



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 302 OF 2012**

**IN THE MATTER OF THE ESTATE OF THE LATE M'ITIRAI KAMAKIA alias IHIRAI  
KAMAKIA (DECEASED)**

STEPHEN MARANGU M'ITIRAI.....PETITIONER

VERSUS

SILVERIA NCEKE & 4 OTHERS.....OBJECTORS/APPLICANTS

**J U D G M E N T**

1. The objector/applicants through summons dated 15<sup>th</sup> December, 2014 pursuant to Section 76 of the Law of Succession Act(Cap.160) Laws of Kenya and Rules 17,44 and 73 of the Probate and Administration Rules and Section 68 of the Land Registration Act, 2012 seek the following Orders:-
  - i. ***That this Honourable court be pleased to grant an Order of inhibition against land titles Nos. ABOTHUGUCHI/L-KAONGO/32 or any other resultant titles from thereof, ABOTHUGUCHI/KIIJA/68 or any resultant tiles from thereof and ABOTHUGUCHI/KIIJA/190 or any resultant title from thereof.***
  - ii. ***That this honourable court be pleased to annul and revoke the grant of letters of administration made and issued to the petitioner herein and confirmed on 29<sup>th</sup> October, 2013 and grant leave to the applicants/objectors herein to file an objection and cross petition out of time.***
  - iii. ***That this honourable court be pleased to order the rectification of the registers in respect of titles Nos. ABOTHUGUCHI/L-KAONGO/32, ABOTHUGUCHI/KIIJA/68 and ABOTHUGUCHI/KIIJA/190 by cancelling all the resultant titles emanating from those titles and reverting back to the name of the deceased herein M'ITIRAI KIMAKIA alias ITHIRAI KAMAKIA so that this Honourable Court can through a proper succession distribute the deceased estate to the rightful beneficiaries.***
2. The application is premised on the grounds on the face of the application inter alia; that the applicants and others not on list are children of the deceased herein; that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by making of false statements and concealing material facts; and that the grant was obtained by making untrue allegations of facts essential on point of law justify the issuance of the grant to the petitioner in absence of applicants/objectors herein.
3. The objectors further have filed supporting affidavit averring inter alia; that all the

objectors/applicants and two others who are deceased but will be represented by their children are all children and heirs of the late M'Itirai Kamakia alias Ithirai Kamakia, that the deceased died on 7<sup>th</sup> February, 1986 domiciled in Kenya without leaving a written or oral will and that the deceased was survived by the following:-

- i. **Jerichah Kathiku M'Itirai** - **(widow)deceased**
  - ii. **Silveriah Ncece** - **Daughter**
  - iii. **Marieta Nduru Mwirigi** - **Daughter**
  - iv. **Sarah Naitore** - **daughter**
  - v. **Veronicah Kiende** - **Daughter(deceased)**
  - vi. **Beatrice Mwari** - **Daughter**
  - vii. **Elizabeth Ngure** - **Daughter**
  - viii. **Joseph Kaaria** - **Daughter(deceased)**
  - ix. **Stephen Marangu** - **Son**
  - x. **Robert Michael M'Itirai** - **Son**
4. That the deceased estate comprised of parcels of land namely:-
- i. **Abothuguchi/L-Kaongo/32;**
  - ii. **Abothuguchi/Kiija/68 and**
  - iii. **Abothuguchi/Kiija/190**
5. The objectors/applicants aver that the respondent/petitioner did not inform them nor sought their consent when he filed this cause That the petitioner filed this cause secretly and is now dishing the entire estate to strangers who are unknown to the objectors/applicants. That the grant was obtained fraudulently as there was no consultation nor was their consent sought. That the petitioner has breached the applicants constitutional fundamental right which prohibits discrimination under Article 27(1),(2),(3),(4) and (5) of the Constitution of Kenya, 2010 which provides:-

***“27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***

***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***

***(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***

***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***

***(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”***

6. The petitioner was served with the summons on 3<sup>rd</sup> February, 2015 as per filed affidavit of service by Joseph Kithinji M'Kiambati a licensed court process server, which summons he accepted and signed. The petitioner filed replying affidavit dated 3<sup>rd</sup> March, 2015 in which the petitioner has averred inter alia; that the facts in paragraph 4 of objectors' affidavit are partly true; but the objectors are married women with their own homes and family with their husbands and out of their jealousy they want to claim the properties of petitioners late father; that the deceased had during his lifetime gifted the land to the petitioner and none to the objectors; that the facts in paragraph 5 and 6 of supporting affidavit are true as regards the deceased date of death and the deceased dependants and heirs; that the deceased properties are as stated by the objectors; that Chief did not require consent of the objectors to issue letter to the petitioner to file this cause as the objectors are married with their own established homes; that the petition was not filed secretly and that the petitioner is not dishing the entire estate to strangers but to his sons; that the petitioner could not consult the objectors for consent as they are married women; that it is true the petitioner leased some portion to alleged strangers to obtain

money to enable him file this cause; that the petitioner followed the proper procedure through the chief of the area and that the objectors/applicants application should be dismissed.

7. That when the application came up for hearing the petitioner though served was absent consequently this matter was set down for judgment on 30<sup>th</sup> April, 2015.
8. I have carefully considered the summons, affidavit in support and the replying affidavit. The issue for consideration is whether the objectors/applicants application has satisfied the conditions set out under Section 76 of the Law of Succession Act to warrant the grant issued and confirmed revoked or annulled?
9. Section 76 of the Law of Succession Act provides:-

***“76. A grant of representation, whether or not confirmed, may at anytime 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;***

***(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-***

***(i) 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***

***(ii) to proceed diligently with the administration of the estate;***

***or***

***(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or(e ) that the grant has become useless and inoperative through subsequent circumstances.”***

10. Further under Rule 26(1) of the Probate and Administration Rules it is provided:-

***“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”***

11. The petitioner in petitioning for grant of letters of administration of the deceased estate did not consult or inform sought the consent of other beneficiaries nor did he notify any of the objectors as required under the provisions of Rule 26(1) of the Probate and Administration Rules. He did not cite them to accept or renounce their right to do so.
12. The petitioner in his own replying affidavit averred that there was no way he could consult the objectors/applicants for consent as they are married women with their own homes and families and lands from their husbands. That the chief told him that their consent was not required because the objectors/applicants were married with their own established homes and families.
13. The petitioner in his replying affidavit is alluding to the fact that female children are not entitled to their parent's estate once they are married nor are they supposed to give consent as by getting

married they are deemed to have to renounce their rights to their parent's estate. He is further suggesting that the chief has authority to decide who should consent to petitioning for the grant and that married daughters have no right to deceased estate hence their consent is not required.

14. Section 29 of the Law of Succession Act defines who is he "dependent" to the deceased estate. It states as follows:-

**"29(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

15. The Succession Act does not as it defines child differentiates a child on the ground of sex. That any attempt to discriminate against a deceased "dependant" on grounds of sex or marital status in my view is discriminatory and unconstitutional by virtue of the provisions of Article 27 of the Constitution of Kenya which states that anyone is equal before the law and has equal right to protection and equal benefit of the law. It prohibits discrimination on grounds of sex and marital status. The said Article 27(1),(2),(3),(4) and (5) provides:-

***"27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***

***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***

***(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***

***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***

***(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).***

16. The petitioner's refusal to get the deceased daughter's consent on the ground of being married women and chief's failure to include the deceased's daughters in the list of the deceased children in his letters of 18<sup>th</sup> April, 2012 as alleged by the petitioner is unconstitutional. In my view the law requires that all the deceased children whether alive or dead, whether male or female, married or unmarried be listed in an application for grant of letters of administration failure whereof, any omitted dependent has a right to challenge the grant on such a ground.

17. The petitioner has admitted he did not consult any of the objectors. Rule 26(1) of the Probate and Administration Rules required him to have given them notice before a grant of letters of administration was made to him. He did not issue any notice to any of them but acted secretly. In Form P&A5 he lied by failing to disclose the objectors/applicants amongst the people who survived the deceased. Similarly in P&A 80 he lied by stating every person having an equal or prior right to a grant of representation had consented or had renounced such right or had been issued with a citation to renounce such right and applying for a grant of representation and has not done so. Further when the matter came for confirmation of grant the petitioner lied that the beneficiaries were only him and one Robert Michael M'Itirai.

18. I have very carefully gone through the forms filed by the petitioner for issuance of letters of administration, application for confirmation of the grant and affidavit in support as well as the objectors application and petitioner's replying affidavit and I am satisfied that the grant was obtained in complete breach of Section 76 of the Law of Succession Act. The proceedings to obtain the grant were defective in substance, the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case and the grant was further obtained by means of untrue allegations of facts essential in point of law to

justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.  
19. The upshot is that the objectors/applicants objection is merited and is granted. I therefore order as follows:-

- i. *The grant of letters of administration made and issued to the petitioner on 3<sup>rd</sup> October, 2012 and confirmed on 29<sup>th</sup> October, 2013 be and is hereby revoked.*
- ii. *The titles No's Abothuguchi/L-Kaongo/32, Abothuguchi/Kiija/68 and Abothuguchi/90 if already transferred are cancelled and ordered to revert back into the name of the deceased M'Itirai Kimakia alias Ithirai Kamakia.*
- iii. *Stephen Marangu M'Ithirai and Sarah Naitore are appointed joint administrators of the deceased estate and grant of letters of administration intestate do forthwith issue to the two; the two administrators are at liberty to file application for confirmation of grant forthwith in default any can proceed to do so.*
- iv. *The objectors/applicants and petitioner are sisters and brothers award the objectors half costs of the application.*

**DATED, SIGNED AND DELIVERED AT MERU THIS 30<sup>TH</sup> DAY OF APRIL, 2015.**

**J. A. MAKAU**

**JUDGE**

***Delivered in open court in the presence of:***

- 1. Mr. Riungu for objectors/applicants***
- 2. Petitioner in person – present/absent***
- 3. C/clerk Penina/Mwenda***

**J. A. MAKAU**

**JUDGE**