



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 776 OF 2010

IN THE MATTER OF THE ESTATE OF JIMMY MUTUA MULWA (DECEASED)

FAITH MUMBUA MUTUA.....OBJECTOR/APPLICANT

VERSUS

FRANCIS MWANZA MULWA.....RESPONDENT

RULING

1. The application dated **11th March 2011** is brought pursuant to the provisions of **Section 76** of the **Law of Succession Act** and **Rule 44(1)** of the **Probate and Administration Rules**.
2. The applicant seeks an order revoking the grant of Letters of Administration intestate issued to her and the respondent. The application is premised on the grounds that the grant was obtained fraudulently by means of untrue allegations, by concealment of some material facts and the making of false statement.
3. In the affidavit in support of the application, the applicant deposes that the respondent is her brother-in-law. That the probate matter was filed without her knowledge and she had initially filed another probate matter with her step son in **High Court Succession Cause No. 721 of 2010**. The Cause was gazetted on the **29th October, 2010**. Thereafter the respondent filed a fresh petition of Letters of Administration and made her a co-petitioner without her consent. Thereafter he wrote a letter dated **20th November 2010** threatening sureties. He concealed the fact that there was a previous suit touching on the Estate of the deceased. The respondent is in the process of disposing of the deceased's property without regard to the needs of beneficiaries.
4. In his replying affidavit the respondent describes himself as an advocate by profession and he acknowledges the fact that letters of administration have been issued to him and the applicant. He avers that the applicant's step son was not party to **Succession Cause. Cause No. 721 of 2010**. That the death certificate acquired by the applicant had an error in respect of the deceased's occupation which he caused to be corrected. The Petition was not supported by the Chief's certificate indicating the beneficiaries of the deceased and it was subject to a caveat. The mother of the deceased was not included as beneficiary.
5. An analysis of evidence adduced by way of affidavit shows that the applicant herein was the first to file a **Succession Cause No. 721 of 2010**. The petition of Letters of Administration having been taken out by the applicant jointly with **Moses Mulwa Mutua** said to be her step-son, the respondent petitioned for letters of administration in this particular case on the **1st November, 2010**. The Grant of Letters of Administration was obtained by the respondent per the indication on the document on **8th February, 2011**. On the said date he was aware of the existence of the **High Court Succession Cause No. 721 of 2010**. It has not been specifically denied that the respondent did not obtain the consent of the applicant when he petitioned for letters of administration in this matter.

6. It is not in contention that the applicant herein is the wife (widow) to the deceased who was survived by four (4) children. It is not specifically stated if the mother of the deceased was his dependant as envisaged by **Section 29 (b) of the Law of Succession Act, Cap 160 Laws of Kenya**.
7. Be as it may, **Section 66 of the Law of Succession Act**, provides for preference to be given to particular persons to administer the estate of a person who dies intestate. It provides:-

“a) Surviving spouse or spouses, with or without association of other beneficiaries;

- b. **Other beneficiaries entitled on intestacy,**

with priority according to their respective beneficial interests as provided by part V”.

The surviving spouse is given the first priority being the person with a life interest of the property. The widow and the deceased’s son come first; they would be followed by the father, mother, that is when brothers are considered.

- c. In the case of the Estate of **Benard Njonjo [2014] eKLR** the court held thus:-

“The father and brothers of the deceased are remote relatives as the deceased was survived by a widow and a child. By virtue of Section 39(1) of the Act, the father and brothers of the deceased are not entitled to a share in the estate of the deceased. Similarly by virtue of Section 66 of the Act, the father and brothers of the deceased do not have a prior or equal right to administration over or with the widow and child of the deceased. In other words the widow and son have a superior right to the administration of the estate of the deceased over the father and siblings of the deceased. So long as there is a surviving widow and child, the other relatives have no interest in the estate, and there is therefore no need for them to be represented in the administration of the Estate”.

8. Guided by the aforestated authority it is obvious that the applicant herein and her step son have a prior right to administration of the estate.
9. It is averred in **paragraph 9** of the replying affidavit that the petition for Letters of Administration filed by the applicant is a subject of caveat that is yet to be removed. The caveat was filed on the **15th November, 2010** pursuant to **Rule 15** of the **Probate and Administration Rules**. The notice of the cause having been filed was gazetted on the **2nd September 2010**. That caveat was not effective so as to prevent issuance of a grant to a person who had capacity to obtain the same. (see **Rule 15(8) of the Probate and Administration Rules**). An appropriate application in respect to the caveat can be made in the Cause.
10. The respondent being an advocate who is well conversant with the law should have filed an objection in the **Succession Cause No. 721 of 2010** instead of filing a fresh Succession Cause that is irregular. He should have notified the court of the existence of some other cause in respect of the deceased’s estate. Indeed he acted in bad faith.
11. It is apparent that the grant herein was obtained following concealment of some material facts. In the premises it is annulled /revoked.
12. Costs of the application shall be paid by the respondent.
13. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 12TH day of JUNE, 2014.

L.N. MUTENDE

JUDGE