



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 264 OF 2008

**IN THE MATTER OF THE ESTATE OF M'ETHIRIA M'ITHITURA KIRUKU
ITHIRIADECEASED**

**ROSE
NKIROTE.....PETIT
IONER**

**ZAKAYO
KABERIA.....APPLICA
NT**

LESIIT J.

RULING

The Application under consideration is the one dated 22nd November 2010. It has been filed by an Intended Protestor and is brought under ss 47 and 76 of the Law of Succession Act, Rules 44, 49, 67 and 73 of the P&A rules and ss 128 and 129 of the Registered Land Act. The Application seeks that:

- 1. That service of this Application be dispensed with in the first instance due to the urgency of this matter.**

2. That there be stay of execution and/or implementation of the certificate of confirmation of grant issued to ROSE NKIROTE on 16th September 2009 with respect to Land Parcel No. NJIA/LIBURU/131 pending hearing and determination of this Application.

3. That the grant issued to the Petitioner and confirmed on 16th September 2009 be revoked and/or annulled.

4. That inhibition orders be issued against Land Parcel No. NJIA/LIBURU/131 pending hearing and determination of this Application and the order be served upon the Land Registrar Meru North District for compliance and penal notice do issue thereto.

5. That the Applicant be granted leave to file protest out of time.

6. That this honourable court be pleased to issue any other or such better orders as may be necessary to meet the ends of justice.

7. That costs of this Application be provided for by the Petitioner/Respondent

The application is based on the grounds:-

- (i) That the Petitioner filed this succession cause secretly.**
- (ii) That the Petitioner who is a married daughter to the deceased was not living with the deceased as at the time of his death but was living elsewhere with her husband.**
- (iii) That the deceased was an uncle to the Applicant who was living with him before his death.**
- (iv) That the Petitioner has granted shares to total strangers to the deceased's Estate.**
- (v) That the Applicant has been a dependant of the deceased estate but the Petitioner has not provided for him.**
- (vi) That there is a danger of the deceased's estate being alienated further by these strangers and the Petitioner who lives elsewhere with her husband named as Kubai in the confirmed grant.**
- (vii) That its only fair and just that the application be allowed and the applicant be provided.**

The application is supported by an affidavit sworn by the intended protestor of even date. The gist of the affidavit is that the Petitioner is the only child of the deceased, that she is married and lives elsewhere and that she filed the Petition secretly. It is deposed that the estate of the deceased belongs to the protestor's late uncle M'ethiria M'Ithitura Kiruku Ithiria who died on 17th January 2007. The affidavit goes on to state that the Petitioner was not living with her late father since 1993 and that the Applicant took care of the deceased providing him with food and other necessities including medication until 2007 when he died. The Applicant contends that he is a dependant of the deceased by way of taking care of him and for reason the burial permit for deceased burial was issued to him among others.

The Application is opposed. The Petitioner filed a Replying Affidavit dated 1st December 2010. In that affidavit the Petitioner contends that the Applicant is not related to the deceased, that he has never provided for the deceased and that he lived 4Km from the deceased home and therefore it was impracticable that he could have taken care of the deceased in the circumstances. The Petitioner contends that the Applicant is not entitled to a share of the estate of the deceased as the Petitioner is the sole heir to the estate.

I have considered the submissions made by Mr. Omayo for the Applicant and Mr. Akwalu for the

Petitioner.

The Applicant has cited S.47 of the Law of Succession Act, herein after the Act. That section provides that the High Court has jurisdiction to hear any Application and determine any dispute under the Act.

He has also cited S.76 of the Act which gives the court power to revoke or annul grants. The section gives the instances when a grant may be revoked or annulled. Mr. Omayo's submission is that the Applicant is entitled to a share of the estate of the deceased because he is a Defendant of the deceased. Mr. Omayo's contention is that the Applicant took care of the deceased when the Petitioner got married and so is entitled to a share of the estate.

S.76 of the Act gives circumstances under which a Grant can be revoked or annulled and provides as follows:-

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:-

- (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 persons 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.**

The Applicant has not brought himself within any one of those circumstances. He has not alleged that the proceedings leading to the issuance of the grant were defective; or that the Petitioner acted fraudulently either to make false statement or by concealment; or that the Petitioner obtained the grant by means of an untrue allegation of a fact to justify the grant; or that the Petitioner has failed to do any of the acts provided under that section. The provisions of the law cited by the Applicant do not support him in this Application.

In the Supporting Affidavit, the Applicant has given reasons why he feels that his is entitles to a share of the estate. The reasons given are that the Petitioner, the sole heir to the estate is a married daughter.

Secondly that the Applicant took care of the deceased between 1993 to 2007, the period when the Petitioner left the deceased home for her husband's home.

Mr. Akwalu has urged that the reasons given by the Applicant to support his Application are without merit. Counsel cited ss.29 and 35(5) of the Act. S.29 of the Act defines who a dependant as

“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;

(b) such of the deceased's parents, stepparents, grandparents, grandchildren, stepchildren, children whom the deceased had taken into his family as his own, sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death”.

The Applicant has described himself as one who calls the deceased an uncle. He has not described how that relationship comes about. It is however not disputed by the Petitioner. Under s.29 of the Act the Applicant does not qualify as a dependant of the deceased. S.35 of the Act provides for what a dependant of a deceased person will be entitled to. Under s.35(5) the Act Provides:

“(5) Subject to the provisions of section 41 and 42 and subject to any appointment or award made under this section the whole residue of the net intestate estate shall on the death, or in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”.

The law provides that the whole residue of the intestate estate of a deceased person shall devolve upon the surviving child if there be only one. This is subject to the provisions of s.41 and 42 of the Act, and or any appointments or awards made by the court. Ss 41 and 42 provides for a trust for surviving children or grand children of a deceased and for the taking into account payments made to the surviving child while the intestate was alive.

These sections do not therefore apply to this case.

The Applicant is not saying that he has received any appointment or award through court process, which affects the distribution of the estate of the deceased. He is not saying he is a child of the deceased or that the deceased took him in as his child. Clearly the Applicant has no legal right or legal interest to inherit the estate of the deceased.

The Applicant is complaining the Petitioner has given away part of the estate to strangers, who include her husband. Is that a reason for the court to order that the Applicant should receive a share of the estate? That cannot be a basis of challenging the grant. The Applicant is a busy body. He has no legal or other right demonstrated herein why he should share in the estate of the deceased. The Application herein was made to annoy, to delay the distribution of the deceased estate, and is an abuse of the court process.

I find no merit in this Application and consequently and dismiss it in total with costs to the Petitioner

Dated signed and delivered at Meru this 17th Day of February 2011.

LESIIT J.

JUDGE

17TH February 2011

Coram:

Lesiit J.....Judge

Kirimi.....Court clerk

Mr.For Petitioner

Mr.....For Objector

Ruling was read, signed and delivered in open court this 17th February 2011.

LESIIT J.

JUDGE

Dated Signed and delivered at Meru this 17th day of February 2011.

LESIIT, J

JUDGE

