reminded that she was one of the administrators, but insisted the Respondents wrote her name, she also denied that she was aware that she was one of the petitioners, She admitted that the magistrate entered judgement in terms of the arbitration award but insisted she did not agree with it. She admitted that she appeared before the D.O.

On further cross-examination, the first applicant was reminded that after the award was read in court she applied to set it aside but her application was dismissed on 16th November 1994 but despite being the applicant and in spite of being shown the ruling, she insisted that she could not remember. She also admitted three separate titles had been issued pursuant to the grant but insisted she did not see her title. She also admitted that she was aware the second Respondent sold his land to a one **Stephen Ndei Wachira**. She admitted that she filed an application seeking to stop the said purchaser from burying his

wife on the said land but her application was dismissed. She also admitted that she was sued by the said **Stephen Wachira** in ELC No. 33 of 2008 and the court ordered her eviction and ordered her to pay damages for trespass but maintained that she did not agree with the said decision. She also admitted that her application to set aside the said judgement was dismissed. She also admitted that none of the other children of the deceased had challenged the award or grant in court. She also admitted that she did not appeal after the court dismissed her application to set aside the award in 1994.

The second Respondents testified that the first applicant was one of the administrators, that the deceased's land was divided into three as per the grant between the two Respondents and the first applicant. The first Respondent got parcel number 1677, the second Respondent got 1678 and the first applicant was given 1676. The second Respondent stated that 10 years after getting his title, he sold and transferred his land to a one **Stephen Ndei Wachira**.

He also recalled that the dispute was referred to the DO for arbitration, the award was filed in court and judgement entered in terms of the award. He stated that the first applicant filed an application dated 19.7.1994 seeking to set aside the said award but the same was dismissed by the court. He insisted that they applied for the grant the three of them including the first applicant who was a party to all the decisions. He also denied allegations by the second applicant that her father called a meeting and that the deceased gave her land. He recalled that their father called a meeting and gave instructions on how the land was to be divided and this was reduced into writing and the document is an annexed to the affidavit dated 19th December 2012. The DO followed the said document plus the oral evidence adduced before him. With regard to the allegation by the second applicant that she was not involved, he insisted that they all met as a family and agreed to abide by their father's wishes. He recalled that the second applicant was in the said meeting and no one raised objections. Upon cross-examination he stated that the deceased did not specify the acreage but described the parcels of land on the ground and that the parcels were separated by a road, hence the deceased only identified the parcels on the ground.

The first Respondent adopted the testimony of the second Respondent and reiterated that the deceased pointed the various portions but did not specify the acreage. He insisted that himself, the second Respondent and the first applicant attended the confirmation of the grant. He also mentioned that that the second applicant was married in 1940's, hence they did not mention her at the time of petitioning for the grant and added that they followed the deceased wishes

Stephen Ndei Wachira testified that in 2005 he bought land parcel number 1678 from the second Respondent and he was issued with a title deed on 3. 10. 2005, that he took possession and started using it. He also stated that the first applicant sued him in court trying to bar him from burying his wife on the land but she lost the case. He also confirmed that he sued the first applicant in HCC NO 33 OF 2008 seeking to evict her from the land and she was ordered to vacate but she has refused. He produced a copy of the judgement. She also applied to set aside the said judgement but her application was dismissed on 9.3.2016. He produced a copy of the ruling.

The court notes that shortly after the above ruling rendered in HCCC No 33 of 2008 (ELC), the applicant approached this court *ex parte* under certificate of urgency and tried to obtain orders to preserve the *status quo* in the application referred to earlier and did not disclose that eviction orders had been issued against her by the ELC court, and worse still in spite of the clear temporary orders granted, the orders extracted did not conform with the court record.

I find it necessary to point out that the first applicant did not disclose to the court that she had lost a substantially similar application before the ELC Court and that there were subsisting eviction orders against her and this raises questions as to whether or not she acted in good faith in filing the said application and extracting an order that did not conform to the orders granted by the court.

In view of the foregoing it is important for the court to address the question whether or not the above conduct constituted an abuse of the court process. Courts must be used properly, honestly and in good faith and the court will not allow its process to be used for oppression or a means of vexation.

The first applicant knew at all material times that there were eviction orders issued against her by a different court which she unsuccessfully tried to set aside. She did not disclose this information to this court, yet she applied for orders that would in effect defeat existing court orders issued by a different court touching on the same land. Worse still, she obtained an *ex parte* order as earlier mentioned and proceeded to extract an order worded totally different from what the court ordered.

It is settled law that a person who approaches the Court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have a bearing on the adjudication of the issues raised in the case. In other words, he/she owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material facts within his/her knowledge or which he/she could have known by exercising diligence expected of a person of ordinary prudence. If he/she is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner**[2]*** by Viscount Reading, Chief Justice of the Divisional Court.

A party is under a duty to disclose to the court all relevant information even if it is not to his or her advantage.[3]The first applicant was under a solemn duty to bring to the attention of the court the above information and leave it to the court to determine the merits or otherwise of her application.

The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court to know in dealing with the issues before the court. The duty of disclosure therefore applied not only to material facts known to her but also to any additional facts which she would have known if she had made inquiries. The question that inevitably follows is whether the non-disclosure was innocent, in the sense that the fact was not known to the first applicant or that its relevance was not perceived. In my view, the non disclosure in this case was not innocent at all but deliberate and such conduct cannot be entertained by a court of law. I find that the above conduct amounted to non-disclosure of material information.

In their written submissions, counsel for the applicants argued essentially on the mode of distribution which to my understanding the first applicant perceives to be unfair and urged the court to revoke the grant. She also submitted that there was non-disclosure in that some beneficiaries were not disclosed. Counsel for the Respondents reiterated the various steps reflected in the record and citing authorities argued on the need to bring litigation to an end maintaining that the issues raised by the applicants are *res judicata* and referred to the several applications filed by the applicant all of which were dismissed and no appeal was preferred.

As Somervell LJ stated in *Greenhalgh v Mallard* [4] it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. Clearly, the issues now raised by the first applicant are the same issues she raised in her applications that were dismissed or could have been raised then. I find that the first applicants application must fail on this ground.

As pointed out earlier, this dispute has been in court for 26 years and the applicants filed the applications the subject of this ruling after over 22 years. This raises the question of whether there is a time limit within which an application for revocation of grant may be filed. Kamau J *in the matter of the estate of Hemed A. Kariuki*[5] and the Court of Appeal in *Elizabeth K Ndolo vs George M. Ndolo* [6]stated that there is no statutory time limit for commencing an application for revocation. However, in my view, this should be subject to reasonable time and whether or not the applicant was prevented from filing the application by any sufficient cause. In the present case, no explanation has been offered at all for the delay which to me is inordinate and unacceptable especially bearing in mind the fact that the applicants were all along fully aware of the existence of the succession cause right from the time it was before the D.O for arbitration, a fact admitted by both applicants.

It is also important to examine whether or not the applicants have demonstrated sufficient grounds for court to revoke the grant as provided for under Section **76** of the Law of Succession Act[7]which provides that:-

> *A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by* ***an 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 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 untrue allegation of a fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently;*
>
> *d. .....*

It is important to point out that the applicants took over 22 years to apply for the revocation. No explanation has been offered for the long delay but one thing is clear, that is, all along, the first applicant was fully aware of these proceedings and she actively participated in the proceedings right from the arbitration before the DO. After the award was filed in court she did not apply to set it aside. The award was confirmed by the court and judgment entered in terms of the award. Subsequently the grant was confirmed with her as one of the administrators. She unsuccessfully applied to set aside the confirmation. She never preferred an appeal against the dismissal. The land was distributed and title deeds issued in the names of the beneficiaries as per the grant. She is aware that she was awarded land as per the grant. No explanation has been offered as to why it took her over 22 years to realize that the distribution was unfair.

Also, the second applicant has not explained why she took close to 26 years to raise her interests to the estate. The argument advanced by both applicants is that the land ought to have been distributed according to the number of wives. Unfortunately, the said ground is not one of the grounds provided under section 76 of the Law of Succession Act,[8] hence it is not a ground for revocation. In any event, the second applicant was married in 1946 or thereabouts. By the time her father distributed his properties she was long married. She claimed she appeared before the DO but was not heard. If at all she was aggrieved by the DO'S award, she ought to have applied to set it aside.

The provisions of section 76 cited above were construed by the court of appeal[9] which laid down the following guiding principles; namely; A grant may be revoked either by application by **an interested party** or **by the court on its own motion** *and* Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by 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 the administration of the estate.

The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the grounds stipulated is section 76 of the act. The grounds laid down in section **76** can be divided into the following categories:- the propriety of the grant making process; mal-administration or where the grant has become inoperative due to subsequent circumstances.

It is trite law that if a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently, or if the proceedings are defective in substance such a grant can be revoked or annulled.

The expression "defective in substance" has been judiciary construed to mean[10] that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. I have examined the process through which the grant was obtained and I find that it cannot be said to have been defective in substance.

A grant can also be revoked on account of false statements and concealment of vital matters or on grounds that the applicant deceived the court as was held in *Samuel Wafula Wasike vs Hudson Simiyu Wafula*.[11] As stated above, I find that there was no deliberate non-disclosure of relevant materials. The court relied on the arbitration proceedings. The DO was guided by the express wishes of the deceased as per the evidence tendered during the arbitration process. There is nothing to show that there was a deliberate omission of any relevant information. The second applicant was married in 1940's long before the deceased distributed his properties. The other daughter is said to have been married in 1951 long before the aforesaid distribution.

Koome J summarised the grounds for revocation of a grant under Section **76** as follows, *when the procedure followed in obtaining the grant is defective in substance, when the grant is obtained fraudulently by making a false statement, making an untrue allegation of fact essential in point of law to justify the grant and or when the person who has the grant has failed to proceed diligently with the administration of the estate.*

A grant whether confirmed or not can be revoked on the grounds enumerated under Section **76** of the Act which I find not to have been proved in this case. I find that the applicants have not established sufficient grounds for the court to annul or revoke the grant as provided under section **76** of the Act. I find that both applications have no merits. Accordingly, I dismiss the applications dated 15th August 2011 and 3rd July 2012 with costs to the Respondents.

Right of appeal 30 days

Signed, Delivered and Dated at Nyeri this **1st** day of **November** 2016

John M. Mativo

Judge

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[1] Cap 160, Laws of Kenya

[2] {1917} 1 KB 486

[3] Brinks-Mat Ltd vs Elcombe {1988} 3 ALL ER 188

[4] (1) (1947) 2 All ER 257

[5] High Court Succ Cause No 1831 of 1996

[6] Civ App No 128 of 1995

[7] Cap 160, Laws of Kenya

[8] Cap 160, Laws of Kenya

[9] Matheka and Another vs Matheka {2005} 2KLR 455

[10]The Supreme Court of India in Anil Behari Ghosh vs SMT. Latika Bla Dassi & Others in {1955} AIR 566, [1955} SCR (2) 270

[11] CA No 161 of 1993