



**REPUBLIC OF KENYA**

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

**Coram: D. K. Kemei - J**

**SUCCESSION CAUSE NO. 462 OF 2014**

**IN THE ESTATE OF THE LATE KYENGO KIILU NGUNGI *alias* KYENGO KIILU – DECEASED**

**MUTIE KIILU.....OBJECTOR/APPLICANT**

**VERSUS**

**BONIFACE MULI MWEU .....PETITIONER/RESPONDENT**

**RULING**

1. The Objector/Applicant filed Summons dated 18/02/2019 for revocation or annulment of grant under section 76 of the Law of Succession Act and Rule 44 and 73 of the Probate and Administration Rules. It seeks the following reliefs:-

- (a) That the grant of letters of administration issued to Boniface Muli Mweu and confirmed on 25/04/2016 be revoked and or annulled.***
- (b) That an order do issue prohibiting any transaction that might have been commenced by the Petitioner, by use of the confirmed grant herein, either by way of disposal, charge, mortgage or otherwise of any of the deceased's properties pending the hearing and determination of the application.***
- (c) That an order do issue to the Land Registrar Makueni to deregister the Petitioner Boniface Muli Mweu and other titles that may have been issued and restore the names of the deceased in respect of Makueni/Kalawa/103 pending the hearing and determination of the application.***
- (d) That the costs of the application be provided for.***

2. The application is supported by the grounds set out therein and the affidavit of the Applicant sworn on even date. The Applicant's case is that the proceedings leading to the issuance of grant were defective in substance since the petitioner fraudulently made a false statement and concealed from the court material facts and further that the grant was obtained by means of an untrue allegation of a fact essential in law to justify the grant. It was further his case that he had lodged **Succession Cause No. 257 of 2014** wherein a grant was issued on 26/11/2014 and confirmed on 15/12/2016 but however the said grant was revoked and the court directed him to file the present application. It was his case that he learnt with surprise that the Petitioner herein had secretly lodged this Cause yet he has no interest in the estate of the deceased and that the beneficiaries of the estate have been disinherited. His contention is that the Petitioner is out to grab the deceased's parcel of land by use of force or illegally as he did not secure the consent of the beneficiaries during the confirmation.

3. The application was strenuously opposed by the Petitioner/Respondent vide a replying affidavit sworn on 10/04/2019. It was the petitioner's case that he has an interest in the estate by virtue of being a purchaser as he had purchased the land parcel **Makueni/Kalawa/103** from the deceased between 1968 and 1980. He annexed copies of the sale agreement marked as "BMM1". The petitioner averred that he had earlier cited the objector vide **Machakos cause no. 123 of 2013** to take up letters of grant of administration and was granted time by the court to do so failing which he could himself file the same. He stated that upon failure by the objector to lodge the petition, he duly filed the same and later obtained a grant which was subsequently confirmed. The petitioner contends that the objector instead of proceeding in this cause lodged a separate one namely **Succession No. 257 of 2014** wherein the certificate of confirmation was revoked on the grounds that he had not disclosed the existence of the present succession cause. The petitioner finally averred that he has been on the land for over 50 years and at one time vide **Machakos CMCC No. 294 of 2013** the Objector admitted in his defence that the petitioner has purchased several acres of land from the deceased and hence the objector's assertion that he has no interest on the land and a stranger is in bad faith. The petitioner sought for the dismissal of the application with costs.

4. Mr. Kamolo for the Objector/Applicant filed submissions dated 4/02/2020. It was submitted that the Petitioner is a stranger to the estate of the deceased. Counsel contended that the petitioner as a purchaser has never presented any sale agreements for consideration and

ascertainment of the acreage if at all he had purchased them. It was submitted that the petition herein was filed without the knowledge of the Applicant and other beneficiaries and that the petitioner took advantage of the same to have the entire land transferred to himself while aware that he had purchased a portion thereof. It was finally urged that the orders sought in the application be granted pending the completion of the **Succession Cause No. 257 of 2014**.

5. Mr. Tamata learned counsel for the petitioner filed submissions dated 16/11/2020. He submitted that this matter started off as a **Citation Cause No.123 of 2013** whereby the petitioner had cited the objector and his family members to take up letters of grant of administration and that the court gave them 90 days to do so failing which the petitioner would do so. It was submitted that the Citees failed to comply with the order and thus the Petitioner lodged the present cause wherein he secured a grant which was subsequently confirmed. It was submitted that the objector has been aware of the present proceedings but choose to ignore it and secretly filed **Succession Cause No. 257 of 2014** wherein the certificate of confirmation of grant was revoked and objector directed to come to this court and participate in the proceedings. Finally, counsel was of the view that the objector's conduct is one worth not believing because at one instance he claims the petitioner has no interest in the estate while at another instance he claims the petitioner is entitled to 18½ acres of land while at another instance he claims the petitioner is a stranger yet the petitioner has been on the land for over 50 years with full knowledge of the objector and his family. Learned counsel sought for the dismissal of the application with costs.

6. I have given due consideration to the objector's application and the rival affidavits as well as the submissions of both learned counsels. It is not in dispute that the Petitioner herein had cited the Objector and his family members vide **Citation Cause No. 123 of 2013** and that the Objector and his family members as Citees were granted 90 days to file for letters of administration failing which the Petitioner (Citor) was to be at liberty to petition for the same. It is not in dispute that the objector and his family (Citees) failed to comply with the said order dated 19/11/2013 and that the Petitioner lodged the present succession cause. It is not in dispute that vide these succession proceedings the petitioner has been issued with a grant and which has since been confirmed. It is also not in dispute that the objector lodged a separate **Succession Cause No. 257 of 2014** wherein he secured a grant and had it confirmed but however the confirmed grant was later revoked vide a ruling by Odunga - J dated 6/02/2019. Finally, it is not in dispute that the Petitioner had purchased land comprised in **Makueni/Kalama/103** from the deceased prior to his demise and as such the Petitioner being a purchaser was a creditor to the estate of the deceased pursuant to section 66 of the Act. That being the position. I find the issues for determination are as follows:-

*(i) Whether the Objector/Applicant has presented sufficient evidence to warrant revocation or annulment of grant.*

*(ii) What orders may the court make?*

7. As regards the first issue, it is noted that the Objector seeks for revocation of grant on the ground that the Petitioner fraudulently concealed material facts from the court when filing for letters of grant such as not providing the names of the family members and proceeding without their consent during the confirmation of grant yet he is a stranger with no interest in the estate of the deceased. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the Law of Succession Act as follows: -

*“Revocation or annulment of 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 the 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 litigation was made in ignorance or inadvertently;*

*(d) That the person to whom the grant was made has failed, after the notice and without reasonable cause either:-*

*(i) To apply for confirmation of the grant within one (1) year from the date hereof, or such longer period as the court orders or allows; or*

*(ii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by provisions of paragraph (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.”*

8. Applying the test of law in section 76 of the Law of Succession Act, the Objector has alleged that the Petitioner filed this cause without notifying him and the rest of the family members and further obtained a confirmed grant without the consent of the beneficiaries yet he is a stranger to the estate of the deceased. To decide in his favour, the court has to be satisfied that the Applicant has furnished evidence whose level of probity is such that a reasonable man even in a case as this where the Respondent has not adduced any evidence might hold that the more probable conclusion is that for which the applicant contends, since the standard of proof is on a balance of probabilities/preponderance of evidence (see **Lancaster-vs- Blackwell Colliery Co. limited [1918] WC Rep 345**). Hence the burden of proof as required by section 107 – 109 Evidence Act lay with the Objector/Applicant to discharge.

Non-disclosure of material facts to the succession court by the petitioner is the main accusation laid against him by the objector herein. The summary of the accusation is that the Petitioner filed the present cause without informing the family of the deceased and further went ahead to confirm the grant without the consent of beneficiaries yet he is a stranger to the estate of the deceased. However, the petitioner in his replying affidavit gave a chronology of the events regarding the matter of the dispute. The petitioner presented evidence to the effect that he

had purchased land parcel **Makueni/Kalawa/103** from the deceased in which the transaction spanned from 1968 to 1980. Upon the demise of the deceased, he filed a **Citation Cause No. 123 of 2013** and cited the Objector and two family members as Citees and sought orders from the court to compel them to take up letters of grant of administration intestate. He presented a court order dated 19/11/2013 directing the objector and his two family members (Citees) to take up the letters of grant within 90 days failing which the petitioner was to be at liberty to lodge the petition. Apparently, the objector and his family members did not comply with the said order and thus the petitioner herein filed the present cause and proceeded upto confirmation of grant. It has transpired that the objector also filed **Succession Cause No. 257 of 2014** which proceeded upto confirmation of grant but upon the petitioner herein raising an objection, the court agreed with him and revoked the certificate of confirmation of grant vide the ruling of Odunga J dated 6/02/2019 and in which the objector was advised to file the present application. Looking at the versions of the petitioner and objector, I am inclined to agree with the petitioner that he is not a stranger to the estate but a purchaser and since he bought land from the deceased then he became a creditor to the estate by virtue of section 66 of the Law of Succession Act and entitled to apply for letters of grant of administration in the estate of the deceased. The sale agreement annexed to the replying affidavit of the petitioner leaves no doubt about the petitioner's interest in the estate. Again, from the annexures and averments of the objector there is evidence that the petitioner had purchased all or part of parcel **Makueni/Kalawa/103** from the deceased. I am satisfied that the objector and his family had notice of the filing of the present cause since they had appeared through counsel upon being cited and received the court order dated 19/11/2013. It is obvious that the objector and his family having declined to take up letters of grant as directed by the court gave a wide berth to the present cause as they took refuge in their own **Succession Cause No.257 of 2014** hoping to dislodge or defeat the interest of the petitioner but the same appear not to have succeeded as the court revoked the certificate of confirmation of grant and rightly directed them to come and proceed in this succession cause. I have no doubt in my mind that the objector and his family did not want to have anything with the present proceedings as they wanted to shut him out of the estate of the deceased as can be seen in the certificate of confirmation of grant issued to them that indicated that the interest of the petitioner as creditor to the estate was not considered at all. Now that the objector has agreed to participate in these proceedings, I need to consider whether or not to revoke the grant issued to the petitioner. The objector seems to suggest that the petitioner might not have purchased the whole plot **Makueni/Kalawa/103** and has indicated that the acreage sold was about 18½ acres. I have perused the sale agreement and note that there is such acreage of 18½ acres. The objector maintains that the total acreage is 37 acres in all. The petitioner also has not come out clearly as to whether he had purchased the whole plot of land from the deceased. This seems to me to be the only ground for revocation of grant. However, the power granted under section 76 of the law of succession Act for revocation of grants is discretionary. Where a case is made out for revocation of a grant under section 76 of the Law of Succession Act, the court has the option to either revoke the grant or make other orders as may meet the ends of justice. The deceased herein died on 7/08/1999 and this cause lodged in 2014. The revocation of the grant may set the parties back several years yet the issue in contention is on the distribution of the only property of the deceased between the petitioner and the objector plus family members. The petitioner being a creditor to the estate is entitled to apply for grant of letters of administration just like the objector and the fact that this court vide the **Citation Cause No. 123 of 2013** had granted him the right to lodge the petition then the grant that had been issued to him was legitimate in all respects. Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules enjoins the court to exercise inherent jurisdiction to make orders as are necessary to meet the ends of justice. I find an order revoking the grant will cause prejudice to the parties who are all anxious to have the property distributed. That being the position, I decline the objector's request for revocation of the grant but find that an order revoking the certificate of confirmation of grant and directing the petitioner to apply afresh for the distribution of the estate of the deceased namely **Makueni/Kalawa/103** within a certain timeline to be appropriate in the circumstances. It is noted that none of the parties herein have presented evidence to the effect that the ownership of parcel number **Makueni/Kalawa/103** has changed hands from the deceased to the petitioner. However, should there be any such change then an order for cancellation and reverting it into the name of the deceased will ensue pending the fresh confirmation of grant.

9. As regards the last issue and in view of the foregoing observations the objector's application dated 18/02/2019 succeeds to the extent as follows:-

*(a) The certificate of confirmation of grant issued on the 26/04/2016 is hereby cancelled.*

*(b) The Petitioner is directed to file a afresh summons for confirmation of grant and distribution of the only asset of the deceased namely MAKUENI/KALAWA/103 and serve the objector together with family members of the deceased with the same within 30 days from the date hereof and who are granted leave to file affidavits of protest if need be within 14 days upon being served with corresponding leave to the petitioner to file further affidavit if need be within 7 days upon being served.*

*(c) Title to L.R. Number Makueni/Kalawa/103 if already in name of BONIFACE MULI MWEU be and is hereby cancelled and that the same do revert in the name of the deceased KYENGO KIILU.*

*(d) The conservatory orders made by this court on the 9/10/2014 regarding the status quo in respect of land parcel MAKUENI /KALAWA/103 shall be maintained and shall remain in force until the final determination of the fresh summons of grant.*

*(e) Each party to bear their own costs.*

It is so ordered.

Dated and delivered at **Machakos** this 9<sup>th</sup> day of **February 2021**.

**D. K. Kemei**

**Judge**