



**IN THE REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.55 OF 2015**

***In the Matter of The Estate of M'thiiringa M'arungu( Deceased)***

**RUTH KALOKI.....1<sup>ST</sup> APPLICANT**

**SABINA KARAMBU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**HENRY M'CHOKERAM'MWAMBI.....PETITIONER**

**RULING**

**Revocation of Grant**

[1] The application dated 30<sup>th</sup> June, 2014 seeks for two significant orders, namely:

***(a) An inhibition upon L.R NO. ITHIMA/ANTUAMBUI/3633 and L.RNO.ITHIMA/ANTUAMBUI/1039; and***

***(b) Revocation and or annulment of the grant issued to HENRY M'CHOKERA on 23rd April 2012.***

[2] The application is grounded on the supporting affidavit of RUTH KALOKI and other grounds set out in the application. But the main grounds forth in the application are: (1) That the petitioner is not their brother but a stranger to the estate of the deceased;(2) the petitioner is a fraudster who stealthily and fraudulently filed this succession cause in Maua to unjustly enrich himself with property that he is not entitled to. One of their brothers called Joseph Mungai colluded with Petitioner to file this cause; and the documents and signatures used in the cause are forgeries;(3) that Maua court lacked jurisdiction as the estate is over Kshs. 2,000,000; and (4) that the Petitioner is disinheriting the real beneficiaries of the estate. In addition, the Applicant alleged that the petitioner intends to transfer the suit properties to third parties.

[3] Matters did not end there. The Applicant argued that the Petitioner took away their brother Joseph Mungai and induced him, without family involvement, to withdraw an earlier application that had been filed. On the basis of the foregoing reasons the Applicant applied for revocation of the grant issued herein. He also prays for inhibition on the estate properties.

[4] The Applicant filed submissions on 8<sup>th</sup> October, 2014 in which she amplified the grounds for

applying. He emphasized that Section 47 of the Law of Succession Act (now repealed) limited the jurisdiction of magistrate's court to estates of a value not exceeding Kshs. 100,000. He also pointed out that the Petitioner had not filed any replying affidavit or grounds of opposition. On those reasons the Applicant beseeched the court to grant the application.

### **Application was opposed**

[5] The Petitioner opposed the application through grounds of opposition which he filed, albeit belatedly, on 18<sup>th</sup> March, 2015. The major grounds were that; (1) This application is *res judicata*; (2) the Applicants were parties in some application dated 26<sup>th</sup> April, 2012; (3) the applicants are not entitled to the estate; and (4) the application is an abuse of process of the court. The Petitioner also filed submission on 30<sup>th</sup> April, 2015 in which it was argued that this application is *res judicata*. They cited the case of **MICHAEL GICHIRA NJERU vs. SAMUEL MAGUMUGO & 2 OTHERS [2014] eKLR** to support this submission. Further submissions were made by the petitioner as follows. That by a letter dated 2<sup>th</sup> August 2012 members of the clan wrote to the court seeking withdrawal of Cause No. 246 of 2012 which case concerns succession court no. 96 of 2010. The Petitioner opined that the issues being raised were determined by Makau J in the ruling delivered on 7<sup>th</sup> May, 2014 in which he adopted consent of parties to withdraw the application dated 26<sup>th</sup> April, 2012. To him that was a determination of the matters in this application. According to him, the Applicants cannot apply again for similar orders. They cited cases of **TITUS MBAABU [2013] eKLR AND JOSEPH KIARIE [2012] eKLR** to support their said position. In any event, the Petitioner argued that the alleged fraud in obtaining the grant herein has not been proved. Finally he stated that the estate does not exceed Kshs. 100,000 and so the magistrate's court had jurisdiction to issue the grant.

### **DETERMINATION**

[7] I need to put the record straight before I address the substantive issues herein. First, Cause No. 246 of 2012 was filed as a miscellaneous cause and was commenced by way of Chamber Summons dated 26<sup>th</sup> April, 2012. The said application was filed by Joseph Mungai M'Arangu against the Petitioner. The application was not, however, heard on merits it was withdrawn by consent of the parties dated 9<sup>th</sup> January, 2014 and with the superadded authority of the court on 7<sup>th</sup> May, 2014. The entire miscellaneous application was therefore spent. Meru High Court Succession Cause No. 195 of 1994 was initiated by Ruth Kaloki and Sabina Karambu through Chamber Summons dated 30<sup>th</sup> June, 2014- that application is the subject of this ruling. The main agenda of the latter application was to revoke the grant of letters of administration that were issued in Mau CMC Succession cause No. 96 of 2010 on the basis that: the said magistrate's court did not have jurisdiction and that the grant was obtained through fraud and deceit. Now the question is: *Does the withdrawal of Misc. Appl.No. 246 of 2012 render the application dated 30<sup>th</sup> June 2014 res judicata?*

### **Question of Res Judicata**

[8] There is no dearth of judicial decisions in this subject of *res judicata* whose main aim is to prevent unscrupulous litigants from reinstituting already determined case. Such crafty litigants do this by repackaging cases which have been determined and giving them a different complexion. The doctrine of *res judicata* guards against such perpetuity in litigation. I need not multiply the many judicial authorities on the subject except to cite the case of **MICHAEL GICHURA (supra)**. In a nutshell, a matter becomes *res judicata* if;

**a) The matter was directly and substantially in issue in a former suit between same parties or between parties under whom they or any of them claims, litigating under same title;**

**b) The issue must have been heard and finally decided by a competent court.**

[9] Applying this test, Meru HC. MISC APP NO 246 of 2012 was filed by Joseph Mungai M'Arangu whereas the application under consideration was filed by Ruth Kaloki and Sabina Karambu.

The Applicants herein have accused the said Joseph Mungai M'Arangu of collusion with the Petitioner in the withdrawal of the application in Cause No 246 of 2012. Again, the withdrawn application was not heard and finally determined on merit. Such summary withdrawal of the application cannot be a bar to a subsequent application for revocation of grant. Therefore the argument fails the important test of *res judicata*. Accordingly, the application dated 30<sup>th</sup> June 2014 is not *res judicata*.

[10] I now turn to the substantive request for revocation of grant herein. Although the Petitioner stated that the estate is of Kshs. 100,000, I have not been shown the basis of that value. I have not been shown any or any professional valuation to support that claim. Curiously, on 4<sup>th</sup> March 2015, the Petitioner is recorded to have stated as follows:

***The value of the deceased estate is around Kshs. 1,000,000/=. In the court file I indicated it is Kshs. 50,000/=. That is not the value...***

Clearly, there is no basis upon which the subordinate court at Maua assumed jurisdiction over this estate which at the time exceeded its jurisdiction of Kshs. 100,000. I am aware that following amendments to the Law of Succession Act magistrate courts' jurisdiction in succession causes was substantially enhanced. But the law cannot apply retrospectively and so these amendments cannot confer jurisdiction in retrospect. Accordingly the subordinate court in Mau did not have jurisdiction to issue the grant let alone confirm it in Mau CM Succession Cause No. 96 of 2010. Accordingly, I annul the grant issued to the Petitioner on 23<sup>rd</sup> April, 2012. Following the decision, it is in order to preserve the estate property as these proceedings continue. Towards that end, I order inhibition to be registered in the suit properties prohibiting all dealings in NTHIMA/ANTUAMBUI/3633 and NTHIMA/ANTUAMBUI/1039 until further orders of this court. I also direct the parties to agree on the person or persons to whom I shall make a grant of representation of the estate of the deceased within 30 days which failing I shall exercise my final discretion under section 66 of the Law of Succession Act. Given the circumstances of this case, I direct each party to bear own costs of the application. It is so ordered.

**Dated, Delivered and Signed in Open Court at Meru this 15<sup>th</sup> Day of June, 2016.**

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**F. GIKONYO**

**JUDGE**

**In the presence of :**

Mr. Muriuki advocate for applicants

Mr. Mutua advocate for the respondents.

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**F. GIKONYO**

**JUDGE**