

The allegation is however, vehemently denied by the administrator/respondent on the basis of the averments contained in her replying affidavit dated 17th June, 2014.

At the hearing of the application, learned counsel, **Mr. Kemei**, appeared for the applicant/objector while learned counsel, **Mr. Teti**, appeared for the respondent.

Pursuant to directions given by this court written submissions were filed by both parties on the 16th and 17th June, 2014.

Counsels for both parties were allowed to orally highlight segments of the written submissions.

After due consideration of the rival submissions in the light of the averments contained in both the supporting and replying affidavits, it is apparent that the basic issue for determination is whether the grant was obtained fraudulently and/or by concealment of material facts on the part of the respondent.

A person who makes false statements and /or conceals material facts at the time of applying for grant of letters of administration would be treated as having acted fraudulently and the grant subsequently obtained would attract the application of section 76 of the Law of Succession Act.

Herein, the applicant indicates that the last Will of the deceased dated 10th January, 2004 has all along been opposed by him and other dependants and/or beneficiaries of the estate of the deceased as it was opened in the offices of a law firm in the absence of the two executors who included the respondent (second widow) and a brother of the deceased, **Elly Okul**.

However, no formal protest and/or contest respecting the Will has been made by the applicant or any other person. Ideally, such protest and/or contest should have been made prior to the confirmation of the disputed grant.

The application is for the revocation of the grant issued to the respondent rather than the validity or otherwise of the last Will of the deceased.

It has also been indicated by the applicant that when the respondent applied for grant of letters of administration she did so without the consent of the other beneficiaries. That, signatures obtained from the beneficiaries were related to the opening of the Will and not the application for grant. Further, the power of attorney donated by May Okul was for purposes of contesting the Will rather than for giving consent to the issuance of the grant to the respondent. That, the grant was issued and confirmed with the consent of a firm of advocates (i.e. Kiarie & Co. Advocates) which acted without necessary instructions from the applicant and that the grant was issued to the respondent only, yet there was another executor of the Will in the person of Elly Okul.

In responding to the foregoing , the respondent denied all allegations of fraud and concealment made against her by the applicant and contended that all the beneficiaries consented to her application for grant and that the other executor of the Will was informed and was therefore much aware of the application which he did not oppose.

Consent of the beneficiaries and/or dependants in an application for grant of letters of administration is always necessary and where none exists , it may be taken that the potential applicant is acting unilaterally with he intention of concealing material facts or information or defrauding the rest of the beneficiaries.

Absence of consent may thus be regarded as a concealment fact if not a fraudulent factor.

Herein, the record shows that contrary to what the applicant stated, the consent of other beneficiaries to the estate was sought and obtained by the respondent. This is established by Form 39 showing that the first widow and the other beneficiaries save May Okul and Edwin Okul appended their signatures to the application for grant.

In the case of May Okul, the applicant represented her by dint of a power of attorney dated 11th June, 2009.

It may be noted that the applicant gave his consent and signed the necessary application, He cannot herein be heard to say that the signatures on the application including his own and the power of attorney donated to him were all intended to be used in contesting the Will.

The form 39 which was used herein may have been the wrong format but its intention was clearly known to all signatories. They all must have known that their signatures was a demonstration of their giving consent to the application for grant of letters of administration.

However, the signature of the second executor, Elly Okeyo Okul was lacking in the Form 39. It was not therefore clear whether or not he had consented to the application for grant by the respondent who was the first executor.

The applicant and other beneficiaries may have indeed consented to the application for grant of letters of administration to the respondent. This explains why the court eventually made the grant in favour of the respondent.

However, it was an oversight that the court issued the grant on the 24th February, 2010 but did not confirm the order by necessary signature on the necessary format. The issue of the grant on that date cured the mistake which therefore did not prejudice the application for grant.

But, with regard to the application for confirmation of the grant, the record does not show that necessary consent for the same was obtained from and given by all the beneficiaries as well as the second executor.

The distribution of the estate as per the Will of the deceased or the certificate of confirmation of grant cannot therefore be said to have been done with the consent of all the beneficiaries and the second executor and even if their advocate was in court at the time of confirmation no written consent had been filed prior or during the confirmation proceedings so as to leave no doubt that all the necessary beneficiaries consented to the proposed distribution. The record does not indicate that the beneficiaries were personally in court during the confirmation proceedings.

In fact the distribution of the estate seems to be the most important factor leading to the present application. It is the bone of contention and that is why there are allegations made against the respondent by the applicant relating to the actual extent of all the property forming part of the estate of the deceased and to the management and/or administration of the same by the respondent.

Despite the allegations, no tangible evidence has been given by the applicant to prove the same. In any event, any dispute regarding past and present ownership of part of the estate property and in particular ownership of land would not find any forum in this succession court but the land court.

However, the administration and/or management of the property by a legal administrator would be within the mandate of this court in so far as it issued the disputed grant of letters of administration.

The applicant has not established by tangible evidence that the estate property is illegally being wasted by the respondent by way of mismanagement and intermeddling. The sale of part of the estate property allegedly by the respondent would be proper and lawful if it was done after the confirmation of grant with the consent of all the beneficiaries and if the proposed distribution was in accordance with the last Will of the deceased which will has not been invalidated by any court and therefore remains intact for proper execution by the appointed executors.

Basically, this court would find that the application for grant of letters of administration was at large proper and devoid of any fraud and/or concealment of material facts. The respondent should however, have included the second executor as a joint administrator for purposes of ensuring that the distribution of the estate was done in accordance with the wishes of the deceased and in relation to property in actual and

lawful possession of the deceased prior to his death. Any property sold by the deceased prior to his death and included in his Will ought not form part of his estate for purposes of distribution.

But, any sale of the estate property after the death of the deceased and prior to the confirmation of the grant would not be proper. Any such sale would not therefore alienate the property from the estate of the deceased as it would be an unlawful transaction in which an aggrieved party may move a civil court for damages or any other remedy.

Be that as it may, the distribution of the estate herein ought to be re-done but only in relation to property which forms part of the estate of the deceased and which exists to date. Property lawfully distributed to any of the beneficiaries and sold to third parties after the confirmation of the grant should be treated as the affected beneficiaries share in the estate.

In sum, the grant of letters of administration in favour of the respondent remains intact as the grounds by the applicant for its revocation and/or annulment have not been satisfactorily established and proved. However, the certificate of confirmation of grant dated 2nd June, 2011 must and is hereby revoked for want of consent of all the beneficiaries as well as the second executor. There shall be an amendment of the grant to include the second executor, Elly Okeyo Okul, as the second administrator of the estate of the deceased.

Parties must go back to the drawing board and agree to carry out a proper and lawful distribution of any existing property forming part of the estate of the deceased and in accordance with the last Will of the deceased as long as it remains valid. They may thereafter move the court for confirmation of the grant as amended. Each party would be left at liberty to move the court for inclusion as a beneficiary and/or dependant so that necessary provisions not included in the Will may be made in his/her favour or they may move the court for orders they deem to be fit. Each party shall bear own costs of the application.

[Read and signed this 3rd day of July, 2014.]

J.R. KARANJA.

JUDGE.