



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 442 OF 2008**

**IN THE MATTER OF THE ESTATE OF KEMUNTO MOENIA**

**JOHN OMBOSE MOENIA.....PETITIONER**

**VERSUS**

**JARED MOENIA NYAMOTI.....OBJECTOR**

**RULING**

1. The deceased Kemunto Moenia died on the 12<sup>th</sup> November 2003. On the 4<sup>th</sup> December 2008 John Ombose Moenia the petitioner her son filed a petition for letters of administration intestate. A grant was issued to the petitioner in January 2011 which was confirmed on the 24<sup>th</sup> October 2014.

2. In his affidavit in support of the petition and the application for confirmation of grant the petitioner John Ombose Moenia (the petitioner) named the following persons as beneficiaries of the deceased's estate; John Ombose Moenia, Samwel Nyangau Moenia, Joel Nyakoe Moenia and John Asuga Moenia. The deceased had only one asset parcel number North Mugirango/ Bonyarorande/21 which was measuring about 2.0Ha. The said parcel of land of shared amongst the beneficiaries in equal shares of 0.5Ha.

3. On the 8<sup>th</sup> February 2013 Jared Moenia Nyamoti (the Objector) filed an application dated the 3<sup>rd</sup> February 2016 seeking to have the grant issued to the petitioner revoked and declared null and void. He also sought to have a stay of distribution and execution of the certificate of confirmation of the grant or in the alternative that the said certificate be granted to the objector.

4. The subject of this Ruling is the said application. At one time the objector filed an application to have DNA tests carried out on various persons and after he elected to act in person he chose to withdraw the said application dated the 26/11/2019. The matter proceeded to hearing.

5. The objector testified that he is the son of Peter Nyamoti Moenia who was a son of the deceased. That Peter Nyamoti Moenia passed on the 11<sup>th</sup> of November 1987 leaving him behind to inherit his estate. That his father before his death had divided his portion of the land. His portion was snatched from him in 2007 when the succession cause was filed. That by distributing the estate into 4 equal parts he has been disinherited by the petitioner. That as a grandson of the deceased he is entitled to a share of the deceased's estate. He claims that he was not served with the petition and the subsequent application. He also claims that the petitioner colluded with the area Chief Kiabonyoru location to mislead the court to disinherit him yet it is the same chief who demarcated the same land into 5 portions in March 2008. That after they came to court the villagers decided that he builds. That it is a lie that his grandmother died in 2003. That they have been engaged in land disputes over the said parcel of land. That the petitioner's intention is to evict him. That the certificate of confirmation should be set aside.

6. During cross examination he admitted that his mother is still alive and that his siblings are also alive. He also admitted that a mother knows the father of her child. That his mother has not written that he is the son of the deceased nor has she claimed that her husband died. He stated that he was born in 1970 in Nyamira. That the parcel of land was sub divided but it was his grandmother's name. That he declined to do the DNA. That he looks like the petitioner. That has no witness to indicate that his mother visited the petitioner. That they failed to recognise his father in the estate of the deceased. That he schooled there and lived there. He does not know Ondieki Maritain nor has he lived where his mother is. His ID card indicates where he was born.

7. The petitioner testified that he is the son of the deceased. That the objector is not the son of the deceased. They do not recognise him as the son of the deceased. That his brother Peter who is deceased died without a wife. He did not see his brother nor his wife. That his uncle who was left divided the shamba for them. He did not see his father. That the deceased was not given a portion of the shamba. That the objector's mother is married to a relative she has children with him.

8. During cross- examination he stated that the shamba was not divided into 5 parts. That maybe the objector built when he was not there. That he has no child named after the objector's father. That he filed the petition using the documents his late brother left him. That the chief knows then very well.

9. The objector did not file any submissions. Mr. Nyariki for the petitioner filed written submissions. In his submissions he argues the grant was confirmed after due process was followed. That the objector has failed to disclose an iota of evidence connecting him to the estate of the deceased. That there is no evidence that the petitioner's brother was married or that he cohabited or sired a child with the objector's mother. That the objector's mother never filed any affidavit nor was she called to testify on behalf of the objector. That further the objector declined to have a DNA test done despite having asked for it. That it was only through the said test that it would have been established if he was the son of the petitioner's brother. That there is no material before the court to justify the revocation of the grant.

#### **ANALYSIS AND DETERMINATION**

10. I have considered the evidence adduced by the parties and the written submissions. The main issue for determination is whether the grant that was issued to the petitioner and confirmed should be revoked on the basis that there was concealment of material facts.

11. The objector claims that he is the son of one Peter Nyamoti Moenia who was the deceased's son. There is no dispute that Peter was the deceased's son. This is admitted by the petitioner. He who alleges a fact must prove his allegation (**see section 107 and 109 of the Evidence Act**). The objector states that the deceased was his grandmother. In his evidence he admitted that his mother was still alive. He chose not to call her to confirm that his father was the son of the deceased or that she had a relationship with Peter and that he was their son. Further the objector withdrew his application to have a DNA analysis. A DNA analysis would have helped establish the issue he raises that he is the son of the deceased's son. In the absence of this evidence I find that the objection has no merit and it is dismissed. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 21<sup>ST</sup> DAY OF JULY 2021**

**R. E OUGO**

**JUDGE**

**In the presence of:**

<b>Objector</b>	<b>In Person</b>
<b>Petitioner</b>	<b>Absent</b>
<b>Orwasa</b>	<b>Court Assistant</b>