



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Succession Cause 178 of 2004**

**IN THE MATTER OF THE ESTATE OF THE LATE WAMBUA MBUVI MUANGE**

**1. TABITHA TINI WAMBUA**

**2. RAPHAEL MUANGE WAMBUA.....PETITIONER/RESPONDENT**

**VERSUS**

**GREGORY MUTINDA KILONZO.....OBJECTOR/APPLICANT**

**RULING**

The application dated 2<sup>nd</sup> December 2008 is brought pursuant to section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules.

It is for revocation and/or annulment of the grant of letters of administration intestate granted to **Tabitha Tini Wambua** on the 14<sup>th</sup> April, 2008 and confirmed on 17<sup>th</sup> November 2008.

It is premised on grounds that the proceedings to obtain the grant were defective in substance; and that the grant was obtained fraudulently following concealment of some material facts in the matter.

The application is supported by an affidavit sworn by the applicant in which he depones that the administrators of the estate of **Wambua Mbuvi Muange** sold to him a portion of land being part of Muthetheni/Kionyweni/548 property owned by the deceased at a consideration of Kshs.350,000/=. The arrangement was for the administrator to include him as one of the beneficiaries of the Estate. They obtained his consent to the making of a grant of administration intestate. His name was however erased from the document. He learned of the alteration on the document after the grant of representation had been confirmed. He also learnt that the same portion of land had been sold to one **Bernard Mbolonzi Mbuvi**.

In response thereto the respondent opposed the application. In her replying affidavit **Tabitha Tini Wambua**, the 1<sup>st</sup> respondent stated that she sold the land without full knowledge that it belonged to the entire family. After the transaction the family opposed the sale and offered to refund the sum paid to the applicant who however declined to accept.

Regarding filing the petition in respect of the estate of the deceased, she averred that the initiative was made by the applicant. She claimed to have been taken to the court precincts, Machakos, whereby she was made to sign documents in respect of the succession cause. She denied having acted fraudulently and blamed the applicant for what transpired.

The application was canvassed by way of written submissions. I have considered rival submissions filed herein by counsels for parties.

The deceased **Wambua Mbuvi Muange** died on the 4<sup>th</sup> December, 1994. A petition for letters of administration in respect of his estate was made on the 26<sup>th</sup> May, 2004. Annexures "JAMIK" are sale agreements, the last one; an acknowledgement of receipt of the last instalment of the consideration of the sale is dated 30<sup>th</sup> March, 2004.

According to the affidavit in support of the petitioner for letters of administration intestate the only asset the deceased owned at the time of his demise was land parcel No. Muthetheni/Kionyweni/548. The said document as correctly stated by the applicant has an alteration.

The sale agreement entered into between the applicant and the 1<sup>st</sup> respondent is silent on the title of the land but both parties seem to agree that the portion that was disposed of was part of Muthetheni/Kionyweni/548. This brings into play the issue whether the sale was legitimate? It is important to note that at the time of disposing of the land in issue, the 1<sup>st</sup> Respondent was not a personal representative of the estate of the deceased. She did it in her capacity as the widow of the deceased.

According to the law no immovable property can be sold before confirmation of a grant (vide section 82(b) (ii) of Law of Succession Act). The 1<sup>st</sup> respondent had no power to sell the land. The purchase of the property was therefore null and void.

The application herein is for revocation or annulment of the grant. It is alleged the grant herein was obtained fraudulently which calls for revocation. With regard to the issue, I am duly guided by section 76 of the Law of Succession Act which provides as follows:-

***"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 on its own motion on the grounds;***

***(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 the allegation was made in ignorance or in 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 the 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, or***

***(e) That the grant has become useless and inoperative through subsequent circumstances”.***

The application herein has been filed by the applicant whom this court construes to be an interested party. But this court has a duty to ensure justice is done. Although I have found that what transpired was null and void, I have to address the issue whether the court on its own motion can act and grant orders sought.

The court of appeal addressed this issue and laid down guiding principles in the case of **Matheka (2005) 2KLR 455**. It stated as follows:-

***“1. A grant may be revoked either by application by an interested party or on the court own motion.***

***2. 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***

***3. The grant may also be revoked if it can be shown to the court that the person to whom the grant has been issued has failed to produce to the court such inventory or account of administration as may be required.***

***4. When a deceased has died intestate, the court shall save as otherwise expressly provided have a final discretion as to the person or persons to whom a grant of letters of administration shall in the best interests of all concerned be made but shall without prejudice to that discretion accept as a general guide the following order of preference.***

***a. Surviving spouse or spouses, without association of other beneficiaries***

***b. Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided by part V of the Law of Succession Act.***

***c. The Public Trustee; and***

***d. Creditors”***

Looking at the sale agreements reduced into writing, they simply referred to purchase of land situated at Kionyweni, Kyumbi. There was therefore non-disclosure of the fact that the land belonged to the deceased at the time of sale.

It is not denied that the applicant later shouldered the expenses of filing the petition. His name was included initially. The fact that his name was erased from the document (consent to making of the grant of administration) which he had duly signed is evidence of bad faith on the part of the respondent. The action taken by the respondent was meant to conceal from the court the fact that there had been interference with the property of the deceased person prior to a grant of representation being obtained. However, since what happened was contrary to the law the applicant is not eligible to the relief sought

The upshot of the above is that the application fails. It is dismissed with not orders as to costs.

**DATED, SIGNED and DELIVERED at MACHAKOS this 9<sup>TH</sup> day of MAY, 2013.**

**L.N. MUTENDE**

**JUDGE**