REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC CIVIL APPLI 205 OF 2000

ONESMUS WAWERU GITHIOMI ..... APPLICANT

VERSUS

KENNETH GITHAIGA MWANGI ..... RESPONDENT

R U L I N G

On 6th November 2000, **Onesmus Waweru Githiomi** hereinafter referred to as "*the applicant*" took out summons for revocation or annulment of grant under rule 44 of the probate and Administration rules claiming that the grant of letters of Administration to **Kenneth Githaiga Mwangi** hereinafter referred to as "*the respondent*" issued on the 30th June 2000 was obtained through proceedings that were defective in substance and further that the grant was obtained by concealment from the court of something material to the case.

The application was supported by an affidavit sworn by the applicant. In the main, he deponed that the **Habel Mwangi Githaiga**, deceased did not die intestate as the respondent had led the court to believe when he petitioned and was granted letters of administration intestate. The true position was that the deceased died testate as he had left a valid will dated 11th August 1977 and the applicant had been named therein as the executor of the said will. A copy of the said will was annexed to the affidavit. It was the contention of the applicant therefore that the proceedings ought to have been by way of testate succession cause which in fact the applicant had filed vide succession cause number 346 of 1999 in the principal magistrate's court at Murang'a. However the respondent too had filed intestate succession cause number 280 of 1999 in the same court. The contention of the applicant is that the court erred by consolidating the two succession causes into cause number 280 of 1999 aforesaid meaning therefore that the proceedings were henceforth intestate. That the grant is yet to be confirmed and he believed that being the executor of the last will of the deceased, he had priority in seeking a fresh grant.

On being served, the respondent reacted by filing a replying affidavit dated 11th October 2002 in which he deponed that the applicant was a party to the proceedings he now wishes to nullify and that from the totality of circumstances he was satisfied with the consolidation. That he verily believed that the applicant ought to have appealed against the consolidation order as opposed to revoking the grant. That the granting of the instant application will be an exercise in futility in that the revocation of the grant will not terminate the proceedings before the lower court which the applicant depones are intestate.

Earlier on **Justice Khamoni** had given directions that the application be served on the respondent as well as each one of the adult beneficiaries in the estate of the deceased. Pursuant to that order**, Nicholas Kajuamba Mwangi, Gerald Macharia Mwangi, Donald Githaiga, Loise Njeri** and **Nduati Mwangi**

whom I will hereinafter refer to as "*the beneficiaries"* were served. They responded to the application by filing individual affidavits. The affidavits were similar in tone and tenor. They all supported the application. In a nutshell, they all deponed that they did not oppose the applicant's application for revocation or annulment of grant dated 15th November 2000 and the same should be granted as prayed. That they were aware that their deceased's father had left a valid will appointing the applicant as the executor of the said will and the proceedings herein ought to have been testate but that the respondent lied to the lower court when he filed an intestate succession cause.

The matter then came before me for further directions pursuant to rule 44(4) of the Probate and Administration rules. The parties agreed to have the matter heard and determined by way of affidavits. I agreed to the proposal and ordered that the application for revocation of grant be heard by way of affidavits filed and or record. For the applicant he chose to rely on his own affidavit in support of the application as well as all the affidavits sworn by the beneficiaries as aforesaid.

As for the respondent, he relied on his own replying affidavit as well as an affidavit sworn by one, **Dishon Maina** dated 23rd December 2005. He is one of he beneficiaries though. He parted company with his other siblings in so far as the revocation or annulment of the grant was concerned. He deponed just as the respondent had that the applicant was a party to the proceedings that he now wishes to nullify. That no material facts were concealed from the court and that if the applicant was unhappy with the order of consolidation he ought to have appealed.

I have carefully read and considered all the affidavits filed herein and the law. Section 76 of the law of succession Act, gives unlimited and unfettered jurisdiction to this court to revoke and or annul a grant. It provides:-

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 he 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 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 applicant has anchored his application on the grounds (a) and (b) above. It is common ground that the applicant petitioned the principal magistrate's court, Murang'a for the grant of Probate of a written will in succession cause number, 3346 of 1999. It is also common ground that the respondent petitioned the same court for the grant of letters of administration intestate. It is also common ground that the two petitions were consolidated. It is also common ground that following the consolidation a grant of letters of administration intestate was subsequently issued to he respondent.

When this application for revocation and or annulment of the grant was filed, this court called from the PM's court Murang'a, the two succession cause files namely succession cause numbers 280 of 1999 and 346 of 1999 respectively. I have carefully gone through these court files and have noted that succession cause number 280 of 1999 was filed earlier than 346 and ordinarily therefore it should take precedence over succession cause number 346 of 1999. However by a letter dated 28th March 2000, under the hand of the applicant and addressed to the principal magistrate, Murang'a, he stated:-

"**I am the petitioner in this cause. I have learnt that there is another succession cause No. 280/99 in respect of the same deceased filed by KENNETH GITHAIGA MWANGI.**

My request, your Honour, is that this matter be placed before you on 31.3.2000 when Succession Cause comes up for hearing of an application by Gacheru J. & Co. Advocates for issue of letter of administration

I intend to apply for consolidation of the two matters under the provisions of Order XI rule I and 2 of the Civil Procedure Rules Raised (sic) (1985).

I undertake to pay the charges, if any."

That letter was received by the court on the same day. The court duly complied with the applicant's request and when the matter came up before **Wanjiku F. F.** (P.M.) on 30th June 2004, the record shows that both the applicant and the respondent were present. A consent order was then entered in these terms:-

"**..... By consent this case consolidated with 346/99 as the deceased is the same person. Also by consent letters of administration given to the son of the deceased who is Kenneth Githaiga to be confirmed within 6 months. Petitioner in Succession 346/99 may file an objection ....."**

From the foregoing can it really be said that the proceedings leading to the grant of letters of administration intestate to the respondent were defective in substance? I do not think so. It is the applicant who initiated the move to have the two causes consolidated knowing very well that whereas he had petitioned for grant of Probate the respondent had petitioned for the grant of letters of administration intestate. When the matters came up for hearing, he consented to the grant of letters of administration intestate being issued to the respondent. The applicant could have objected to the grant at that stage based on the grounds or reasons he has advanced in support of the instant application. He did not. He was even given leave to file objection proceedings by the court. He did not take up the challenge. He cannot now be heard to fault the court and or the respondent for his own failures. He had an opportunity to raise the concerns that he has ventilated in this application and did not seize it. He is accordingly estopped from canvassing those concerns since he acquiesced in the process. By so doing he waived his right to prosecute his petition for grant of probate.

In consolidating the two succession causes, the court did not act suo moto. It was moved by the applicant. We all know that a consent is in the nature of a contract that is binding on the parties to the same. The applicant is clearly attempting to resile from that consent by filing this application. That cannot be allowed. I am not aware of any law which says that a consent cannot be entered into where there are two succession causes in respect of the estate of the same deceased person one being testate and the other intestate. The applicant made his bed and must sleep on it. He cannot blame anybody for the consequences that have flowed as a result of the consent order he entered into as aforesaid.

Was the grant obtained by concealment from the court of something material to the case? Once again the answer is emphatic NO. The respondent never concealed to the court that there was another succession cause 346 of 1999 relating to the same estate of the deceased. How could he have done so when the petitioner in the said succession cause was present in court himself and when the said petitioner on his own free will applied for the consolidation of the two causes. The two succession cause files were available before the learned magistrate when the consent order for consolidation was made. Where then is the concealment? If there is any modicum of concealment and I do not detect any, then the blame lies

squarely with the applicant.

If the applicant felt aggrieved by the order of consolidation aforesaid, nothing stopped him from going back to the same court and asking for the same to be reviewed and set aside. Indeed he could still have even appealed. He chose none of those options available to him. There is therefore no basis for the revocation of the grant. To my mind this application is an afterthought designed and or calculated to achieve ulterior motives, misconceived and indeed an abuse of the process of court. It is accordingly dismissed with costs to the respondent.

Dated and delivered at Nyeri this 20th day of November 2008

M. S. A. MAKHANDIA

JUDGE