



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Succession Cause 369 of 2008**

IN THE MATTER OF THE ESTATE OF ZAKAYO MUNYI THORONJO (DECEASED)

MICHAEL THORONJO.....APPLICANT

VERSUS

**ERASTUS THORONJO.....1ST RESPONDENT
(SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOAN NYAGUTURI MUNYI)**

CECILIA GATHIGIA MUNYI.....2ND RESPONDENT

RULING

MICHAEL THORONJO, the applicant herein, took out the Summons for Revocation/annulment of Grant dated 21st July 2008 pursuant to *Section 76* of the Law of Succession Act and under *rules 44 (1) and (2)* and *73* of the Probate and Administration Rules. In the aforesaid Summons, the Applicant applied to have the grant issued to Joan Nyagaturi Munyi (now deceased) and Cecilia Githiga Munyi vide Nyeri, S.R.M. SUCC. No. 17 of 1984 and confirmed on 18th May 1988 revoked and or annulled. He also applied for the names of JOAN WAMBUI MUNYI and CECILIA GATHIGA MUNYI to be cancelled from the register as proprietors of the parcel of land known as MAGUTU/GAIKUYU/184. The Applicant swore an affidavit he filed in support of the Summons.

ERASTUS THORONJO (1st Respondent) filed a Replying Affidavit to oppose the Summons. Wachira Zakayo filed a further affidavit to oppose the Summons. When the Summons came up for hearing, learned advocates appearing in the matter agreed to file written submissions which they did to dispose of the application.

I have considered the grounds put forward on the face of the Summons and the facts deponed in the affidavits filed for and against the Summons. I have further considered the written submissions filed by learned counsels. The Applicant has put forward two main grounds. First, it is the Applicant's argument that the Petitioners failed to disclose the fact that he was the only person who survived the deceased. In short, the Petitioners are accused of material concealment and fraud. Secondly, that the Nyeri Senior Resident Magistrate's Court did not have the pecuniary jurisdiction to hear and determine the succession cause.

The Respondents urged this Court to dismiss the Summons. It is said the Summons is *res subjudice* because the Applicant and 9 others are said to have filed a similar application against the 2nd Respondent, (Cecilia Munyi) his mother and step-brothers vide Nyeri H.C. Misc. Application No. 100 of 2001. It is said he sought for similar orders. The Respondents further pointed out that the Nyeri S.R.M. SUCC Cause No. 17 of 1984 was initially filed by Joan Nyagaturi Munyi, deceased (1st wife of the deceased) but the same was objected to by Cecilia Munyi, the 2nd Respondent herein. She stated in the objection proceedings and the cross-petition that she was objecting on her own behalf and her children. Both the late Joan and Cecilia were later appointed joint administratrixes of the Estate of Zakayo Munyi, deceased. The dispute over distribution of the Estate was referred to arbitration by the District Officer, Mathira. The award was filed as the judgment of the Court in which the late Joan was given 10 acres to hold in trust for herself for life and for her children. The 2nd wife (2nd Respondent) was given 24.9 acres. When the 1st wife died, her Estate was distributed amongst the dependants. It is also the submission of the Respondents that the application does not specify under which subsections of *Section 76* the Applicant relies on.

It is also said that the application was filed after an inordinate delay. In fact the entire Estate has been distributed. It is argued that the Applicant should lodge his claim from the 2nd Respondent.

After considering the material placed before me, there is one preliminary issue which arose from the submissions of Mr. Wachira, learned advocate for the 1st Respondent. The question is whether or not this application is *res subjudice*. It is said that the Applicant has filed a similar application vide Nyeri H. C. Misc. App. No. 100 of 2001. It is said the Applicant has sought for similar orders against the 2nd Respondent and 9 others. This allegation has not been controverted. I have no reason to disbelieve that assertion. I have taken the liberty to call for the aforesaid file and it is obvious from the record that the Applicant herein and 9 others had applied for the grant to be revoked on two main grounds, that is, First that the grant was obtained by concealment of material facts. Secondly, that the same was obtained by the making of an untrue allegation of fact. The Applicants named the 2nd Respondent herein as the first Respondent while the 1st Respondent herein was named as the 2nd Respondent. It is obvious that this application is *res subjudice*. I hereby order the same to be struck out for it was filed in abuse of the court process.

Having dealt with the preliminary objection, let me now turn my attention to the merit of the summons. The first ground raised is that the Senior Resident Magistrate's Court lacks the pecuniary jurisdiction to hear and determine the succession cause. I have perused the estimated value given to the parcel of land known as MAGUTU/GAIKUYU/184 to be Ksh.35,000/=. The Applicant has merely stated the acreage of the land without attaching any valuation to show the actual value of the land. *Section 48* of the Law of Succession Act allowed Magistrates courts to hear and determine succession causes in respect of estates whose gross value does not exceed Ksh.100,000/=. There is no evidence that the land was beyond Ksh.100,000/= in 1984. Having failed to discharge that burden, the application must fail.

The other ground argued is to the effect that the Applicant did not specify under which sub-section of the said *Section 76* or whether

the Applicant is seeking for revocation or annulment of the grant. I agree that the Applicant may not have specified the subsections to Section 76 he was relying on. However, I have perused the prayers the Applicant sought and it is apparent he has alleged there was concealment of material fact. The Applicant has named his mother, Cecilia Munyi, as the 2nd Respondent. The 2nd Respondent who was expected to have mentioned the Applicant's name did not do so when she filed objection proceedings and a cross-petition. She is now in agreement with her son, that is to say that she did not include the Applicant's name. The 2nd Respondent has not explained why she did not include the name of the Applicant yet she fully participated in the proceedings before the Senior Resident Magistrate's Court as representing the 2nd house. I do not think the issue of concealment in the circumstance is a genuine ground. It would appear the 2nd Respondent concealed that fact to use it on a rainy day. I agree with the submissions of Mr. Wachira that the Court should not countenance such a ground because it was intentionally withheld to frustrate the administration of the Estate. I also agree that the issue was raised too late in the proceedings so that if I accede to the application, it would cause untold suffering to the other members of the family. Further more it would appear the Applicant and the 2nd Respondent have colluded to use the ground to frustrate the other beneficiaries. The Applicant's claim lay with the 2nd Respondent. The name of the Applicant was withheld for reasons well known to the 2nd Respondent alone. The end result is that that ground was not genuinely raised. For that reason the same is rejected.

In the final analysis, the Summons is ordered struck out and dismissed with costs to the 1st Respondent.

Dated and delivered at Nyeri this 23rd day of February 2010.

J. K. SERGON
JUDGE

In open court in the presence of Miss Lucy Mwai holding brief for

Muchoki for Applicant and Miss Kabethi holding brief for Mugo for

Respondent.