



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISC. SUCC NO. 89 OF 2013**

**PETER MBOGO GITUNU Alias PETER MBOGO GIKUNJU Alias MBOGO GATIMU THEYA - DECEASED**

**BETWEEN**

**NELSON GACHOKI MURAGE Alias GACHOKI MURAGE.....APPLICANT**

**AND**

**STEPHEN MWANGI MURIITHI.....1<sup>ST</sup> RESPONDENT**

**NELSON DOUGLAS KABUI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This matter relates to the estate of Peter Mbogo Gitunu alias Peter Mbogo alias Mbogo Gatimu Theya Gikunju (deceased). A grant of letters of Administration were issued to Stephene Mwangi Muriithi on 10/10/2011 and confirmed on 11/05/2012.

2. The applicants Mwai Ngandi Machira and Nelson Gachoki Murage alias Gachoki Murage filed an amended summons for revocation of grant in Miscellaneous Succession Cause No. 89/2013. The application is brought under **Section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules.** It is based on the grounds that:-

a) The proceedings to obtain the grant were defective in substance.

b) The grant was obtained fraudulently by the making of a false statement or by virtue of concealment from the court of something material to the case.

c) That the grant was obtained by means of untrue allegations of a fact essential in point of law to justify the grant notwithstanding the allegation was made in ignorance or inadvertently.

3. The respondent Stephene Mwangi Mureithi in a Replying Affidavit sworn on 4/7/2016 at Para -4- deposes that the application is defective in nature and does not fulfill the provisions of section 76 and Rule 44(1) of Chapter 160 Laws of Kenya. That it is mandatory that such an application can only be filed in the original file where the grant was issued.

4. The respondent raised this as a pre-liminary point. In his submission Mr. Mahan for the respondents stated that the application has not complied with **Section 76(4) of the Law of Succession Act (to be referred to herein as the Act)** as the grant was issued in the Senior Principal Magistrate's court Kerugoya Succession Cause No. 235/2011. That there is no provision under the rules to invoke a miscellaneous cause when there was a substantive suit. That once an application is filed in two different registries directions should be given as to where it should be heard. That the High court lacks inherent jurisdiction to entertain the application.

5. The substantive issue raised is jurisdiction of this court to entertain the application for revocation of grant. It is trite that the court must determine the issue of jurisdiction where it is raised because jurisdiction is everything and without it the Judge must down his tools and leave the matter. This was stated by Nyarangi - J – in **The owners of Motor Vessel “Lillian S” –v- Caltex Oil Kenya Ltd 1989 KLRI: where he stated:-**

***“Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”***

**It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the**

doors of justice, and that is jurisdiction. The authority of the court is determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court will cross before it embarks on its decision making function.

6. The powers of the Court to revoke or annul grants is under **Section 76 of the Law of Succession Act**. It lays down the grounds upon which the court may revoke or annul a grant.

**Section 76 of the Law of Succession Act Cap 160** states;

*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 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 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 that the allegation was made in ignorance or inadvertently.*

The Act has in the subsidiary provisions made rules of procedure for the carrying out of the purposes and provisions of the Act. In this regard Rule 44(1) of the Probate and Administration Rules guides the procedure on the matters under section **76 of the Act**.

**Rule 44(1) of the Probate and Administration Rules** states;

*Where any person interested in the estate of the deceased seeks pursuant to the provisions of [section 76](#) of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.*

7. The implication of the rule is that the court with jurisdiction to entertain applications for revocation and annulment of grants in the High Court. The rule states the procedure where the grant was issued in a Resident Magistrates Court. The application shall be through the High Court Registry by summons in Form 107. The heading of Form 107 is "**Summons for Revocation or Annulment of Grant**." It bears a footnote that this summons must be issued in the High Court. My view is that an application for revocation of grant from the Magistrates court through a summons is proper when filed as a Miscellaneous Cause.

8. This issue was raised before my brother Justice Limo in the case of **Magundu Miano –v- Jane Wainoi & Another in Misc Succ Cause No. 87/12 H.C Kerugoya (UR)**. He stated as follows:-

**A party moving the court to revoke/annul a grant under Section 76 of the Act is required to, under rule 44 (1) of the Probate and Administration Rules, apply to court by summons in Form 107 that is provided at the back of the Act. The summons requires to be issued by the Deputy Registrar of the High Court within the cause that the grant was issued. If the grant was issued by a resident magistrate then the summons will be issued through the High Court registry nearest to that resident magistrate's registry. A litigant would then be in order to file a miscellaneous cause before the said High Court through which the summons for revocation of grant can issue. That is the correct position in law in my view.....**

A similar holding was made by J. A. Makau, J, in the **matter of the Estate of Erastus Muriungi Ngaruthi – Deceased H. C Meru Succ. Cause No. 275/14** where he stated:

**In view of the above I am of the view that the proper procedure to seek revocation or annulment of Resident Magistrate decision against confirmation of a grant is by filing a miscellaneous application by way of summons as provided by the law of Succession Act to the nearest High Court registry applying the provisions of the Law of Succession Act.....**

These are persuasive decisions and I am in agreement with them as it is the correct position as provided under the **Law of succession Act**.

9. The applicants filed a summons for revocation of grant. The grant was issued in the Magistrates's Court. The applicants were in order by filing the miscellaneous cause in the High court by way of Summons seeking revocation of the said grant. This court is therefore clothed with jurisdiction to entertain the application. The objection is without merits.

10. The Miscellaneous application was supported by an affidavit and from the record there was compliance with Rule 44(4) Probate and Administration Rules. The Judge did issue directions that any party who maybe affected by the application be served and it was confirmed that they were served. On the question of forms used or not used as provided under the **Act**, these are technicalities which the court should disregard in favour of doing substantial Justice. The respondents are before court and they filed their responses. There is no prejudice occasioned. Article 159(2) of the Constitution provides:

***“In exercising judicial authority the courts and tribunals shall be guided by the following principles-***

*Justice shall be administered without undue regard to procedural technicalities.”*

In conclusion I find that the application is properly filed before this court and the court has jurisdiction to entertain. The objection is without merits and is dismissed with costs. The application ought to be heard and determined on merits.

**Dated at Kerugoya this 31<sup>st</sup> Day of July 2018.**

**L. W. GITARI**

**JUDGE**