



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 140 OF 2011**

**IN THE MATTER OF THE ESTATE M' MUNGANIA M' MWONGERA**

M'NKANATA M' MWONGERA.....PETITIONER/RESPONDENT

-Versus-

JACOB KINYURU M' MUNGANIA.....APPLICANT/BENEFICIARY

**RULING**

**Revocation of grant**

[1] I have been called upon through a Chamber Summons Application dated 11<sup>th</sup> October 2016, to:

- 1. Revoke or annul the grant of letters of administration issued to the petitioner on 1<sup>st</sup> October 2012 and the resultant certificate of confirmation of grant issued to the petitioner on 25<sup>th</sup> February 2014;***
- 2. Order inhibition to be registered upon title L.R NO. ABOTHUGUCHI/KATHERI/590 prohibiting any dealings in the said parcel land pending the hearing and determination of this application; and***
- 3. Make provision for costs of this application to be borne by the petitioner/respondent.***

[2] The Application is premised on the grounds inter alia that this Cause was filled;

- (1) Secretly and fraudulently by a person who is not a beneficiary and/or dependent of the deceased estate;
- (2) Without the consent of the rightful beneficiaries and
- (3) Through fraud, misrepresentation of material facts and non-disclosure of key information with a purpose of grabbing the deceased estate and that orders sought should be granted to obviate the Petitioner disinheriting the rightful beneficiaries, loss and damage to them.

[3] The Applicant claims that the deceased herein was his father and that the estate should only be dealt with by his dependants. Yet, the Petitioner herein M' Nkanata M' Mwongera is the uncle of the deceased and his only interest was only to disinherit them of their father's estate.

[4] The Application was opposed via Replying Affidavit filed in court by the Respondent on 14<sup>th</sup> February 2017, where he deposed inter alia that:-

(1) The deceased, whose estate this cause relates was his eldest brother and that at all material times the suit property namely L.R NO. ABOTHUGUCHI/KATHERI/590 was ancestral land;

(2) In the year 1963 during the time of registration within Katheriarea, the deceased and got registered in the suit property as a trustee for himself and the Respondent. The deceased was to share it later with the Respondent equally. But in complete breach of the said trust, the deceased bestowed the land uponself and chased him from the suit property.

(3) Further, he averred that he demanded  $\frac{1}{2}$  share of the suit property from the deceased but he refused to give him a share and instead threatened to subdivide the land and share it among his children

(4) Upon the death of the deceased, he tried to prevail upon the Applicant together with his siblings to file a succession cause but they refused, after which he instructed his advocates to file a citation against the Applicant and his siblings which eventually led to the filing of this succession cause.

(5) He followed the law, all steps and procedure in pursuing this cause and that there was evidence of several affidavits of service of all the documents served to the Applicant. The citation was filed on 17<sup>th</sup> March 2011 but the Applicant never filled any document to oppose it.

[5] The Petitioner in his submissions reiterated the contents of his Replying Affidavit, but specifically submitted that following the order by Justice Kasango, the Petitioner obtained Chief's letter dated 5<sup>th</sup> January 2012 which was part of the court record and filed this cause which was gazetted in the Kenya Gazette dated 6<sup>th</sup> June 2012. Thereafter, on 1<sup>st</sup> October 2012, the Grant of Letters of Administration was issued to the Petitioner. He subsequently applied for rectification of the Grant and a Rectified Certificate of Confirmed Grant of Letters of Administration was issued on 18<sup>th</sup> July 2016. The Respondent further contended that it was imperative to note that the cited parties who included the Applicant herein were always served with all the relevant documents as ordered by Kasango J but they opted not to come to court. And following service of all the documents to the cited parties, the Honourable Court allowed the Petitioner to proceed with this cause to the stage when the Applicant filed the present application. Consequently, the Respondent submitted that he followed the law and due process as required by the court and that the Applicant could not come to court at this stage to mislead the court on oath that he and his siblings were not aware of this cause when the Applicant were all along aware of this cause. The Respondent further submitted that the Applicant and his siblings having failed to file succession cause in respect of their late father even after being cited, the Respondent was entitled to file the instant succession cause.

### **Applicant's default**

[6] On 15<sup>th</sup> February 2017, the court permitted the Applicant to file a supplementary affidavit within 7 days thereof. But, by 21<sup>st</sup> March 2017 the Applicant had not complied with the court's orders issued on 15<sup>th</sup> February 2017. Nonetheless, the Applicant was again given 7 days to file and serve a further affidavit but with admonition that on service as ordered or in default thereof, the Respondent shall serve his submissions in 14 days, and that the court would not accept any pleadings filed out of time by the Applicant. On 16<sup>th</sup> May 2017, once again the Applicant had not complied with court's order prompting the court to rule that it would determine the Application on the basis of materials filed in court as of that date.

### **DETERMINATION**

[7] The Applicant herein did not file submissions or supplementary affidavit as ordered. There is none to consider. However, I shall be guided by the facts of the case and the law. The Respondents assertions

inter alia that the Applicant and his siblings were all long aware of this succession cause remain uncontroverted. They were served with a citation to accept or refuse the grant of letters of administration in respect of the estate of the deceased. None filed any response. Subsequently, the court allowed the Petitioner to file this cause. I must state that Citation is a lawful procedure provided in law to enable a person who would be entitled to a grant in the event of the person cited renouncing his or her right thereto to obtain the grant to himself. See rule 22(1) of the Probate and Administration Rules which provides as follows:-

## **22. Citation to accept or refuse or to take a grant**

**(1) A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.**

Upon service of citation, if any person cited does not file any appearance or response within the period stated in the Citation, the citor may petition the court (if he has not filed already) for a grant to himself, or apply for noting by court that the power of an executor who has been cited has ceased; or apply to court that the person cited be given specified time within which to take out a grant. Such failure to respond to the Citation after service or to apply for grant within the time prescribed in the Citation is deemed to be renunciation of right to apply. See Part VI of the Probate and administration Rules. See rule 22(5) of the Probate and Administration Rules below:-

**(5) If the time limited for appearance has expired and the person cited has not entered an appearance in either the principal registry or the Mombasa registry, the citor may-**

**(a) in the case of a citation under sub rule (1), petition the court (if he has not already done so) for a grant to himself;**

**(b) in the case of a citation under sub rule (2), apply to the court by summons for an order that a note be made on the grant that the executor in respect of whom power was reserved has been duly cited and has not appeared and that all his rights in respect of the executorship have wholly ceased;**

**(c) in the case of a citation under sub rule (3), apply to the court by summons on notice to the person cited for an order requiring such person to take a grant within a specified time or for a grant to himself or to some other person specified in the application.**

Needless to state that a person cited and served with the Citation cannot claim that he or she was not informed of the proceedings or that the cause was filed secretly, or fraudulently or without his or her knowledge. These provisions of law guarantee that no estate of a deceased person should remain without administration in accordance with the law. Nevertheless, once the cause is filed, notice of proceedings and hearing of confirmation of grant must be given to the beneficiaries. This is the law I will apply in this case.

[8] Turning to the facts of this case, the Petitioner M' Nkanata M' Mwongera is the uncle of the deceased and would himself be entitled to a grant of letters of administration in the event the children of the deceased renounced their right to apply for a grant. John Kinyua M' Mungania, Stanley Murerwa M' Mungania and Jacob Kinyuru M' Mungani were cited and served with a Citation dated 17<sup>th</sup> March 2011. They did not file any appearance or response thereto. Subsequently, the court on 19<sup>th</sup> September 2011 directed the Petitioner to petition the court for grant of letters of administration in respect of the estate of the deceased. The court also noted that all documents after gazettelement be served on the cited persons. This is because, despite failure to enter appearance, the petition filed pursuant to a Citation should be heard in the manner prescribed in the Act. Of significance is that hearing notice for Summons for Confirmation of Grant scheduled for hearing on 25<sup>th</sup> February, 2014 was duly served on the sons of the deceased including the Applicant. An affidavit of service sworn on 21<sup>st</sup> February 2014 in that respect was duly filed in court. But, again, on the hearing date, none of the persons cited appeared in court. The grant was therefore confirmed. No explanations were given why the Applicant or any of the persons cited

or served did not participate in court proceedings yet they had been duly served with the requisite notices. Accordingly, the applicants are simply trying to reap from their own default. This default is consistent in this cause and I must remind the Applicants that he who comes to equity must come with clean hands; theirs are not. I should also note that the Petitioner is claiming beneficial interest in the estate under a trust. In the premises, therefore, the allegation by the Applicants that the cause was filed: (1) secretly and fraudulently by a person who is not a beneficiary and/or dependant of the deceased estate; (2) without the consent of the rightful beneficiaries; and (3) through fraud, misrepresentation of material facts and non-disclosure of key information with a purpose of grabbing the deceased estate; are false and are aimed solely to tempt the court into believing that real grounds for revocation of the grant exist. Consequently I do not see any plausible ground to revoke the grant. Accordingly, I find the application dated 11<sup>th</sup> October 2016, to be without merit and is hereby dismissed with costs to the Petitioner. Following this decision, and in order to resolve the acrimony in these proceedings, I will give appropriate directions on the other pending applications in the presence of the parties and their legal counsels.

**Dated, signed and delivered in open court at Meru this 18<sup>th</sup> day of October 2017**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Mwirigi advocate for Mr. G.G. Mugambi advocate for applicant

Mr. Nyamu for petitioner – absent

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**F. GIKONYO**

**JUDGE**