



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NANYUKI**

**SUCCESSION CAUSE NO. 7 OF 2016**

**IN THE ESTATE OF SAMUEL M'TWARUCHIU M'NARIMU ..... DECEASED**

**LOISE MAKANDI M'TWARUCHIU..... APPLICANT**

*versus*

**GLADYS NCHECHE M'TWARUCHIU..... 1<sup>st</sup> RESPONDENT**

**CHARITY KABURO M'TWARUCHIU.....2<sup>nd</sup> RESPONDENT**

**RULING**

1. The deceased **SAMUEL M'TWARUCHIU M'NARIMU** died on 12<sup>th</sup> October,1997. Surprisingly the issue of the administration of his estate is still before court todate, 19 years later.

On 19<sup>th</sup> May, 1998 the two wives of the deceased namely Gladys Ncheche M'twaruchiu and Charity Kaburo M'twaruchiu petitioned for letters of administration intestate under Senior Resident Magistrate's Court Nanyuki Succession Cause No. 11 of 1998. In their petition the petitioners listed the following as the other beneficiaries of the estate:-

**Beatrice Karwitha**

**Rose Mukandi**

**Edward Mutuma**

**Julius Kithinji**

**Francis Kiriinya**

**Cyrus Kathukumi**

**Peter Kiambi**

**Moses Bundi**

**Agnes Ntinyara**

**Geoffrey Muriithi**

All those beneficiaries are the sons and daughters of the deceased.

3. The Petition was gazetted under **gazette notice No. 3434** in July 1998. Since no objection was raised to that petition as provided under **Rule 17** of the **Probate and Administration Rules (the Rules)** a grant was issued to the two petitioners on 24<sup>th</sup> November, 1998.

4. Loise Makandi M'twaruchiu (Loise) represented by Learned Counsel Muia Mwanzia has approached this court by summons dated 4<sup>th</sup> February, 2016. She seeks the following prayers:-

***“2. THAT this Honourable court be pleased to transfer Nanyuki SRM Succession No. 11 of 1998 to the High Court at Nanyuki for purposes of trying or disposing this application and the entire cause.***

***3. THAT this honorable court be pleased to revoke and/or annul the Grant of Representation issued to GLADYS NCHECHE M'TWARUCHIU and CHARITY KABURO M'TWARUCHIU on 24<sup>th</sup> November, 1998 in relation to the estate of the Late SAMUE M'TWARUCHIU M'NARIMU (Deceased) in Nanyuki S R M SUCCESSION CAUSE NO. 11 OF 1998.***

***4. THAT this honorable court be pleased to place an inhibition over parcel No. LAIKIPIA/DAIGA/ETHI BLOCK 2/69 and DAIGA /UMADE BLOCK 10/281 (TIMAU) pending the hearing and determination of this application inter partes or pending further orders of 5. THAT this honorable Court be pleased to place an order of inhibition over parcel No. LAIKIPIA/DAIGA/ETHI BLOCK 2/69 and DAIGA/UMANDE BLOCK 10/281 (TIMAU) pending the hearing and determination of this summons.”***

5. The above prayers are supported by the grounds that the petitioners failed to obtain the consent of Loise before petitioning for grant of administration intestate; that one of the beneficiaries namely Julius Kithinji M'twaruchiu has transferred to himself parcel No. DAIGA/UMANDE BLOCK 10/281 which was part of the estates assets while the Succession Cause No. 11 of 1998 is still pending; and that the Nanyuki Chief Magistrates Court has no pecuniary jurisdiction over that succession cause.

6. The court issued directions on the hearing of the summons on 23<sup>rd</sup> February, 2016. Parties were directed to file and serve each other with further affidavits and the matter was fixed for hearing by way of affidavit evidence and written submissions. The parties have filed their submission and affidavits. The petitioners are separately represented. Gladys Ncheche M'twaruchiu (Gladys) the 1<sup>st</sup> petitioner acts in person while Charity Kaburo M'twaruchiu (Charity) is represented by Learned Counsel Mr. Kiget.

7. Gladys in her affidavit confirmed that she and her co-petitioner did not obtain the beneficiaries consent before petitioning for the grant. She therefore did not oppose the revocation of the grant as sought by Loise.

8. Charity, through her Learned Counsel raised preliminary objection with three limbs. The objection is as follows:-

***“1. THAT the Applicant has not complied with the Probate and Administration Rule Prior to filing this application dated 4<sup>th</sup> February, 2016 since grant was confirmed a long time ago.***

***2. THAT the Application is an abuse of the court process and devoid of merits as it is not based on Section 45 of the Law of Succession Act.***

***3. THAT the Applicant's Application seeking for revocation/annulment of Grant has been filed late without leave of the court.”***

9. A close look at limb No. 2 and 3 above reveals that those objections do not meet the legal threshold of preliminary objection. A preliminary objection raises pure points of law which are argued on the

assumption that all the facts pleaded by the other side are correct see **MUKHISA BISCUIT MANUFACTURING CO. LTD – V- WEST END DISTRIBUTORS LTD [1969]EA 696**. It will be noted that what is sought under the 2<sup>nd</sup> and 3<sup>rd</sup> Limb of the preliminary objection is the exercise of this court's discretion. Those Limbs do not raise pure points of Law. Charity has however raised the same objections in her written submission which the court will consider.

10. Charity submitted that Loise's revocation of the grant was filed without leave of the court as required under **Section 30** of the **Succession Act Cap 160 (the Act)**. That argument is erroneous. Section 30 of the Act provides that no application can be brought Under Part 111 of the Act, encompasses Section 26 to Section 29 of the Act, when a grant has been confirmed. In the Succession Cause No. 11 of 1998 there was a grant issued on 24<sup>th</sup> November, 1998 and since then that grant has not been confirmed. It follows that the provisions of Section 26 to 29 of the Act do not apply to that Succession Cause. It follows that Loise did not require to obtain the leave of this court before filing the summons for revocation because the grant had not been confirmed.

11. Charity was also in error to fault the summons for revocation for relying on **Section 45** of the Act. Section 45 is the Section which prohibits intermeddling in the property of the deceased. Since it is now confirmed above, contrary to Charity's submission, that the grant issued on 24<sup>th</sup> November, 1998 has todate not been confirmed and therefore no distributions of deceased's assets has been undertaken it follows that anyone who deals with the deceased's estate by either taking possession or disposing of the same is intermeddling in the estate as defined in Section 45 of the Act. Loise was correct to cite Section 45 of the Act.

12. Charity argued that this court cannot issue injunctive orders under the Act. To support this argument two cases were cited. It is important to state that the Learned Counsel Mr. Kiget did not supply copies of the cases relied upon. I will therefore only cite one of those cases relied upon, since it was the only case I was able to find. This is the case of **Estate of Kilungu (Deceased) (2002) KLR 136**. This is a High Court decision and therefore it has no binding force over this court. It only has persuasive force. It is a case decided in January 2002. A lot has happened since then. Most importantly we now have a new Constitution. Article 159 (d) provides that the courts shall be guided by the principle that:

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

13. It is correct, as argued by Charity that the Act and the Probate and Administration Rules do not provide for injunction orders to be issued in Succession Cause. Rule 63 of the Rules in respect to Succession matters specifically omits the provision of the Civil Procedure Rules under which injunctions are issued.

14. In my view, contrary to the holding of the case **Estate Of Kilungu(Deceased) (Supra) Rule 73** of the Rules can be invoked to grant injunctive orders to ensure the ends of justice are met. That Rule provides:

***“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

15. It is instructive to note that Loise did not seek an injunctive order by her summons for revocation. Rather she sought an order of inhibition to be registered over parcel No. **LAIKIPIA/DAIGA/ETHI BLOCK 2/69** and **DAIGA/UMANDE BLOCK 10/281(TIMAU)**. It follows that the authority relied upon by Charity which only relates to the issuance of injunctive orders, does not assist her with a view to Loise's prayer of inhibition.

16. The summons for revocation are filed relying on two grounds. The first ground is that Loise's consent was not obtained before the petitioners petitioned. That assertion was confirmed by one of the petitioners, Gladys. **Rule 7 (7)** of the Rules is in the following terms.

(7) where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

*renounced his right generally to apply for a grant; or consented in writing to the making of the grant to the applicant; or been issued with a citation calling upon him either to renounce such right or to apply from a grant.*

17. It is clear from Rule 7 (7) (b) of the Rules that the petitioners were required to provide to the court, when petitioning for grant, consent in writing of the beneficiaries if they were persons having a prior preference to a grant by virtue of Section 66 of the Act. Loise's consent by virtue of being a daughter of the deceased was required as provided under Rule 7 (7) (b) of the Rules. The requirement of that consent is not diminished by the fact that the Petition was gazetted in the Kenya Gazette.

18. The estate of the deceased according to Loise is valued at Ksh 25 million. The Chief Magistrate's pecuniary jurisdiction as per Section 7 of the **Magistrates Court Act No. 26 of 2015** is limited to Ksh. 20 million. It follows the SRM Succession cause No. 11 of 1998 shall be transferred to this court.

19. It is of great concern to this court that a grant was issued to Gladys and Charity as petitioners on 24<sup>th</sup> November, 1998 and to date, now

18 years later, that grant has not yet been confirmed. This grant is 'ripe' for revocation or annulment as provided under Section 76 of the Act. That Section Provide:

*“76. 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- that the proceedings to obtain the grant were defective in substance; 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:*

*(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or to proceed diligently with the administration of the estate; or*

*(iii) to produce to the court, within the time prescribed, and such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any inventory or account which is false in any material particular; or*

*(e) that the grant has become useless and inoperative through subsequent circumstances.”*

20. That Section gives details of circumstances under which a court can either revoke or annul a grant whether or not confirmed. From the submissions made by Loise it is clear that the grant issued to Gladys and Charity can rightly be revoked on the ground that Gladys and Charity failed to obtain the beneficiaries consent before petitioning for the grant, see Section 76 (a). Additionally the grant can be revoked on the ground that the petitioners have failed to confirm that grant 18 years after it was issued; See **Section 76 (d) (i)**.

21. Although the summons for revocation attached certificates of official searches over parcel Nos. **LAIKIPIA/DAIGA/ETHI BLOCK 2/69** and **DAIGA/UMANDE BLOCK 10/281 (TIMAU)** which

show that they are registered in the names of Charity Kaburo M'twaruchiu and Julius Kithinji M'twaruchu respectively, there is no evidence before court that those parcels were part of the estate of the deceased. Consequently this court cannot make a finding that there has been intermeddling with the estate of the deceased.

22. In this court's view the grant issued to both petitioners must be revoked. This court as provided under **Section 66** of the Act has final discretion on whom to issue a grant. It is obvious the petitioners are not suitable persons to carry out the administration of the deceased's estate. Had they been suitable they could have applied for confirmation of the grant and distributed the estate before the expiry of 18 years. In my view Loise is a suitable candidate to be issued with the grant. On my perusal of the file before me I noted that Loise, in person, wrote to the court on 29<sup>th</sup> October, 2014 making inquiry over the Succession Cause. Unfortunately she did not receive a response from the court. Undeterred she filed the present Summons for revocation on realization that there was intermeddling in the estate. It is for that reason that the court shall order the grant be issued to her.

23. In the end the orders of this court are:-

**The Nanyuki S R M Succession Cause No. 11 of 1998 is hereby transferred to Nanyuki High Court and to be attached to this matter.**

**The grant issued to Gladys Ncheche M'twaruchiu on 24<sup>th</sup> November 1998 is hereby revoked.**

**A grant is hereby issued to Loise Makandi M'twaruchiu. That grant, with the leave of this court, shall be confirmed within 30 days. Such application for confirmation shall be served upon all the beneficiaries of the deceased's estate.**

**Until further orders of this court an, inhabitation shall be registered over parcel No. LAIKIPIA/DAIGA/ETHI BLOCK 2/69 and UMANDE BLOCK 10/281 (TIMAU).**

**(e) Since this matter involves closes family members there shall be no orders as to costs in respect to the summons dated 4<sup>th</sup> February, 2016.**

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF DECEMBER 2016**

**MARY KASANGO**

**JUDGE**

**Coram**

Before Justice Mary Kasango

Court Assistant .....

Applicant: Loise Makandi M'twaruchiu .....

1<sup>st</sup> Respondent Gladys Ncheche M'twaruchiu.....

2<sup>nd</sup> Respondent Charity Kaburo M'twaruchiu .....

For the applicant .....

For the Respondents .....

**COURT**

Ruling delivered in open court

**MARY KASANGO**

**JUDGE**