



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**SUCCESSION CAUSE NO.347 OF 2013**  
**IN THE MATTER OF THE ESTATE OF ALICE KAHAKI NJOKA (DECEASED)**  
**JOHN KIBUNJA NJOKA.....1<sup>ST</sup> PETITIONER/RESPONDENT**  
**CHRISTINE NYAGITHA NJOKA.....2<sup>ND</sup> PETITIONER/RESPONDENT**  
**VERSUS**  
**JOSEPH NJUGUNA.....1<sup>ST</sup> OBJECTOR/APPLICANT**  
**LUCY WANJIKU.....2<sup>ND</sup> OBJECTOR/APPLICANT**  
**TERESIA NJERI.....3<sup>RD</sup> OBJECTOR/APPLICANT**  
**MARGARET DAMAT.....4<sup>TH</sup> OBJECTOR/APPLICANT**

**RULING**

This ruling relates to the estate of Alice Kahaki Njoka who died intestate on 25/8/1983. The petitioners herein, Johnson Kibunja Njoka and Christine Nyagitha Njoka petitioned this court for grant of letters of administration. On 27/9/2013, Emukule J issued the petitioners with a grant of letters of administration intestate. The said Alice Kahaki Njoka was survived by the following:-

1. Philip Kamau Njoka – husband;
2. Johnson Kibunja Njoka – son;
3. Joseph Njuguna Njoka – son;
4. Elizabeth Wanjiku Njoka – daughter;
5. Christine Nyagitha Njoka – daughter;
6. Carolyne Wanjiru Njoka – daughter;
7. Irene Wanoki Njoka – daughter;
8. Daniel Antony Nganga – grandson.

Following the certificate of the grant herein, to the petitioners, the objectors filed several applications challenging the said grant. The objectors are (1) Joseph Njuguna – a son to the deceased, Alice Kahaki and Philip Njoka - 1<sup>st</sup> objector; (2) Lucy Wanjiru who claims to be a widow of Philip Njoka; (3) Teresia Njeri who claims to be a widow of Philip Njoka; (4) Margaret Damat who claims to be a widow of Philip Njoka. Philip Njoka was the husband of the deceased i.e. Alice Kahaki and he died on 1/5/2012.

1. In the application dated 15/10/2013, filed by Waiganjo Advocate for the objectors, they sought orders that the court do strike out the petition herein and was supported by the affidavit of the 1<sup>st</sup> objector, Joseph Njuguna;
2. The objectors also filed the application dated 6/11/2013, in which they sought revocation and/or annulment of the grant of letters of administration issued to the petitioners on 27/9/2013. The 1<sup>st</sup> objector swore an affidavit in support;
3. The application dated 13/11/2012, was filed by the firm of Musembi Ndolo Advocate on behalf of the 4<sup>th</sup> objector seeking annulment of the grant issued herein;
4. In an application dated 20/11/2013, the petitioners sought to have the court review and/or set aside the orders issued by this court on 7/11/2013, suspending the grant of letters of administration issued to the petitioners.

All the 4 applications were heard together.

### **The nature of applications**

Through the applications dated 6<sup>th</sup> November, 2013 and 13<sup>th</sup> November 2013, the objectors seek to revoke or annul the letters of administration issued to the petitioners on 27<sup>th</sup> September, 2013 on the grounds that the proceedings to obtain the said grant were defective in substance; that the grant was obtained fraudulently by making a false statement or by concealment from the court of material facts to the case; that the grant was obtained by means of untrue allegations of facts essential in point of law to justify the grant; and that the petitioners intend to use the grant to interfere and intermeddle with the estate of Phillip Njoka Kamau which is subject of Nakuru H.C Succession Cause No.497 of 2013.

In the affidavit sworn in support of the application dated 6/11/2013, to which the grounds stated above relate, the deponent, has inter alia deposed that when they learnt that the petitioners had brought this cause, they filed their objections to the issuance of the grant which the court failed to consider; that in issuing the grant, the court was oblivious and/or failed to consider that there existed another grant in respect of the same estate; that the petitioners obtained the grant through false pretences; and that all the assets listed in this cause belong to Philip Njoka Kamau who died testate.

It was contended that the grant obtained in this cause is intended to delay and/or intermeddle in the administration of the estate of Philip Njoka Kamau. As the issues raised in the application dated 27<sup>th</sup> September, 2013 are similar to the issues raised in the former, I will consider the two applications together.

In the application dated 15<sup>th</sup> October, 2013, the applicants seek to strike out the petition herein on the grounds that the petition is based on misrepresentation; that the petition is an abuse of the court process; that the petitioners lack legal basis and/or justification for bringing the petition; and that the petition was lodged without the consent of the objectors yet as beneficiaries they had an interest therein.

In the affidavit sworn in support of the later, the deponent, Joseph Njuguna Njoka, has, inter alia, deposed as follows:-

- (a). that the petitioners who are his siblings did not inform him before presenting the petition in court;**

- (b). that the 2nd, 3rd and 4th applicants (objectors) are wives of Philip Njoka Kamau who died testate on 1/5/2012;**
- (c). that the executor of the will of Philip Njoka has petitioned for probate in Nakuru H.C Succession No.497 of 2013;**
- (d). that the petition is based on falsehoods and misrepresentation;**
- (d). that its not true that their father did not file a petition for the estate of the deceased;**
- (e). Further that its not true that their late father forged the documents showing that he obtained a grant in Nakuru Succession Cause No. 16 of 1984 and to show that the grant was subsequently confirmed;**
- (f). that indeed their father filed the succession cause in SUCC. 16/1984 above and obtained a grant that was later on confirmed;**
- (g). that the petition by his father was gazetted as by law required but none of the petitioners, who were of majority age, objected to the grant;**
- (h). that on 25.3.2009, the petitioners took up summons for revocation of the grant issued to their father but for reasons best known to them, the petitioners did not prosecute the application;**
- (i). that in view of what is stated herein above, the petitioners' averment that no such succession cause existed cannot be true; and**
- (j). that the petitioners failed and/or refused to disclose to the court the pendency of their application for revocation of the grant and filed the current petition with full knowledge of the existence of their father's petition hereto.**

Maintaining that all the assets set out in this petition compromise the estate of their father, it is submitted that the court cannot issue two separate grants in respect of the same estate.

In reply, the 2nd petitioner, on behalf of the 1st petitioner and on her own behalf, has deposed as follows:-

- 1. that the objectors' applications herein are vexatious, frivolous and an abuse of the court process;**
- 2. that in lodging the petition hereto they complied with the law;**
- 3. that the questions of what share of the properties in dispute belong to their deceased mother can only be determined in another suit before distribution can take place;**
- 4. that striking out a petition is a drastic measure which a court can only take if the petition cannot be redeemed by other means;**
- 5. that since the grant issued to their father was obtained fraudulently and does not fully administer the estate of their mother, the suit is not irredeemably hopeless;**
- 6. that the 2nd, 3rd and 4th objectors are busy bodies in this cause and as such have no locus to apply for striking out of their petition;**
- 7. that failure to obtain the consent of the 1st objector does not amount to misrepresentation of facts and that in any event he is listed as a beneficiary in the petition;**

- 8. Further that the grant issued to their father was defective and that in any event that grant got spent and/or became useless and/or inoperative upon his demise;**
- 9. that the objectors' application is premised on the misconception that upon death of a married woman, her estate has no right to bring proceedings against the estate of her husband in respect of properties held by the husband in trust for the estate of his wife;**
- 10. that the application is bad in law as it offends the rule in Nabro Properties case;**
- 11. that under section 51(1) of the Law of Succession Act (LSA) no omission of any information from an application for grant shall affect the power of the court to entertain the application;**
- 12. that the 1st objector has joined his step mothers in depriving their mother's estate its rightful inheritance and it would have been a waste of time to seek his consent;**
- 13. that their application for revocation of the grant was never placed before a judge;**
- 14. that because they did not wish to participate or propagate forgeries, they opted to file a fresh petition and disclosed the reasons why they believed the purported grant issued to their father vide Succession cause No.16 of 1984 was a forgery and/or why they believed it could not help in administration of their mother's estate;**
- 15. that if the impugned succession cause exists, in the interests of justice, that petition should be consolidated with the current one;**
- 16. that the documents annexed to the objectors' application supports their case in that-**
  - (i) only two assets are listed as having been owned by their mother;**
  - (ii) that contrary to section 35(1) of the LSA, their father took absolute ownership of the entire estate of their mother;**
  - (iii) that no consent was obtained from the other beneficiaries of the deceased or explanation given as to how and why their father disinherited them;**
  - (iv) that the disparity and confusion created by their father as to what the deceased owned points to dishonesty, forgery and puts doubt on the authenticity of the entire proceeding leading to issuance and confirmation of the grant;**
- 17. that the assets that their mother had worked so hard to obtain are being enjoyed by the 2nd, 3rd and 4th objectors who have no right and/or claim to it whatsoever;**
- 18. Further that they have demonstrated that the properties in the name of their late father contained their deceased mother's shares and the same need to be separated;**
- 19. that they disclosed the existence of the impugned succession cause and gave an explanation as to why they doubted its authenticity;**
- 20. that the objectors are intermeddlers and as such their applications are based on an illegality;**
- 21. that the objectors did not disclose to the court that they are enjoying income from the deceased's estate in their application for suspension of the grant issued to them.**

Issues that arise:-

1. Whether Succession Cause No. 16/1984 in respect of the estate of Alice Kahaki existed;
2. Whether the grant issued in HC SUCC. 16/1984 was ever revoked;
3. Whether procedure for challenging a grant was followed by petitioners;
4. Whether the objectors' appliciton amount to intermeddling;
5. Whether the petition is defective and bad in law;
6. Whether this petition is an abuse of the court process.
7. Whether the objectors have locus standi in this matter;

1. Whether Succession Cause 16/1984, ever existed: It is the contention of the petitioners that the said cause in which their father Philip Njoka was issued with letters of administration of the estate of Alice Kahaki Njoka did not exist. The objectors exhibited a grant of letters of administration issued on 24/7/1984 signed by J Masime whereas the confirmed grant was issued on 28/2/1994, signed by J Rimita. The Cause 16/1982 relating to the estate of Alice Kahaki was gazetted under Gazette Notice 2265. The file 16/1984 which belongs to Gatamaka Muiruri which the petitioners rely on for the proposition that HCC 16/84 belonged to other parties do not hold any water because that file 16/84 that the petitioner was purported to rely on is a file emanating from the lower court in Naivasha. It is not a High court case. The gazettment of the cause and existence of the two grants in my view is sufficient evidence which demonstrates that HC Cause 16/84 in relation to Alice Kahaki's estate existed. For unknown reason it has gone missing. Further to the above the petitioners did file summons for revocation of grant in the said cause. The 2<sup>nd</sup> petitioner swore an affidavit dated 24/3/09. They were filed at Nakuru in HCC Cause No. 16/84 – not in Naivasha CMCC 16/1984. The petitioners' father Philip Njoka actually filed a reply to the said application vide affidavit dated 30/4/09.

In the affidavit that the petitioners swore in support of their application on 24/3/09 for revocation of that grant, the 2nd petitioner had, inter alia, deposed:-

**“the Respondent became polygamous and married other wives after the death of our mother; that we are apprehensive that the respondent will omit us from the estate of the deceased and collect all the benefits of the estate of the deceased to the detriment of other beneficiaries; that we discovered in early February, 2009, that the succession was fraudulently conducted. We wrote a letter to District Officer Githunguri; and that the respondent has since transferred the various parcels of land into his names and transferred monies of our beloved mother into his account.....” (Para. 4, 5, 6 & 10)**

In reply dated 30/4/09, MDN5A (annexed to the 4<sup>th</sup> objector's affidavit), the respondent (Philip Njoka) had, inter alia, deposed:-

**“...that upon demise of the deceased, I petitioned for letters of administration and disclosed the surviving children; on 6th May, 1993 I applied for confirmation of the grant and thereafter got the grant confirmed; that the deponent of the affidavit (the 2nd petitioner herein) was married in Nigeria and I was surprised she had come back with her Nigerian husband to harass and frustrate me; and that the deponent had on several occasions taken him to the C.I.D Kiambu demanding that I give her a portion of her inheritance....”**

From the above facts it is evident that the HCC SUCC. 16/1984 in respect of the estate of Alice Kahaki did exist and the petitioners were aware of its existence as early as 2009. if the file had gone missing, they could have applied for reconstruction.

2. Whether the grant in HCC Cause 16/1984 was ever revoked: Having perused the entire record in that succession cause, there is no evidence of the grant issued to Philip Njoka in that cause having been

annulled and/or revoked. The replying affidavit by the 2nd petitioner, in this cause confirms as much. At paragraph 14, 15, 20 and 22 of the affidavit sworn on 26th February, 2014, the 2nd petitioner has deposed as follows:-

**“14. That as we stated in paragraph 17 of our said supporting affidavit in respect of the petition, our late father forged documents with a view to enabling him to deal with the properties of our late mother;**

**15. That until I discovered otherwise after I filed an application for purported revocation of his purported grant, I was under the illusion that my late father had applied for a grant of representation and obtained it and that his grant had been confirmed.....**

**17. That I requested the Criminal Investigation department to investigate the matter.....**

**20. That the investigations and the inability of the court to confirm whether there indeed was succession cause 16 of 1984 in respect of the Estate of Alice Kahaki puts so much doubt in the applicant's contention that such a cause existed that the only conclusion is that the contention is invalid.**

**21. That although the applicant is aware of the fact that in the affidavit in support of the petition we have stated that my late father perpetrated a fraud, the applicant pretends that indeed there was a grant.**

**22. In view of this kind of information I could not and still cannot see the genuineness of the grant purportedly issued in respect of the Estate of Alice Kahaki Njoka.”**

From the above averments, I have no doubt that the petitioners were aware of the former grant. The only issue they had with the grant is the manner in which the grant was obtained. The 2nd petitioners averments in what she calls her application for revocation of grant confirms as much and the documents on record that I have alluded to earlier.

Under Section 107 of the Evidence Act, the petitioners were duty bound to lead evidence, that indeed the grant was obtained fraudulently or using forged documents. They did not do that. Can they then be said to have discharged the burden of prove imposed on them under Section 107 of the Evidence Act?

My answer is negative. I say this because, the evidence on record clearly shows that the petitioner in the former grant (their father) had obtained a grant and which grant the court subsequently confirmed. The said grant cannot be challenged by filing of another cause but the challenge and proof of fraud and material non disclosure should be done in HCC Succession Cause 16/1984.

In my view, the petitioners ought to have informed the court of the existence of the impugned grant and also of the fact that they had brought an application challenging that grant which application they did not prosecute.

3. Whether the procedure for challenging a grant was followed;

Under Section 76 of the Law of Succession Act, Cap 160 Laws of Kenya, **a grant of representation, whether or not confirmed may at anytime 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 concealment from the court of something material to the case;**

**(c) that the grant was obtained by means of an untrue allegation of 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 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.

(e) that the grant has become useless and inoperative through subsequent circumstances.

(emphasis supplied).

From the above cited section and the cases cited in the applicants' submissions, to wit, Nakuru H.C Succession No. 87 of 2005, estate of **Waitheera Maina**; **Kisumu** H.C Succession No.77 Re: Estate of **Obed Aburili Otenyo of 2013** and Nakuru H.C Succession No. 493 of 2004 Re: Estate of late **Ayub Ikiaru Kabuku**; it is clear that the proper procedure of challenging a grant once issued is by taking up summons for revocation and/or annulment of a grant in the same cause. In **Wathera's** case, J Emukule said:-

**“In matters of succession if grant has failed and become inoperative, the proper procedure is to come to court and seek appropriate orders of revocation, and appointment of new administrators. The legal representative do not file a new cause without first having the first cause determined. If they do, they risk letters grant being revoked in this case.”**

It is not in dispute that instead of applying for revocation of the grant issued to their father in HSUCC. 16/1984, the petitioners decided to petition for a new grant claiming that the grant confirmed to their father in file 16/1984 to gain control over the estate of their mother was forged and/or fraudulently obtained.

Because of this fact, it is submitted that the court had no duty to issue the petitioners with a new grant before the previous grant on the same estate is revoked.

It is also submitted that the grant herein was obtained by making of a fraudulent statement to the effect that some of the property belonging to their father formed part of the estate of the deceased when in actual fact the assets listed therein are subject of another Succession cause to wit, Nakuru Succession Cause No.497 of 2013 in which the petitioner's father left a valid will. The action of the petitioner's of applying for a new grant when there exists a valid will in respect of their father's estate is viewed as intermeddling with the estate of their father and a way of delaying the distribution of the assets of their father in accordance with his will.

In a rejoinder, the petitioners have maintained that the grant herein was regularly obtained and that the petition is based on points of law, particularly that their father held the deceased's property in trust for them.

Having found that the procedure used by petitioners is incapable of being used to challenge the grant issued to their father, I do not see how the petitioners can rely on the alleged trust to obtain another grant in respect of the estate of the deceased. In my view, the argument advanced in the petitioner's submissions would only be material, if the petitioners filed an application for annulment of the grant issued to and/or

obtained by their father, had succeeded to impugn that grant

4. Whether the objectors' applications are meant to aid the objectors in intermeddling with the deceased's estate; intermeddling is an offence under **Section 45** of the **Law of Succession Act Cap 160**. The petitioner's counsel urged the court to invoke the decision in **Nabro Properties v Skystructures Ltd (200)2 KLR 299**, where the court held that nobody can base his claim on his own wrong; that the objector's application will lead to criminal activities and the court should allow the real issue as to how many shares Alice Kahaki owned which should be separated from Njoka's. The objectors cannot be faulted for challenging the grant herein bearing in mind that the petitioners withheld material facts when they approached this court. The estate of Alice Kahaki has been administered and distributed in HSUCC 16/1984. If any party is to be faulted, it is the petitioners.

5. Whether the petition is defective or bad in law; The objectors contend that this petition was brought without notice to all beneficiaries Alice Kahaki. As observed above the duty lay on the petitioners to demonstrate that the petition was filed with consent of all beneficiaries.

Clearly and from the petitioners' own admissions, they brought this petition without seeking the consent of all the beneficiaries. The first objector is their own brother who denies having been informed of the filing of the petition. The response of the petitioners is that it would have been a waste of time. The petition was filed contrary to **Rule 26** of the **Probate & Administration Rules** which states:-

**“Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant”**

It is not known whether the other children of the deceased were notified of this petition. The application was therefore defective.

6. Whether the petition is an abuse of the court process; what is abuse of court process? As properly captured by the petitioners' submissions, abuse of court process connotes that the process of the court 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. Due to the fact that all beneficiaries were not informed of the filing of this petition, and in view of the fact that the petitioners misrepresented to the court that no grant had been obtained in respect of the estate of the deceased, when the evidence is clearly to the contrary, I find and hold that the grant herein was indeed obtained by concealment of material facts; namely the existence of a grant issued in favour of their father. It was wrong for the petitioners to misrepresent to the court that no grant was issued in respect of the estate of the deceased when in actual fact, only a dispute existed pertaining the existence of that grant. The petitioners did not act in good faith. The appropriate forum for resolving that dispute would have been through lodging an application for revocation and/or annulment of the grant in HCC 16/1984.

7. As to locus standi: Concerning the contention that the applicants' had no locus standi to bring the instant application, I agree with the 1st objector's submission that under Section 76 of the Law of Succession Act, any party interested in the estate of the deceased may bring the application contemplated under that section and/or Rule 2 as read with Rule 17(1) of the Probate & Administration Rules. Rule 17(1) of the Probate & Administration Rules provides that:-

**“any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has already applied for by another person may do so.”**

The important word here is 'any person'. The objectors fall under that category. The estate sought to be administered by the petitioners forms part of the estate of Philip Njoka and the objectors have sufficient interest in the suit property as they claim to be widows of the late Philip Njoka. The grant confirmed to the petitioners includes the estate of Philip Njoka. That being the case, the objectors do not need to obtain letters of administration before lodging the instant applications.

The upshot of the foregoing is that the applications dated 6/11/2013 and 13/11/2013 by the objectors have

merit and are allowed and the grant issued to the petitioners on 27/9/2013 is revoked. There being another cause in respect of the estate of Alice Kahaki, the filing of this cause is an abuse of the court process and it is hereby struck out and the application dated 15/10/2013 is therefore granted. The application dated 20/11/2013 by the petitioners lacks merit and is hereby dismissed with costs. Because the petitioners were aware of the existence of Succession Cause 16/1984 and yet filed the instant cause, they will bear the costs of this petition and the applications.

**DATED and DELIVERED this 6<sup>th</sup> day of June, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Ms Wamucii for the petitioners

Mr. Waiganjo for the 1<sup>st</sup> – 3<sup>rd</sup> objectors

Mr. Ndolo for the 4<sup>th</sup> objector

Kennedy – Court Assistant