



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 11 of 1983

JAPHET MIRITI M'MWENGWA.....PETITIONER/RESPONDENT

V E R S U S

SEBELINA KAIRIGO M'MIRITI.....1ST OBJECTOR/APPLICANT

AGNES NYAI M'MIRITI.....2ND OBJECTOR/APPLICANT

Law of Succession

- *Annulment/revocation of a Grant s.76 of the Law of Succession Act Cap 160 Laws of Kenya and Rules 17, 44 and 73 of the Probate and Administration Rules.*
- *Land Law inhibition s.128 Registered Land Act (Cap 300 Laws of Kenya)*

R U L I N G

This Ruling relates to an application by way of a Chamber Summons dated and filed on 25th April 2005 in which the two objectors seek:-

- An order of inhibition against the land parcel title No. ABOGETA/LOWER CHURE/210 pending the determination of their claim against the Petitioner/Respondent.**
- An order of annulment/revocation of the grant of letters of Administration made to the petition and confirmed on 24.10.1986,**
- An order granting the applicants leave to file objection and cross petition out of time.**
- Costs be in the cause.**

The Application was supported by the joint Affidavit of the Objectors/Applicants Sebelina Kairigo M'Miriti and Agnes Nyai M'Miriti, the daughters of the deceased Gituoki Mbuuru and the grounds that:-

- 1) the petitioner is not related to the deceased herein in any way,**
- 2) the applicants are the true daughters of the deceased,**

3) the deceased had no son and only left the applicant daughters surviving him together with the widow.

4) the cause (11/83) was filed without notice to the applicants or their consent being beneficiaries entitled.

There are two issues involved in this application **firstly** whether an inhibition should issue, and **secondly** whether, the Grant confirmed under the Ruling of 24th October 1986, by E. M. Githinji Esq. the Senior Resident Magistrate Nkubu, (and now Judge of Appeal) should be annulled or revoked. A confirmed grant may be annulled or revoked upon proof of any of the grounds set out in Section 76 of the Law of Succession Act (Cap 160, Laws of Kenya). The Section 76 reads-

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-

(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 concealment from the court of something material to the case.

(c) that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

(d) - (e) not in issue here.

On the first issue on the prayer on order of inhibition unless first withdrawn by the court under Section 128(4), will prevent the Petitioner/Respondent from dealing with the subject land while the inhibition is subsisting under the said provision of the Registered Land Act, (Cap 300, Laws of Kenya).

It is acknowledged that there is already in existence a caution against any dealing in the land without reference to the Objectors/Applicants. That is the effect of a caution on the register of any land registered under the Registered Land Act. An order of inhibition has the prevents the dealing with the land without first removing the inhibition by order of court. An order of inhibition in addition to the caution would in my view unnecessarily burden the land with encumbrances which encourage parties to delay in determining their disputes. For instance the Appellant in **Meru HCCA No. 45 of 2002** has taken no steps to prosecute the appeal and is liable to dismissal for non-prosecution. I therefore, decline to grant the prayer for an inhibition.

On the more important issue of annulment/revocation of the Grant, I see no grounds under the provisions of Section 76 of the Law of Succession Act aforesaid which would justify the annulment or revocation of the Confirmed Grant as per the Ruling of Hon. E. M. Githinji Senior Resident Magistrate as he then was.

The Petitioner/Respondent may not have been the deceased Gituoki Mburu biological son. He was however, the son of his step biological brother, one Muchai by his father Gituoki Mburu though from the first wife from Kiijo village. This son was Mwegwa the Petitioner/Respondent herein. The late Gituoki Mbuuru, was a World War I veteran. Upon his return after the war, he found his elder brother Muchai had married a girl called Njaga who had given birth to Mwegwa. Unfortunately Muchai got mentally sick and was divorced by his wife who then returned to her parents with her son Mwegwa.

Upon Gituoki's return from the war, he went and collected his brother's son Mwegwa, and they lived together – Gituoki subsequently married his first wife called Nyai and after staying without a child they divorced. Gituoki married another wife Muthoni while pregnant, and upon giving birth, mother and child where returned to the paternal father of the child.

Gituoki was thus left with Mwegwa his brothers (Muchai's son), and had him circumcised. Karimi

Gituoki was the 1st wife of Gituoki. She had first been married to one M'Mbogori and was inherited in a levirate marriage by Gituoki after the death of her husband. The third wife lived with Mwendwa throughout without Gituoki getting any other child.

When Mwendwa, married it is Gituoki who paid dowry M'Mwendwa gave birth to Japhet Miriti Mwendwa, the Petitioner/Respondent and two daughters Kairigo and Nyai. When Gituoki found that he could not have any male child, in (1964) he told M'Mwendwa to give him one son, to be looking after him and M'Mwendwa gave him the Applicant Miriti who by custom became the deceased Gituoki's "**brother**"

In brief the genealogy of Gituoki shows that the Petitioner/Respondent was a direct descendant of the root of Gituoki Mbuuru and upon his death in 1965, he left his wife the applicant mother and the petitioner living together peacefully and after land demarcation it is the Petitioner/Respondent who paid for the property compensation to the former land owners.

The foregoing are the findings of 19 elders and Murungi M'Nkanata, Chief Kanyakine Location filed in court on 25th July 1986 when the Objector/Applicants say on oath was the Petitioner/Respondent is not related to the deceased in any way, they lied and are guilty of swearing a false affidavit.

It is also not true that they suddenly discovered in April 2005 that their father's estate (being title No. ABOGETA/L-CHURE/210 had been transferred to the names of the Petitioner without notice to them or without their consent. This is because **Succession Cause No. 11 of 1983** a subject of inquiry outlined above and also elaborate notices to the chief of Abogeta, South Imenti Division dated 17th March 1983 requiring the same to be affixed or placed-

(a) On a prominent place in the nearest trading centre.

(b) Chief's notice Board, and

(c) On the property or land Parcel of the deceased.

2) A report dated 21st June 1984 by the Chief Kanyakine Location (Muriungi M'Nkanata) stating that the deceased had also two daughters namely Celina Kairigo married to M'Miriti and Agnes Nyai married to Muthamia Manene.

3) A confirmation dated 8th March 1985 by the Muriungi M'Nkanata Chief Kanyakine Location, that the deceased Gituoki Mburu died in the year 1965, and that the heir is Japhlet Muriuki M'Mwongela the step son of the deceased.

It was also the subject of a reference to the Elders per order of the Learned Senior Resident Magistrate E. M. Githinji Esq. on 20th June 1986 on determination of the relationship between the Petitioner (Miriti) and the deceased (Gituoki), and the Chief and nineteen(19) Elders Report forwarded to the court by Festus Muriungi Assistant Chief per his letter of 22nd July 1986. This report leads to the Learned Senior Resident Magistrate's Ruling and Confirmation of the Grant Temporary Grant on 24th October 1986 and the apportionment of the compensation on the acquisition of part 2 of the subject land by the Government for the construction of the Thuchi – Nkubu road in the sum of Ksh. 36,064/- whereof the Respondent apportioned Ksh.20,000/- himself, Karimi Gituoki (widow) ksh.10,000/- and the Objectors Zaverina Kairigo (Ksh.3,032/-) and Agnes Nyai (Ksh.3,032/-) each.

The objectors have not said in their joint Affidavit in support of their application for the various orders they seek that they or their mother were strangers to that money or that they did not receive it. It is also to be observed that the objectors' mother Karimi Gituoki had on 27th May 1985 appointed the firm of Maitai Rimita & Co Advocates to act, for her. It is most unlikely that the objectors' mother kept them in the dark, if the Petitioner/Respondent did so, which I find highly unlikely from the above analysis of the evidence available to the court.

In the event therefore, I find in the context of Section 76 of the Law of Succession Act, aforesaid, no ground for the annulment of the Grant confirmed on 24th October 1986.

For those reasons the objectors application dated 19th April 2005 and brought under a Certificate of Urgency of the same date lacks merit and the same is dismissed with a direction that these being family disputes each party shall bear its own costs. I further direct that the appeal in this matter, being Meru **HCCA No. 45 of 2002** be listed for hearing as a matter of priority.

There shall be orders accordingly.

Dated, Delivered and Signed At Meru this 22nd Day of May 2009

M. J. ANYARA EMUKULE

JUDGE.