



**REPUBLIC OF KENYA**

**IN THE HIGH COURT KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**SUCCESSION CAUSE NO. 187 OF 1992**

**IN THE MATTER OF THE ESTATE OF IKUNYUA M'MUHAMBI (DECEASED)**

**BETWEEN**

**PMM'M.....PETITIONER/RESPONDENT**

**AND**

**ISABERA NCHURUBI MARETE.....RESPONDENT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR REVOCATION**

**BY**

**DOREEN KARAMBU.....INTERESTED PARTY/APPLICANT**

**RULING**

### **Introduction**

1. On 23<sup>rd</sup> January, 2020, after hearing *interpartes* of the protest to the application for confirmation dated 06<sup>th</sup> November, 2006, the court having satisfied itself that one of deceased's son KM'I was deceased and did not have dependents directed that the estate of the deceased comprised in LR. ABOTHUGUCHI/GAITU/54 be distributed equally to his son PMM'I and ISABERA NCHURUBI MARETE the widow of deceased's son MM'I.

2. The applicant who claims to be the daughter of deceased's son KM'I by summons for revocation dated 03<sup>rd</sup> February, 2020 seeks the following orders; -

**1) Spent**

**2) The Honourable Court be pleased to issue an order of inhibition restricting any kind of dealing over LR. NO. ABOTUGUCHI/GAITU/54 for purposes of preserving the estate pending the hearing and determination of this application or until further orders of this Honourable Court.**

**3) The Honourable Court be pleased to grant an order revoking or annulling the Grant of Letters of administration confirmed on 16<sup>th</sup> June 2016;**

**4) That the costs of this Application be provided for.**

3. The application and supporting affidavit sworn by the Applicant are founded on the grounds that the Petitioner moved the court secretly without the Applicant's knowledge and obtained the grant fraudulently by making false statements as he did not list all the beneficiaries as he

left out daughters of the deceased and her being the daughter to deceased's son KM'I also deceased.

4. The Application was opposed by the Respondent **ISABERA NCHURUBI MARETE** who by her affidavit sworn on 14<sup>th</sup> February, 2020 avers that the Applicant is a busy body and a stranger to the estate and that the application is frivolous, vexatious, lacks merit and should be dismissed.

#### **Applicant's Case**

5. The application proceeded by way of oral evidence on 28<sup>th</sup> April 2021. **PW1 Doreen Karabu**, maintained that she was informed that she was a daughter to deceased's son KM'I also deceased and that she had adopted the name Mwirigi on her ID Card having lived at the home of deceased's son PMM'I and his family for 2 years and left at the age of 14 years.

6. **PW2 Sabera Nyoroka Mwirigi**, widow to deceased's son PMM'I. She on one hand stated that she and PMM'I were blessed with 6 children including the Applicant and on the other stated that Applicant was daughter to deceased's son **KM'I** whom she had taken care of since she was 4 years old,

#### **Respondent's Case**

7. **DW1 Isabera Marete** opposed the application for revocation of the grant made in accordance with accordance with Meru customary practices the deceased having died in 1965 which was before the commencement of the Law of Succession Act on 1st July, 1981. She testified that deceased had three sons namely, KM'I, her husband MARETE M'IKUNYUA and PMM'I who are all. It was her evidence that the Applicant is daughter to PMM'I and **PW2 Sabera Nyoroka Mwirigi** and that KM'I died without a wife and children.

8. **DW2 Abraham Gitonga Mutungi**, retired chief of Gaitu location from 1999 to 2005 stated that KM'I died without a wife and children. It was also his evidence that he has known the Applicant since she born to P MM'I and **PW2 Sabera Nyoroka Mwirigi**. It was therefore his evidence that the contents in the chief's letters dated 27/1/2020 and 30/1/2020 are untruthful.

#### **Analysis and determination**

9. I have considered the application in the light of the affidavits and submissions on record and the issue for determination is whether the application for revocation dated 03<sup>rd</sup> February, 2020 has merit.

10. The Court in **Jamleck Maina Njoroge v Mary Wanjiru Mwangi [2015] Eklr** stated THAT;

**The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.**

11. In order to prove her case, the Applicant had to show that she was a biological child of deceased's son KM'I (See **Re-Estate of Jairus Ratemo Nyandusi (deceased) [2019] eKLR**).

12. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

**"As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."**

13. The question as to what amounts to proof on a balance of probabilities was discussed by **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 as follows:

**"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

14. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

**"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where**

**both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”**

15. Applicant stated that she was informed that **KM'I** was her father after he died. Although she did not disclose from whom this information came, **PMM'M** with whom she lived did not name her as daughter of **KM'I** when he filed this cause. Applicant's case was complicated by her witness **Sabera Nyoroka Mwirigi** who testified that she was widow to deceased's son **PMM'I** with whom they were blessed with 6 children including the Applicant. Further to the foregoing, the Applicant's identity card was registered in the name of Mwirigi.

16. From the evidence on record, I find that **Sabera Nyoroka Mwirigi** and the Respondent and his witness cast doubt on the Applicant's case that she was the daughter of **KM'I** entitled to benefit from the deceased's estate. There is no evidence that the Petitioner concealed any material facts in regard to leaving out the Applicant as a beneficiary. The Applicant has failed to demonstrate within the purview of Section 76 of the Act as restated in **Moses Wachira Kimotho [2009] eKLR, Japheth Kaimenyi M'Ndatho V M'Ndatho M'mwiria[201]eKLR and Re-estate of Magangi Obuki (Deceased) [2020] eKLR** that the grant was fraudulently obtained and there was concealment of material facts and misrepresentation.

17. In the end, I find that no case has been made out for the revocation of the grant herein. I accordingly find the summons for revocation dated 03<sup>rd</sup> February, 2020 lacks merit and the same is hence dismissed with costs to the Respondents

**DATED AT MERU THIS 10<sup>TH</sup> DAY OF FEBRUARY 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For Applicant - Mr. Otieno for Otieno C & Co. Advocates**

**For Petitioner - N/A for Mutuma & Koskei Advocates**

**For Respondent - Mr. Kariuki for Mithega & Kariuki Advocates**