



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 352 OF 2006

IN THE MATTER OF THE ESTATE OF ALICE MWOSE NZIOKA (DECEASED)

MARTIN NZIOKA MUTUA

RUTH NDINDA MUTUA.....OBJECTOR/APPLICANT

CYRUS MUTETI MUTUA

VERSUS

MARGARET NGINA FRANCIS MUTUA.....PETITIONER/RESPONDENT

R U L I N G

1. **Alice Nzioka** (Deceased) died on the **23rd October, 2003**. On the **14th July, 2006**, **Margaret Ngina Francis Mutua (Respondent)** petitioned for a grant of letters of administration ad litem of her estate, limited to filing a suit as a personal representative and without power of distribution. She presented the petition to court in her capacity as the deceased's daughter-in-law.
2. The limited grant of letters of administration ad litem (grant) were issued to her on the **17th day of July, 2006**.
3. On the **4th day of November, 2011** **Martin Nzioka Mutua; Ruth Ndinda Mutua** and **Cyrus Muteti Mutua** (Applicants) who described themselves as beneficiaries of the Estate filed summons for revocation or annulment of grant on the grounds that: The proceedings to obtain the grant were defective in substance; the grant was obtained fraudulently by the making of false statements or by concealment from the court of things material to the case; the grant was obtained fraudulently by altering, falsifying and/or forging signatures on documents material to the case and by means of untrue allegations of facts essential in point of law to justify the grant notwithstanding that the allegations were made in ignorance or inadvertently.
4. The Applicants relied on an affidavit deponed by the **1st** Applicant who deposed that: the deceased was his grandmother; the Applicant had no locus to apply and obtain the grant; she was not the deceased's dependant; the allegations and/or misrepresentation made by the Respondent are meant to enable her benefit wrongfully from the Estate in which she has no interest; the Respondent acted in bad faith, misled the court and failed to disclose pertinent material facts; she did not comply with the relevant provisions of the law and obtained the grant fraudulently by concealment of facts relating to the assets in respect of the Estate of the deceased.
5. In response thereto the Respondent swore a replying affidavit. She deponed that she obtained the grant in respect of the Estate of the deceased, a mother to her husband **Geoffrey Mutua Titus** who was also deceased. The grant was limited to filing a suit to nullify title deeds which were fraudulently issued to her co-wife **Josephine Mukonyo Mutua** together with **Martin Nzioka**

- Mutua** (1st Applicant); it was necessary to obtain the grant to get the capacity to sue her co-wife who had disinherited her of her mother-in-law's property that she was entitled to.
6. Having obtained the grant she filed a suit on behalf of the Estate of the deceased against the 1st Applicant, **Josephine Mukonyo Mutua, Lukenya Ranching & Farming Co-operative Society, the District Land Registrar Machakos** and **the Honourable Attorney General** praying for cancellation of title deeds issued to **Josephine Mukonyo Mutua** amongst other prayers. She disclosed names of all beneficiaries of the Estate of the deceased, the three (3) objectors being some of them. The subject matter in civil suit was land allocated to the deceased which was distributed fraudulently by **Josephine Mukonyo** following the 1st Applicant's demand. Revocation/nullification of the grant would render the suit filed nugatory. This would make her suffer irreparable damage as her children would miss out on their father's inheritance and by extension their grandmother's Estate.
 7. The deceased herein died intestate on the 23rd day of **October, 2003**. It is not in dispute that she had only one child. A death certificate was adduced in evidence by the Respondent of **Geoffrey Mutua Nzioka** who died on the 29th **April, 1999**. This means that he predeceased the deceased herein. This was the person who could have legitimately benefited from her Estate. Having passed on, his dependants would be entitled to benefit.
 8. A dependant is defined by **Section 29** of the **Law of Succession Act** as:

“(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

“(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

“(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

9. The Respondent herein petitioned for a limited grant ad litem for purposes of filing of a suit/defending suit and/or representing suit. This was the special purpose for which it was sought. In her affidavit in support of the petition she disclosed that the deceased had an only son who was deceased who was married to two (2) wives, his rightful heirs and dependants, namely: **Josephine Mukonyo Mutua** (daughter-in-law), **Margaret Ngima F. Mutua** (daughter-in-law), **Martin Nzioka Mutua** (grandson), **Ruth Ndinda Mutua** (granddaughter), **Muteti Mutua** (grandson), **Mary Mwendu Mutua** (granddaughter), **Innocent Mwendu Mutua** (grandson), **Antony Nzioki Mutua** (grandson), **Theresia M. Mutua** (granddaughter), **Nzeu Mutua** (grandson). Adduced in evidence by way of affidavit was a letter from the **Provincial Administration** authored by the **Chief, Mwa Hills Location** who listed the aforesaid dependants.
10. Procedurally, the court considered the matter administratively and issued the grant. It was clearly stipulated that the grant was limited for the purpose of filing a suit until further representation would be granted by the court.
11. Pursuant to the grant, she filed a civil suit against two of the beneficiaries of the Estate on **28th July, 2006**. She averred that one of the beneficiaries and her co-wife purported to be the sole beneficiaries of the Estate of the deceased, as a result properties belonging to the deceased were fraudulently transferred to her (**Josephine Mukonyo Mutua**).
12. The allegation of the Respondent was that the 1st Applicant and his mother, **Josephine Mukonyo Mutua** had intermeddled with the Estate of the deceased. **Section 45(1)** provides thus:

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

It is apparent that free property of a deceased person must be protected. If indeed a party took possession of the property of the deceased herein after her demise contrary to the law, these must be addressed.

13. It is argued that the Applicants moved the court upon learning of the limited grant. The 1st Applicant learnt of the existence of the limited grant on being sued in the civil suit that was filed on the **28th July, 2006** where the Respondent described herself as the legal representative of the Estate of the deceased. He entered a memorandum of appearance and filed a defence through a firm of **Mungata and Company Advocates** on the **11th September, 2006**. They waited until **4th November, 2011, five (5) years** later, when they filed the instant application. Their allegation is far from being truthful.

14. The Respondent's capacity to file the petition has been questioned. Persons entitled to a grant are stipulated for in **Section 56(1)(a) of Law of Succession Act** which provides thus:

“(1) No grant of representation shall be made—

(a) to any person who is a minor, or of unsound mind, or bankrupt; or.”

Being an adult of sound mind she could apply for one. It is averred that she was not a wife to the deceased's son as no ceremony was conducted therefore her union with that of the deceased's son was not solemnized. Consequently, she was not a dependant of the deceased. What has not been disputed is the fact that she had children with the deceased's son. Children who are now dependants of the Estate of the deceased. Whether or not she was a legal wife to the deceased's son would be established by evidence. But, if the deceased was survived by dependants who are entitled to the Estate in equal shares then the Estate must be protected and preserved until it is distributed in accordance with the law.

15. The application was brought pursuant to the provisions of **Section 76(a)(b) and (c) of the Law of Succession Act** provides thus:

“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;”

16. Looking at the application filed by the Respondent, it has not been demonstrated that the proceedings were defective. The purported concealment of material fact from the court has not been proved. Finally it has not been proved on a balance of probabilities that the averments stated in the affidavit in support of the petition for the limited grant were untrue.

17. Finally, it is worth noting that the limited grant was issued for a specific purpose. It was

specifically stated that:

“.....but limited to the purposes only for filing suit, and until further representation were granted by this court to Margret Ngina Francis Mutua, she having undertaken to administer such estate according to the law (limited as aforesaid) and until further representation to be granted” (Emphasis mine).

18. After issuance of the limited grant, the Respondent did not take any other step of applying for a full grant. Similarly after the Applicants learnt of the existence of the limited grant, they did not attempt to apply for a full grant. Where a grant is issued following special circumstances, it does not prejudice making of a full grant. The person who applies for the limited grant may be appointed to represent the Estate of the deceased or any other person. **(Also see Rule 38 of the Probate and Administration Rules)**. It is therefore imperative for the purpose which the grant was issued to be achieved.

19. In the result, I am not satisfied that the application has merit. The same is accordingly dismissed with costs to the Respondent.

20. It is so ordered.

Dated at Kitui this 16th day of November, 2015.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Machakos this 2nd day of December, 2015.

P. NYAMWEYA

JUDGE