



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUSUCCESSION CAUSE NO. 265 OF 1995**

**IN THE MATTER OF THE ESTATE OF JOSEPH**

**M'KIRERIA M'MUNGANIA (DECEASED)**

**SAMUEL KIUNGA M'KIRERIA.....PETITIONER**

**VERSUS**

**PETER MBAYA.....APPLICANT/OBJECTOR**

**JUDGMENT**

1. **JOSEPH M'KIRERIA M'MUNGANIA (“the deceased”)** died on 19<sup>th</sup> June, 1986 at Meru District Hospital. According to the Letter of Introduction dated 6<sup>th</sup> September, 1995 by Snr. Chief Samson Rithara, the Chief of Nyaki Location, the deceased left the following as his survivors and assets:-

**a) Survivors**

- a) Rebecca Gaceri M'Kireria - widow
- b) M'Imanyara M'Kireria - son
- c) Wilson Mathiu M'Kireria - son
- d) Samuel Kiunga M'Kireria - son
- e) Jason Muguna Kireria - son
- f) Cellah Mkaimiri - daughter
- g) Susan Gaiciuma - daughter
- h) Janiffer Karamana - daughter
- i) Julia Kamba - daughter

**b) Assets**

- a) Nyaki/Mulathankari/312
- b) Nyaki/Thuura/1441

2. In the said letter of introduction, the said Snr Chief listed the following as the witnesses:-

- a) Mr. Gideon M'Mugwika - brother

b) Mr. Zakayo M'Rukwaru - brother

c) Mr. M'Itamwari M'Mungania - brother

3. On 25<sup>th</sup> September, 1995, Samuel Kiunga M'Kireria applied for the grant of Letters of Administration Intestate which was granted on 9<sup>th</sup> May, 1996. On 13<sup>th</sup> February, 1997, the said grant was confirmed as follows:-

a) Samuel Kiunga M'Kireria - Nyaki/Thuura/1441

b) M'Imanyara M'Kireria)

Wilson Mathiu M'Kireria)

Jason Muguna Kireria) Nyaki/Mulathankari/312 in equal shares

4. On 26<sup>th</sup> March, 2015, **PETER MBAYA** ("the Objector"), lodged a Summons for the revocation of the grant on the grounds; that the grant and subsequent confirmation was obtained fraudulently by making false statement; that the petition was filed secretly and that the petitioner failed to disclose that the objector was a beneficiary of the estate of the deceased. The objector further argued that the grant was wrongly issued and confirmed by a Deputy Registrar instead of a Judge. He further contended that he was lawfully in occupation of **Nyaki/Mulathankari/312**, a fact which the petitioner had failed to disclose to court.

5. In opposition, the petitioner filed a Replying Affidavit on 16<sup>th</sup> July, 2015. In that Affidavit, the petitioner denied the allegation that the objector was a beneficiary of the estate of the deceased. He contended that even the objector's father was a witness in the letter of introduction by the area chief and had supported his application for the grant of letters of administration. He further denied that the objector was in occupation of **Nyaki/Mulathankari/312**. He contended that the objector had his own property that he had inherited from his father's property, **Nyaki/Thuura/2726**.

6. The objection was ordered be determined by way of **viva voce** evidence. Both parties testified but did call any witness. Before the trial began, the court allowed Mr. Ogoti Learned Counsel for the objector to amend the particulars of the property that the objector was claiming from **Nyaki/Mulathankari/312 to Nyaki/Thuura/1441 (hereinafter "the subject property")**.

7. The objector told the court that the deceased was his uncle; that the reason for applying to revoke the grant was because his late father, one Zakayo M'Rukwaro had sued the petitioner in the **Meru CMCC No. 221 of 1997 Samuel Kiunga vs. Zakayo M'Rukwaro** claiming the subject property. That in the said suit, the objector's father was claiming the subject property on the ground that the objector's father had permitted the subject property but the deceased took the identity card of the objector's father and had the subject property registered in his name.

8. The objector admitted that the said suit was concluded in favour of the petitioner. That no succession cause had been instituted in respect of the estate of his late father. He further admitted that he had inherited from his father 2.5 acres of land.

9. On the part of the petitioner, he relied on the Replying Affidavit he had earlier on filed and told the court in cross-examination that; the subject property was gathered by the deceased and registered in his name. He denied the claim that the deceased was registered as owner of the subject property in trust. He urged that the objector should pursue his claim in **Meru CMCC No. 221 of 1997 Samuel Kiunga vs. Zakayo M'Rukwaro** elsewhere and not in this succession cause.

10. The Learned Counsel representing the respective parties did not offer any submissions. The both relied on the evidence on record. Having considered the evidence on record, there are three issues for determination; **was the objector notified of these proceedings? Was he entitled to be notified of the same? Should the grant be revoked?**

11. On the first issue, the objector testified that he was not notified of the institution of this Cause. That he only discovered about it in 1996. This piece of evidence was not denied by the petitioner. Indeed the petitioner admitted that fact. That being the case, I find that the objector was not notified of this Cause when it was instituted and that it was prosecuted to conclusion without his knowledge.

12. The second issue is whether the objector was entitled to be notified of the institution of the Cause. The objector testified that he was a beneficiary of the estate of the deceased. That the deceased was his uncle and had been given the subject property by the objector's father for temporary use but converted it to his own use. That he, the objector was entitled to pursue his father's claim on the subject property as had been the case in **Meru CMCC No. 221 of 1997 Samuel Kiunga vs. Zakayo M'Rukwaro**. On his part, the petitioner denied the objector's claim. He told the court that since the objector was not a beneficiary of the estate of the deceased he was not obligated to notify him about this Cause.

13. From the evidence on record, there is no dispute that the objector was a nephew of the deceased; that the subject property was registered in the name of the deceased as at the time of his demise on 19<sup>th</sup> June, 1986; that the deceased's brother Zakayo M'Rukwaro who was the father of the objector did not lay any claim on the subject property during the lifetime of the deceased. It was common ground that after the demise of the deceased, the objector's father is said to have lodged a suit in the Chief Magistrates Court said to be **Meru CMCC No. 221 of 1997 Samuel Kiunga vs. Zakayo M'Rukwaro** allegedly to claim the subject property.

14. The parties agreed that the said suit was determined in favour of the petitioner. The objector was of the mistaken view that since his late father had laid claim on the subject property before he died, he was entitled to litigate such claim before this court. It should be remembered

that a family court, like this one, is only concerned with establishing who the beneficiaries of an estate is and how the estate is to be distributed to the lawful beneficiaries. The **Law of Succession Act Cap 160, Laws of Kenya** is clear on who is a beneficiary. It does not extend to brothers, nephews etc.

15. To begin with, the objector admitted that the alleged suit was determined in favour of the petitioner. None of the parties produced the pleadings or judgment in that suit. The court is therefore not in a position to discern what the suit was all about. If the objector's father lost his claim therein, it follows that there is no right that accrued to him pursuant to that suit.

16. Further, even if there was any right that enured to the objector's father in that suit or for any other reason, the objector did not prove that he had taken any representation of the estate of his late father for him to have any right to mount it on his own behalf as he had sought to in the present proceedings.

17. Accordingly, the objector was not entitled to be notified of this Cause as he was not a beneficiary of the estate of the deceased. He should pursue his claim, if any, before the appropriate forum and not in the family court.

18. The final issue is whether the grant should be revoked in the circumstances. I have found that the objector has not proved his allegations against the petitioner. He did not pursue his claim that the grant was issued and confirmed by a Deputy Registrar instead of a Judge. Having abandoned that claim, I see no reason of making a determination on it. In any event, if I had to rule on it, the orders would have been to set the grant aside, re-appoint the petitioner and reconfirm it as it were. Courts do not act in futility.

19. The upshot of it is that the objection is dismissed with costs.

**DATED and DELIVERED at Meru this 21<sup>st</sup> day of March, 2018.**

**A. MABEYA**

**JUDGE**