



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 437 OF 2008**

**IN THE MATTER OF THE ESTATE OF CHARLES MWANIKI GACHOKI**

**MIRIAM JIMBI PEKINI.....RESPONDENT**

**VERSUS**

**JAME MUMBI MWANIKI.....OBJECTOR/APPLICANT**

**R U L I N G**

1. Before me is the summons dated 22<sup>nd</sup> July, 2019 brought under **Section 47 and 73 of the Laws of Succession Act and Section 1A, 1B and 3A of the Civil Procedure Act.**

2. It is on 23<sup>rd</sup> July, 2019 the *Hon. Ng'etich J* issued status quo order.

3. The applicant now seeks prayer (c), (d) and (e) on the face of the summons.

c) **THAT pending the hearing and determination of this Cause this Honourable Court be pleased to issue a preservatory order in respect of the property known as KWALE/SHIMBA HILLS/148 and the Respondent, her agents, assigns or any persons claiming authority under her be restrained from entering, remaining thereon, leasing, selling, charging or in any other way intermeddling with the interest in the property forming part of the estate herein.**

d) **THAT this Honourable court be pleased to grant an order directing the District Land Registrar, Kwale to rectify the register in respect of KWALE, SHIMBA HILLS/148 by deleting the name of MIRIAM JIMBI PEKINI and restoring the names of the deceased herein, as the legally registered owner, in respect of the subject land pending the hearing and determination of the cause.**

e) **THAT the costs of this application be provided for.**

4. The application is supported by the affidavit of Jane Mumbi Mwaniki, sworn on 22<sup>nd</sup> July, 2019 and the grounds expressed on the face of the application.

5. The application is opposed vide Replying Affidavit of the respondent Miriam Jimbi Pekini.

6. According to the objector/applicant, the respondent/petitioner obtained grant over the Estate of Charles Mwaniki Gachoki comprised of Kwale/Shimba Hills/148, had the grant confirmed, and the property transmitted to her. That she obtained registration of the property in her name. That the grant was however revoked, upon the application of the objector/applicant. That the grant was revoked, and the import of that revocation was the revocation of the said transmission. That for some reason the register had not been rectified to reflect the change in the status of the property therefore that the actions carried out by the respondent regarding the property amounted to intermeddling, that it was only proper that the estate be preserved for the benefit of those who were beneficially entitled.

7. In response Miriam deponed that the applicant had lied because the grant that was made on her on 27<sup>th</sup> November, 2008 and confirmed on 2<sup>nd</sup> March, 2009 has not been revoked. That she had become legally registered as the owner following transmission. That the Certificate of Confirmation was already executed and the issues raised by the applicant regarding the said title did not belong to the jurisdiction of this court. That in any event there was a restriction registered against the property and therefore the property was well guarded. She deponed further that the objector/applicant was a stranger to the said property.

8. In response the applicant filed a further affidavit to the effect that she had pending before this court a Summons for Revocation of Grant. That the respondent's registration was based on a grant whose fate was in question. That as the only widow of the deceased she had filed **Mombasa Succession Cause Number 339 of 2009** but agreed by consent to proceed with this cause. That the property in question still remained part of the deceased's estate. That the orders sought were to compel the Land Registrar to cancel the title issued to the respondent so that the estate could revert to the deceased. That the delay in prosecuting the Summons for Revocation of Grant was caused by the respondent. She urged the court to order the cancellation of the title deed held by the respondent.

9. In her supplementary affidavit, the respondent deposed that the applicant was abusing the court process by filing contradictory affidavits. That there was already a restriction on the title and the prayers sought were spent.

10. Parties chose to rely on these affidavits in support of their rival positions.

11. The application is brought under **Section 47 of the Law of Succession Act** which provides for the jurisdiction of High Court on succession matters and **Section 73 of the Law of Succession Act** which provides for the duty of the court to give notice to holder of grant to apply for confirmation of the grant within one (1) year from its date, and **Sections 3A, 1A, 1B of the Civil Procedure Rules**, which Sections are not applicable as the **Law of Succession Act** which bears its own provisions for the inherent powers of the court to make orders for the necessary ends of justice/prevent abuse of the process of court under **Rule 73 of the Probate and Administration Rules**.

12. Be that at it may, the issue is whether the orders sought can be granted as prayed.

13. The applicant wants preservation orders, and an order of cancellation of the title deed.

14. It is noteworthy that the Land Registrar is not a party to these proceedings, especially due to the manner in which the orders are sought. Secondly, the grant through which the respondent obtained title has not been revoked. On what basis would the court cancel the title deed? It has not been proved by the applicant that the grant was in violation of the **Law of Succession Act**. The applicant is obviously abusing the process of this court. She lied on oath, that the grant had been revoked, and without as much as batting an eyelid, changed her deposition to say that her application for revocation of the grant is pending before this court at the behest of the respondent.

15. The applicant is obviously fishing and wasting the time she would be prosecuting the only appropriate application in this matter, the Summons for Revocation of Grant.

16. The fact the title is in Miriam's name and without revocation of the grant the orders sought are clearly not for this court to grant. Until the property reverts to the estate of the deceased, if and when the grant is revoked, the restriction registered against the title should suffice. The application for a preservative order is superfluous.

17. Regarding the prayer for cancellation of the title deed, as I have indicated it is not tenable as it is the order expected out of the pending Summons for Revocation of the Grant which the applicant ought to prosecute.

18. In my view the application is an abuse of the court process, it is dismissed with costs to the respondent.

**Dated, delivered and signed at Nakuru this 27<sup>th</sup> day of February, 2020.**

**Mumbua Matheka**

**Judge**

In the presence of

Edna Court Assistant

Ruto holding brief for Morendat

For respondent Murangi holding brief for Ms Kinuthia for objector/applicant