



This is an application dated 20<sup>th</sup> September, 2011 seeking prayers 3,5,6 and 7 being the following orders:-

- “ 2. That pending hearing and determination of the cause or until further orders of the court, an order be issued, restraining the Petitioner/Respondent and his representatives, servants, employees, agents, and anyone else acting or claiming for, on behalf of or through him, from selling, leasing, charging and/or whatsoever interfering with 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Applicant's occupation, cultivation, use and enjoyment of the deceased's L.R.No.ABOTHUGUCHI/GAITU/334 and L.R.NO.ABOTHUGUCHI/U-KAONGO/108.**
- 3. That pending hearing and determination of the cause or until further orders of the court, an inhibition do issue, inhibiting registration of any dealings over L.R.Nos ABOTHUGUCHI/L-KAONGO/596,ABOTHUGUCHIGAITU/334and ABOTHUGUCHI/KAONGO/1096.**
- 4. That the grant of representation to Estate of the late M'Mugambi Guoko alias Mugambi Guoko alias Mugambi Guoko issued to Andrew Mbutia, the petitioner herein, and confirmed on 01.02.2011 be revoked, a fresh grant do issue to Mathew Felix Mugambi and he be granted leave to apply for confirmation of the same before lapse of mandatory six(6) months.**
- 5. That costs of the application be provided for”.**

The application is based on the following grounds:-

- I. That the applicants are heirs of the deceased estate but the petitioner has refused to give them their respective entitlements since 01/02/2011.**
- II. That the petitioner has obstinately vowed to forcibly kick some of the heirs from portions of the estate they occupy and cultivate, and charge or sell the land to third parties’.**
- III. That the petitioner has declared having sold a portion of the deceased land to one Ngondoki now that he is registered there over.**
- IV. That some of the heirs had not consented on the mode of distribution, which mode is unfair to some of the heirs’.**
- V. That a purchaser was left in the distribution.**
- VI. That the grant was confirmed following untrue allegations of facts, forgery and misinterpretation.**
- VII. That the petitioner has failed, without a reasonable cause to diligently administer the estate.**

The application is supported by supportive affidavit of Mathew Felix Mugambi alias Mateo Mbaabu on his behalf and that of the co-applicants. It is deponed that the deceased was father to the parties herein and his estate comprised of L.R.Nos **ABOTHUGUCHI/L-KAONGO/596, ABOTHUGUCHI/U-KAONGO/1096, ABOTHUGUCHI/GAITU/334** and Plot No.13 situated in Mitunguu market. That all deceased heirs agreed to sell plot No.13 to Tarcisio Kinyuru to raise money to finance this cause and share the rest of the estate to the heirs and balance of the sale proceeds to be shared amongst petitioner, 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> applicants.

That the applicant when filing application for confirmation of grant did not seek consent of some of the heirs and even caused some of the heirs to sign blank consent forms. It is deponed the petitioner in his application for confirmation of grant did not mention the purchaser who was consequently excluded from the grant, yet he had paid Kshs.500,000 in respect of Plot No.13.

That following confirmation of grant on 1/2/2011 the petitioner has unreasonably and absolutely refused to transfer to each of the heir, his or her entitlement. It is deponed the applicant has denied having sold undisclosed portion of the Estate to one Ngondoki. That the petitioner and the said Ngondoki are said to have threatened to forcibly evict the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 6<sup>th</sup> Applicant's from the portions of L.R.No.ABOTHUGUCHI/GAITU/334 and ABOTHUGUCHI/U-KAONGO/1096 in which the said applicants have been cultivating if they fail to vacate on their own volition. It is deponed the scheme is to disinherit the 2<sup>nd</sup> applicant who is a daughter to deceased and 3<sup>rd</sup> and 4<sup>th</sup> applicants who are grandchildren of the deceased to enable the alleged purchaser assume possession of part of the deceased estate. It is further deponed that 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> applicants occupy portions of the deceased's parcel of lands which they have developed extensively and have dwelling houses therein. It is further deponed the petitioner has refused to share the parcel now in his name and vowed that he can either offer them as security for loan or sell the land as he pleases.

The deponent has attached green card in respect Abothuguchi/Lower-Kaongo/596, Abothuguchi/U-Kaongo/1096 and Abothuguchi/Gaitu/334 all transferred into Petitioner's name on 28/2/2011.

The deponent challenges the distribution stating that Abothuguchi/Kaongo/596 should have been shared including Bernard Kinyua Mugambi. That L.R.No.Abothuguchi/U-Kaongo/1096 is said should have reflected Wilfred Sony Muriuki instead of Thomas Mbobua Mugambi, who passed on long time ago. L.R. No.Abothuguchi/Gaitu/334 is said not to have been shared fairly. The scheme given includes 9 individuals whereas that given to court by petitioner was for seven individuals. This is said to have disinherited some individuals who include Benjamin Murerwa. That Plot 13 sold to Tarcisio Kinyuru was omitted in application for confirmation of grant.

The petitioner filed replying affidavit on 31<sup>st</sup> October, 2011. The petitioner admitted the properties Abothuguchi/L-Kaongo/596, Abothuguchi/U-Kaongo/1096,

Abothuguchi/UGaitu/334 and Plot 13 form part of Estate of Mugambi M'Guoko alias Mugambi Guoko. He stated that he has not refused to transfer the said parcels to the applicants as per confirmed grant dated 1<sup>st</sup> February, 2011, marked as "ADMI". He stated at time of confirmation of the grant all beneficiaries were present and all agreed the same be confirmed. The petitioner relied on annexure "ADMII" claiming all signed the consent.

Mr. Mbaabu in his argument in court relied on the Chamber summons grounds on the face of it and affidavit by the applicants. I have analyzed all what is in the said Chamber Summons and Supporting Affidavit. Mr. Mbaabu in his argument submitted that the petitioner left some beneficiaries out and gave example of Bernard Kinyua Mugambi and Wilfred Sony Muriuki. That petitioner sold part of the Estate to Ngondoki. That he argued distribution was not done as per parties expectation. That the petitioner's acts are against the interest of the estate.

The petitioner in his response in court was that he never omitted anyone amongst the deceased beneficiaries. He later admitted having omitted Bernard Kinyua. He said he refused to transfer land to Bernard Kinyua. He denied having threatened to evict anyone and that he has no intention to do so. He argued that the beneficiaries have refused to give him copies of ID cards and PIN cards to enable him effect transfer.

He claims he is willing to effect transfer. He further stated that he has not denied anyone to cultivate and pleaded with court to grant him time to effect transfer.

Mr. Mbaabu in his reply stated that the petitioner has not told the court the whole truth as the matters he raised are not in his Replying Affidavit. He stated that it has not been denied the distribution is not fair to all beneficiaries. It was also stated the petitioners did not deny selling the deceased land to one Ngondoki and was submitted that was an act of petitioner abusing his powers as an Administrator to the detriment of other beneficiaries.

It was submitted further the petitioner did not deny disinheriting some of the beneficiaries. The petitioner was challenged for his failure to explain the action he had taken after issuance of the grant.

The applicants have demonstrated before this court that the petitioner sold undisclosed portion of the estate of the deceased to Ngondoki. The petitioner did not deny having sold a portion to the said Mr. Ngondoki.

Under Section 45 of The Law of Succession Act it is provided:-

***" 45(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under the Act no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person".***

The Section is clear that the Status Quo as of the time of the deceased ought to be maintained. The deceased estate ought to be preserved as of the time of death. The petitioner's acts of attempting to sell or selling of the deceased property to anyone including Mr. Ngondoki is illegal and null and void for it is against Section 45 of The Law of Succession Act.

Section 82(ii) of The Law of Succession Act provides:-

***"(ii) No immovable property shall be sold before confirmation of grant"***

It is therefore clear that the sale of the undisclosed portion to Mr. Ngondoki is null and void; and no part of deceased estate can be transferred to such a purchaser. This is indeed an act of intermeddling with deceased estate. On the issue of occupation, cultivation, user and enjoyment of the deceased L.R.No.Abothuguchi/Gaitu/334 and L.R.No.Abothuguchi/U-Kaongo/1096, the Petitioner has denied threatening to evict the applicants. He denied ever denying anyone to cultivate the land. The applicants averred that they have developments on deceased property, including dwelling houses, and fruit trees. This was situation obtaining at time of death of the deceased.

This is not an act of intermeddling but is status quo that was at the time of death of deceased. The applicants occupation, cultivation, user and enjoyment should therefore not be threatened or any steps taken to change the status quo as of the time of death of the proprietor of the land, the deceased.

The petitioner on application for grant through his application dated 11<sup>th</sup> November, 2011 he included the name of Bernard Kinyua Mugambi as a beneficiary but did not get him to sign the consent. In the scheme of the distribution the petitioner did not have any portion of land awarded to Bernard Kinyua Mugambi. In respect of Abothuguchi/U-Kaongo/1096 the land was awarded to petitioner and Thomas Mbovia Mugambi, who is said to have died long time ago. The law is clear that no property can be awarded to a deceased person.

I have looked at the confirmed grant produced by the petitioner marked "ADMI" dated 1<sup>st</sup> February, 2011 and green card in respect of the deceased properties which are now in full names of the petitioner alone. The titles were issued on 28<sup>th</sup> February, 2011. I have noted the titles do not include any other beneficiaries nor do they show under what circumstances the petitioner was registered.

The petitioner at the time of confirmation of the grant misled the court to believe all beneficiaries were agreeable and had consented to the distribution when that was not the case.

The petitioner by his conduct cannot be trusted and it is in the interest of the deceased estate that inhibitions do issue, inhibiting registration of any dealings over L.R.No.Abothuguchi/L-Kaongo/596, Abothuguchi/Gaitu/334 and Abothuguchi/U-Kaongo/1096.

On prayer 6 in which the applicants are seeking that the grant to the estate of the late M'Mugambi Guoko alias Mugambi Guoko issued to Andrew Mbuthia Mugambi, the petitioner herein, and confirmed on 1/2/2011 be revoked, a fresh grant do issue to Mathew Felix Mugambi and he be granted leave to apply for confirmation of the same before lapse of mandatory six(6) months. In my opinion this is a serious application that requires all parties be heard by way of viva voce evidence. That by granting this prayer without giving all parties an opportunity to be heard would amount to denying all parties the right to be heard.

Land issues are very sensitive and courts should be slow in making decisions that may shut out any interested party without being afforded an opportunity to be heard and even more in matters of succession fitting family members.

In application for revocation or annulment of grant the application ought to be brought to court by way of summons on grounds set out under Section 76 of The Law of Succession Act. The grounds are set out as follows:-

- 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 estate.***
- 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.*

The application before me is not based on grounds set out under Section 76 of The Law of Succession Act, but as I had pointed earlier on this is a succession matter, in which the main assets are parcels of lands which are highly contentious issue in this country and in the best interest of all the issue of revocation or annulment should be determined by way of viva voce evidence once a hearing date is taken at the registry.

In the circumstances I will grant prayers 3, and 5 of the Chamber Summons dated 20<sup>th</sup> September, 2011. In respect of Paragraph 6, I order that parties take a hearing date on priority basis at the registry.

On issue of costs as the petitioner and the applicants are all family members I order that each party bear its own costs.

**DATED AND DELIVERED AT MERU THIS 19<sup>TH</sup> DAY OF DECEMBER, 2011**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN PRESENCE OF:-**

- 1. M. Kariuki for the respondent**
- 2. Andrew Mbuthia in person**

**J. A. MAKAU**

**JUDGE**