



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**SUCCESSION CAUSE NO. 19 OF 2000**

**IN THE MATTER OF THE ESTATE OF CEASERY MUNITHU NDAMBA  
(DECEASED)**

**M'MUGAMBI NDAMBA ..... PETITIONER**

**VERSUS**

**JANE KARAI M'MURUNGI .....1ST RESPONDENT**

**LINUS KINOTI M'NKANATA ..... 2ND RESPONDENT**

**RULING**

By the application dated 30th May 2002, brought under section 76 of the Law of Succession Act and Rule 44 (1) of the Probate and Administration Rules, the applicant seeks the following orders:-

1. That succession cause No. 148 of 2000 be consolidated with this succession cause No. 19 of 2000.
2. That both grants in H.C. Succession causes 148 and 19 of 2000 be revoked and the same be heard de novo.
3. That all subdivisions and registration of original land reference ABOGETA/KATHANGARI/200 be cancelled and the land do revert to its original title.
4. That the costs of this application be provided for.

The grounds in support of the application are that there are two grants which have already been confirmed relating to the same estate and that the grant in HC Succession cause 148 of 2000 was issued in error through concealment of several material facts. The applicant also filed a supporting affidavit in which he depones that he filed this cause on 27.1.2000 in his capacity as a brother to the deceased who died on 28.9.1981. That he named all the beneficiaries therein including the petitioner in succession cause No. 148 of 2000. The applicant also states that following gazettement of this cause on 18.2.2000 vide gazette notice number 2283 he was issued with a temporary grant on 15.8.2000. On 18.7.2000, Succession Cause No. 148 of 2000 was filed with gazettement of the same taking place on 18.8.2000 vide gazette notice No. 5099 of the same date and temporary grant in respect of cause No. 148 of 2000 was issued on 2.10.2000. The applicant alleges serious non-disclosure of material facts by the petitioner in H.C. Succession cause No. 148 of 2000 by deliberately failing to name other beneficiaries of the estate of the deceased. That even before six months expired the petitioner in succession cause 148 of 2000 applied for confirmation of the grant which was done on 23.4.2001, while the grant in this cause was confirmed

on 20.11.2001. The applicant further avers that following the confirmation of the grant in succession cause 148 of 2000 on 23.4.2001, the petitioner in that cause proceeded to cause the registration of the deceased's land known as ABOGETA/KITHANGARI/200 and shared between LINUS KINOTI M'NKANATA (0.6 Ha.) and Jane Karai M'Murungi (2.16 Ha.) The applicant avers that if the court had been fully furnished with all the relevant information by Jane Karai M'Murungi (Petitioner in succession cause 148 of 2000), the court would not have entertained such a cause. For those reasons, the applicant prays that the confirmed grant in succession cause No. 148 of 2000 be revoked alongside the grant in succession cause No. 19 so that the matter can be heard de novo. Mr. Mburugu for the applicant submitted that Jane Karai M'Murungi is a married daughter of the deceased and filed her cause after the applicant herein, had already filed his cause and further that LINUS KINOTI M'NKANATA who was a purchaser from JANE KARAI M'MURUNGI should not have been shown as a beneficiary of the estate of the deceased when in fact he bought part of the deceased's estate from Jane Karai M'Murungi.

The application is opposed. Linus Kinoti M'Nkanata filed a replying affidavit dated 2.12.2002 in which he states that he bought parcel No. ABOGETA/U.KITHANGARI/1499 measuring 1.50 acres from the first respondent JANE KARAI M'MURUNGI (petitioner in succession cause 148 of 2000) and that it is him who financially assisted the said 1st respondent file in court succession cause 148 of 2000. He also avers that because he has now acquired title to the said parcel of land and extensively developed the land, the court should not allow the applicant's application. Mr. Arimba appeared for the 1st respondent JANE KARAI M'MURUNGI. He submitted that the 1st respondent is the only surviving child of the deceased and that in that capacity she had the locus standi to file the succession cause No. 148 of 2000, while the applicant is said to be a stranger to the deceased's estate. He further submitted that even if the applicant was first in filing succession cause 19 of 2000, he did not seek renunciation from the 1st respondent as stipulated by law. That the 1st respondent filed the succession cause honestly and in good faith and without knowledge of the existence of succession cause No. 19 of 2000.

Mr. Arimba also submitted that the applicant instituted succession cause No. 19 of 2000 in bad faith as in fact he did not include the 1st respondent in the application for confirmation of grant. Mr. Arimba submitted that the applicant has not averred anywhere in his supporting affidavit that the 1st respondent was aware of the existence of succession cause 19 of 2000 when she filed her own cause 148 of 2000.

There are a number of issues that arise in this matter. First is whether, in the face of succession cause 19 of 2000, succession cause 148 of 2000 should also have been filed and allowed to stand? Section 6 of the Civil Procedure Act, Chapter 21 provides as follows:-

**“6 No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”**

In both causes 19 of 2000 and 148 of 2000, the parties were litigating under the same title i.e. **“In the matter of the estate of Ceasery Munithu Ndamba”** and both were seeking the grant of Letters of Administration Intestate to the estate of the said Ceasery Munithu Ndamba. It is my considered view that the provisions of section 6 quoted above apply to cause 148 of 2000 so that had the full facts been known to the court at the time of issuing the grant of Letters of Administration Intestate to Jane Karai M'Murungi in succession cause 148 of 2000 the court should not have proceeded to do so. The provisions of section 6 are mandatory and it does not matter that the petitioner in the said cause 148 of 2000 was the rightful person to have brought any suit touching on the estate of the deceased. Authorities are clear that “matter in issue” in the above quoted section does not mean any matter in issue in the suit but has reference to the entire subject in controversy. The matter in issue in this case is the administration of the estate of the deceased. It is clear that the subject matter of succession cause 148 of 2000 was the same subject matter covered by succession cause No. 19 of 2000. A case in point on this issue is JADVA KARSAN B. HARNAM SINGH BHOGAL (1953) 20 E.A.C.A. 74 (Sir Newnham Worley, V.P. at page 76) in which the appellant/plaintiff sued the defendant/respondent for Kshs. 99472 on a number of dishoured cheques and promissory notes given to him by the respondent and obtained judgment therefor,

which was not satisfied. Before judgment was so entered the appellant sued the respondent for Kshs. 135,265/90 for the balance of goods sold and delivered. The connection between the two cases was that in the earlier suit the appellant had sworn that the cheques and promissory notes were taken in part payment of the sum of Kshs. 135,265/90 due to him for goods sold and delivered. The respondent filed a motion to stay the second suit and succeeded in the High Court on the ground that the matter in issue in the first case was also directly and substantially in issue in the second. It was, held inter alia, that

**“Matter in issue in section 6 of the Civil Procedure Act does not mean any matter in issue in the suit, but has reference to the entire subject matter in controversy; it is not enough that one or some issues are in common. The subject matter in the subsequent suit must be covered by the previous suit, not vice versa”**

The cause that was open to the petitioner in cause No. 148 of 2000 was to file objection proceedings in accordance with the law and such a course of action would have solved her problems as she would have also been able to file her cross-petition in the matter. The conclusion here therefore is that succession cause No. 148 of 2000 was improperly dealt with. The suit should have been stayed and therefore the grant issued therein and the subsequent confirmation of the same were null and void. Having found as I have that succession cause No. 148 of 2000 ought to have been stayed in view of the previously instituted succession cause 19 of 2000, is the applicant’s prayer for revocation of the grants under section 76 of the Law of Succession Act maintainable? The applicant has submitted that the petitioner in succession cause No. 148 of 2000 concealed something material to the case, namely that a similar case had already been filed in respect of the same subject matter. It is on the basis of this that I am persuaded that the grant of representation in succession cause No. 148 of 2000 was made in error and I direct that the same should be revoked and annulled. To pave the way for the parties to canvas this matter fully, I also direct that the grant of representation in succession cause 19 should be revoked and the 1st respondent now be at liberty to file objections to the same together with her cross petition. Consequently, I also allow prayer 3 of the applicant’s application, namely that all subdivisions and registration of original land reference ABOGETA/KITHANGARI/200 be cancelled and the land do revert to its original title pending the hearing and determination of succession cause No. 19 of 2000. Costs for this application shall be in the cause. It is so ordered.

I note in passing that though counsel for both parties ventilated their respective client’s cases with much vigour, their submissions were not supported by any relevant authorities on which the court could fall back in its search for an answer to the issues raised. If such authorities had been furnished, they would have been of much help to the court.

Dated and delivered at Meru this 12th day of July 2004 in the presence of counsel for both parties and the parties themselves.

**RUTH N. SITATI**

**JUDGE**

**12.7.2004**