



IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 345 OF 2003

LESIT, J

**IN THE MATTER OF THE ESTATE OF SOLOMON MWAKA
NKUMARI.....DECEASED.**

CELINA KAIGONGIPETITIONER

V E R S U S

DOMINIC MUTUA NKUMARI.....OBJECTOR

RULING

1. This application is dated 25th June, 2012 brought under Rule 73 of the Probate and Administration Rules. It has been brought by way of Chamber Summons. It seeks the following orders:
 - i. **That the Honourable Court be pleased to set aside the order of confirmation issued herein.**
 - ii. **That any subdivision done to L.R. No. Abothuguchi/L.Kaongo/154 pursuant to the order of confirmation be cancelled.**
 - iii. **Costs be paid by the Respondent.**
2. The grounds in support of this application are cited on the face of the application namely:
 - i. **The confirmation was done before the hearing and disposal of the Applicants objection.**
 - ii. **The Respondent did not serve the objector with the summons for confirmation of grant.**
 - iii. **The Applicant was grossly prejudiced as he was disentitled of his share of the estate.**
2. That application is supported by an affidavit sworn by the Applicant/Objector. In that affidavit the Applicant explains that his Objection to the Petition filed on 13th July 2004 together with a cross petition is still pending. He avers that since filing the Objection and Cross Petition the then Petitioner died, and that no other grant has been issued to any other person. The Applicant contends that in the month of June 2012 he was shocked to learn that one, Gerald Mungatia applied for confirmation of the grant and that it was confirmed on 9th January 2012 and that the same had not been served upon him or his advocate.
3. There is a replying affidavit dated 27th August, 2012 sworn by the Petitioner Gerald Mungatia. It

- confirms that the grant was confirmed by this court on the 1st February 2012 and that at the time of the confirmation, the mode of distribution was done according to all beneficiaries' wishes and all were in agreement. It is also averred that the Objector purports to act on behalf of one John Mutiga, and that the said John Mutiga has filed a replying affidavit denouncing the representation by the Objector. The affidavit concludes by saying that the Objector has no right or merit to file any application to object to or set aside the order of confirmation.
4. The replying affidavit by one John Mutiga is dated 3rd January 2012. In it the deponent avers that he is one of the beneficiaries of the deceased and is now an adult and as such does not need the Objector to stand on his behalf. He confirms that he would like the share awarded to him from the estate of the deceased during the confirmation of the grant, be given directly to him and not through the Objector.
 5. The Applicant's counsel Mr. Murango Mwenda urged the application on behalf of his client. Counsel's main contention was that there was no grant to be confirmed because the Applicant's Objection and cross petition had not been heard. The record contention was that the application in confirmation was not served upon the Applicant and he was therefore unaware of the application.
 6. Mr. Mwenda's contention was that the earlier grant issued to the Petitioner was revoked by consent on 24th June, 2004 with leave to the Applicant to file an Objection Cross Petition which he did. Counsel urged that in the circumstances the grant issued subsequently was irregularly issued.
 7. Ms. Nelima held brief for Mr. Kimathi Kiara and opposed the application on behalf of the Petitioner. Counsel urged that there was confirmation of Grant on the 1st February 2012. Miss Nelima urged that the application sought to cancel sub-divisions under the Grant and not the Grant itself.
 8. I have considered the application together with grounds for the same, affidavits filed herein for and against the application and submissions by the counsels herein.
 9. From the proceedings and pleadings herein it is clear that this Succession Cause was filed by **CELINA KAIGONGI** on 3rd November, 2003. The Grant of letters of Administration was issued on 29th January, 2004. On the 31st March, 2004, the Applicant herein DOMINIC MUTUA NKUMARI filed an application dated 18th February, 2004. In that Application the applicant sought two orders
 - a. The revocation/annulment of the grant of letters administration given to the Petitioner Celina Kaingongi.
 - b. Leave to Applicant to file an objection and cross petition.
 10. The Applicant fled the petition by way of Cross Petition on the 13th May, 2004, in which he sought to be issued with grant of letters of Administration over deceased estate.
 11. Before the Objection and Cross Petition could be heard, the Petitioner Celina died. The burial permit in her respect is dated 8th August 2005. Gerald Mungatia then filed an application dated 9th September 2005 seeking to be appointed the legal representative of the deceased Petitioner. That application was allowed by consent of Mr. Kimathi for Petitioner and Mr. Gichunge holding brief for Mr Mwenda for objector.
 12. The Objection and Cross Petition was then set down for hearing on 30th July, 2007. On the date filed for hearing of same, the matter did not proceed because Mr. Mwenda was absent. On 30th June 2008 both advocates to the parties sought time to negotiate and reach consent on the matters. The parties sought for more time to reach a settlement until Objector's advocate took 9th March, 2010 for the hearing of the Cross Petition on 11th November, 2009. The matter appears not to have gone before court.
 13. On 12th January 2012 Mr. Kimathi for the Petitioner took a date for confirmation of grant. The date taken was 1st February 2012 on the set date the Mr. Kimathi sent Mr. Otieno to prosecute the application for confirmation dated 9th January, 2012. All had signed the consent for the confirmation of the Grant and also the consent to the mode of distribution. The court granted the

application and confirmed the grant. The Certificate of Confirmation of Grant was issued on 1st February 2012.

14. The Applicant then filed the instant application, dated 25th June, 2012 on 28th June, 2012. As stated herein above, the Applicant sets to set aside the order of confirmation of grant and secondly to have any sub-divisions to the sole property forming the estate of the deceased be cancelled I will consider the three reasons given for the setting aside of the confirmation proceedings and order and cancellation of the subdivisions made to deceased estate.

15. The Applicant says he was not served with the summons for confirmation of grant, that confirmation was done before objection was heard and finally that the Applicant has been disinherited. That appears to be correct. Whereas the Objector's advocate took part in the appointment of the legal representative of the deceased Petitioner, he was not involved in the subsequent proceedings, nor is there any proof he was served with any notice of the matter before the confirmation was taken. The Objector was not given any opportunity to ventilate his pending application.

16. Having considered this application and the pending Objection and Cross Petition, it is very clear that the issues which need to be determined are only two namely:

- i. **Whether the Objector has locus standi to file an Objection and Cross Petition in this case?**
- ii. **Whether the beneficiaries consented to the mode of distribution of the estate of the deceased?**

17. In that regard the only orders I can make in respect of the Objector's application herein is to issue an inhibition order over the estate of the deceased pending the hearing and determination of the Objection and Cross Petition. In the result I find as follows:

1. **That the objector should be given an opportunity to prosecute his objection and cross petition.**
2. **That the Objection and Cross Petition should be heard by way of viva voce evidence.**
3. **That the issues for determination should be limited to two issues only namely.**
 - a. **Whether the objector has locus standi to file an objection and cross petition in this cause.**
 - b. **Whether the beneficiaries consulted to the mode of distribution of the estate of the deceased.**
4. **Pending the hearing and determination of the Objection and Cross Petition an inhibition be and is hereby issued over the deceased estate LR No. ABOTHUGUCHI/L.KAONGO/154.**
5. **The application to set aside the court's order confirming grant is dismissed.**
6. **The order to cancel subdivisions of the deceased estate as per the confirmed Grant issued on the 1st February, 2012.**
7. **Costs of this application be in the cause.**

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF JUNE 2014.

LESIIT, J.

JUDGE

