



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Succession Cause 414 of 2004**

**TITUS M. MUKUNDI GATUMBO ..... PETITIONER**

**Versus**

**DAVID MWANGI MOIGO ..... OBJECTOR**

**JUDGMENT**

Moigo Mukuha Thiongo died on 26<sup>th</sup> June 1994. Letters of Administration intestate in respect of his estate were applied by Titus Mukundi Gatumbu. Titus Mukundi described himself as a step son of the deceased. He also listed David Mwangi Moigo as a son of the deceased amongst other beneficiaries. It should be noted that David did not sign consent to the petition by Titus and neither was he cited. David according to part V of the Law of Succession had preference to seek grant. That being so Rule 7(7) of the Probate and Administration Rules was applicable and Titus as a petitioner ought to have cited David;-

***7(7). “Where a person who is not a person in the order or preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has:-***

***(a) Renounced his right generally to apply for a***

***grant; or***

***(b) Consented in writing to the making of the***

***grant to the applicant; or***

***(c) Been issued with a citation calling upon him***

***either to renounce such a right or to apply for a grant.”***

David has now applied for revocation of grant issued to Titus on 17<sup>th</sup> December 2004 the court directed that the application for revocation be heard by way of affidavit evidence. David stated in his affidavit in support of the summons for revocation that the deceased has only two surviving children that is himself and Wangui Moigo. Titus was the son of the deceased brother and that accordingly he was not a step son of the deceased. That the father of Titus was Gatumbu Mukuha. The applicant stated that Titus and his two brothers had already obtained their father’s inheritance and that consequently the property of the deceased in this estate should not be inherited by them. That Titus was the registered owner of his

deceased father's property which was subdivided amongst his three sons and as a result Titus was registered as owner of OTHAYA/ITEMEINE/1039. The applicant said that Titus does not have any legal or beneficial interest in the suit property, that is, OTHAYA/ITEMEINE/261. The applicant finally stated that Titus concealed the truth in petitioning for letters and consequently failed to obtain the applicants consent because of that concealment. That he also misrepresented himself as a stepson of the deceased. In his replying affidavit Titus accepted that his father was the brother of the deceased in this estate. That relationship to his understanding made him a stepson. He said that in petitioning for letters of administration he did inform the applicant who did not object. He then said that the history of the suit property was that it was owned by three persons. That is the deceased, his father and another brother called Gitonga Mukuha. The family of Gitonga Mukuha had surrendered their 3<sup>rd</sup> share to him. That accordingly he was entitled to two thirds of the suit property whilst the applicant was entitled to a one third.

There is no evidence presented before court to support the allegation of Titus that the suit property was owned by 3 brothers. The title of the suit property is in the deceased name absolutely. The title does not show that the deceased held the property in trust for anyone. Titus claim for this land fails. Titus did not deny that he has inherited his deceased father's land. The finding of this court is that the suit property should only go to the children of the deceased as per section 38 of the law of succession act. It is clear that David is in closer degree of consanguinity than Titus. Titus undoubtedly made false statements in petitioning for the grant and that grant issued to him shall be revoked. The applicant relied on the Misc. Application No. 144 of 2002 MAINA KANORU vs MIRIAM WANJIKU WAITHAKA where Hon. Mr. Justice Makhandia faced with a similar scenario held as follows:-

***“ In the end the conclusion I have come to is that the grant was obtained through fraud, cheating and concealment of material facts. The respondent lied repeatedly that she was a wife of the deceased whereas she was a daughter. She also concealed the identity of her co-beneficiaries and the fact that the applicant was in occupation of the suit premises. It is obvious that the grant was obtained fraudulently by making of a false statement and concealment from the court of something material to the case. It is on that basis that I now revoke the grant issued to the respondent on 8<sup>th</sup> December 2000 and confirmed on 9<sup>th</sup> November, 2001.”***

The judgment of this court is that the grant issued herein on 17<sup>th</sup> December 2004 to Titus Mukundi Gatumbu is hereby revoked. A fresh grant shall be hereby issued to **DAVID MWANGI MOIGO** and in view of passage of time leave is hereby granted for the applicant to seek confirmation of that grant immediately notwithstanding that six months will not have expired. The costs of the summons dated 2<sup>nd</sup> April 2007 are awarded to **DAVID MWANGI MOIGO** to be paid by **TITUS MUKUNDI GATUMBU**.

***Dated and delivered this 18<sup>th</sup> day of December 2008***

**MARY KASANGO**

**JUDGE**