



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 647 OF 2009

IN THE MATTER OF THE ESTATE M'TURUCHIU M'MWIRICHIA (DECEASED)

FRANCIS GITONGA M'MWIRICHIA.....PETITIONER

VERSUS

JULIUS MIRITI.....1STOBJECTOR

GEDION MBAYA.....2NDOBJECTOR

J U D G M E N T

1. The Applicants through summons for revocation of grant brought pursuant to Section 76 of the Law of Succession Act (Cap.160) and Rule 44 of The Probate and Administration Rules sought to have orders obtained in this cause revoked on the grounds that the grant was obtained fraudulently by the making of a false statement to the effect that all dependants of the deceased had knowledge of the institution of the cause; that the Petitioner concealed from the court matters material to the case and lastly the cause was instituted stealthily and fraudulently and the consent purportedly executed by the Applicants is a forgery.

2. The application is supported by the affidavit of Justus Mwitii M'Turuchiu who has reiterated the contents of ground in support on the face of the application averring that he was not aware of the institution and the pending of this cause till 20/10/2010 when he was informed of the matter by his co-Applicant; that this consent purportedly signed by him he averred is a forgery; that he denied having been consulted by the Petitioner on the filing of this cause and that distribution has not been agreed upon. The 2nd Applicant swore an affidavit in support of the application dated 29th October, 2011 repeating similar matters as those deposed upon by the 1st Applicant.

3. The Petitioner is opposed to the Applicant's application. He filed replying affidavit dated 16th November, 2010 in which he stated *inter alia*; that after death of their father herein the Petitioner and the Applicants who is his brother; has had several meetings with the chief and the District Officer Kithirune West District to settle the matter but to no avail; that the Applicant refused to co-operate and agree to the filing of the Succession Cause; that chief issued a letter to the Petitioner to file the Succession Cause; that the cause was not filed secretly and that his proposed mode of distribution is fair because each of the deceased's son would get equal share.

4. I have carefully considered the application for revocation of the grant; the affidavits in support and in opposition. The parties counsel rival submissions. The issue for consideration is whether the Applicants have satisfied condition to warrant the revocation of the grant.

5. Section 76 of the Law of Succession Act provides:-

“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-“

6. The Forms filed in this cause by the Petitioner reveal that the Petitioner and the Applicants are sons of the deceased herein. The Applicants denied having consented to the making of the grant of Administration Intestate to the Petitioner a person of equal priority. They deponed that the signature on Form 38 is a forgery. The Petitioner in his replying affidavit stated that the Applicants refused to co-operate and agree to the filing of the Succession Cause. On considering the Petitioner’s averments I doubt whether the signature on Form 38 is that of the Applicants. It could be possible the Petitioner had a hand in the making of the same; but that can only be determined by handwriting expert.

7. Rule 26(1), (2) of the Probate and Administration Rules provides:-

“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.

(2) An application for a grant where the Applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the Applicant and such other evidence as the court may require”

8. Having considered Form 38 and provisions of **Rule 26(1)** and **(2)** of The Probate and Administration Rules and in light of the Applicant’s affidavits and that of the Petitioner; I have no doubt in my mind that the Petitioner did not issue notice to every other person entitled in the same degree as or in priority to him. That when the Applicants declined to co-operate the Petitioner did not cite the Applicants the refusal of the Applicants to co-operate in my view cannot be said to amount to renouncing of their rights so as to give the Petitioner right to petition for the grant alone. The Petitioner acted contrary to the provisions of the Law and his action can rightly be termed as fraudulent and/or amounting to concealment of material facts to the case. The grant issued I am satisfied was obtained by means of making of false statement or untrue allegations of facts essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

9. In view of the conclusion I have come to, I am not satisfied that the Petitioner can be trusted to administer the deceased estate alone. The evidence points to one thing, that is, acrimony between the parties but they have to learn to work as a team to administer the deceased estate. The Petitioner contravened express provisions of the Law of Succession Act and the Probate and Administration Rules, as I have found herein above, to warrant the revocation of the grant. I therefore find merits in the Applicants application. I therefore order as follows:-

a) That the grant of Letters of Administration Intestate issued on 15th April, 2010 to the Petitioner be and is hereby revoked.

b) The Petitioner herein Francis Gitonga M’Mwirichia and the two Applicants herein namely Julius Miriti M’Turuchiu and Gideon Mbaya M’Turuchiu are appointed joint administrators to the deceased estate forthwith and are at liberty to forthwith seek confirmation of the grant herein notwithstanding six (6) months period has not lapsed as this is an old matter.

c) The Applicants are awarded half costs of this application as they are

brothers to the Petitioner.

DATED AND DELIVERED AT MERU THIS 28TH DAY OF MAY, 2015

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Kiambi for the Petitioner
2. Mr. Ringera for the Objectors
3. Clerk – Penina/Mwenda

J.A. MAKAU

JUDGE