



**REPUBLIC OF KENYA**

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

**SUCCESSION NO. 187 OF 2007**

**IN THE MATTER OF THE ESTATE OF M'ITIRAI NKANDIKA (DECEASED)**

**CYPRIAN MWITI .....PETITIONER**

**VERSUS**

**JOSEPH KAURO ITIRAI .....OBJECTOR**

**RULING**

Application dated 10<sup>th</sup> June 2013 was filed on behalf of Josphat Kauro Itirai the objector herein by M/s Kiautha Arithi & Co Advocate on 11<sup>th</sup> June 2013 seeking that the court annuls and revokes the grant of Letters of Administration made to Magdaline Muthoni on the 26<sup>th</sup> day of February 2008 and confirmed on 19<sup>th</sup> December 2008 be set aside.

It was also sought that an order of inhibition restraining any kind of dealing in LR No. Nkuene/Mitunguu/995, LR No. Nkuene/Nkunani/497, Nkuene/Mitunguu/976 and LR Nkuene/Nkunnani/1650 until further orders of this court.

The application was supported by the affidavit of Josphat Kauro Itirai and grounds on the face of the affidavit to the effect the objector was a son of the deceased.

That the petition was filed secretly and clandestinely without involving or obtain the applicants consent.

That the proceedings to obtain grant were defective in substance and meant to defraud and disinherit the applicant.

That there is also another confirmed grant over the same deceased's estate in Meru H.C. No. 298 of 2007 and yet there should not be 2 grants over the same succession cause.

The applicant said that after he obtained consent to petition for Letters of Administration from the petitioner herein and his siblings listed at paragraph 3 of this supporting affidavit he was surprised to find that his step mother the petitioner herein had secretly petitioned for Letters of Administration and had left him out of the distribution of the estate.

The applicant averred that prior to demise of his father he had pointed to him LR No. Nkuene/Mitunguu/995 and LR Nkuene/Nkumari/1650 on which he had built a semi permanent house and extensively developed LR Nkuene/Nkumari/1650.

He averred that petitioner and her brother who have brought several buyers to view LR Nkuene/Nkumari/1650 was preparing to evict him and his family from LR Nkuene/Mitunguu/ 995 and this will occasion his family great hardship/prejudice and injustice.

Magdalina Muthoni Itirai filed a replying affidavit objecting to the application to revoke the grant made to her by an affidavit sworn on 11<sup>th</sup> August 2014. Later by an application dated 26<sup>th</sup> July 2017 it was sought that the petitioner be replaced by Cyprian Mwiti on account of her age and same was allowed by consent of advocates of parties. Directions were taken that the application for revocation be disposed by way of viva voce evidence.

Joseph Kauro in his statement dated 17<sup>th</sup> November 2017 and filed on even date as well as affidavit sworn on 5<sup>th</sup> September 2013 testified and said that LR No. Nkuene/Mitunguu/57 was subdivided into 4 portions and each of the 3 sons given a portion and the deceased settled him on LR Nkuene/Mitunguu/1974. He said LR No. 976 was given to his brother Francis Guantai (now deceased) who developed it and LR Nkuene/Mitunguu/977 was given to Cyprian Mwiti.

In the applicants affidavit at paragraph 7 he averred that LR. No. Nkuene/Nkumari/138 was also subdivided into 3 parcels and he was entitled to LR 1650. He said Cyprian Mwiti and Francis Guantai got their respective portions LR 1648 and 1649 which they sold to Tarsisio

Gichure Mungaria and Mugwiera before the same could be transferred to their names. The applicant denied that he got LR No. 999 as it was preserved for the daughters of the deceased.

He said that the initial petitioner sold LR 497 which was in the name of the deceased after his death to Patrick Kithinji whose name was included in the confirmed grant.

Isaiah Thuiru Munga testified in support of applicant and said that 2 of the deceased person's sons had sold out portions of their land that had been subdivided and given to them by the deceased. From LR Nkuene/Nkumari/138 except the applicant who is entitled to LR Nkuene/Nkumari/1650.

Silas Kiruja M'Kathenya also recorded his statement and testified in court in support of applicant's case. The applicant in cross examination said that LR 1650 was registered in the name of Magdalena Muthoni who was no deceased. He said the deceased gave him the land. He said LR 999 was given to him and Julius Mungute. Isaiah Kauro said that applicant was the one using LR 1650 which border his land. He said that Charity Ngugi Kauro the daughter of the applicant doent use LR /650. Tarsisio Gichuru Mungamia said he owns LR 1648 – Nkuene/Nkumari and that he used to see applicant working on neighboring farm.

Cyprian Mwiti Itirai – the current petitioner testified and relied on his statement filed on 26<sup>th</sup> July 2017. He urged the court to dismiss succession causes No. 238 of 2007 and 289 of 2007 which were filed by the applicant herein without the knowledge of the family. Cyprian Mwiti said that the application by Josephat Kauro be dismissed.

The petitioner confirmed that LR Nkuene/Nkumari/1650 resulted from subdivisions of LR Nkuene/Nkumari/138. He also said that Nkuene/Mitunguu/999 was a subdivision of LR Nkuene/Mitunguu/57 and that LR 999 was given to Josephat Kauro. He confirmed that he sold LR Nkuene/Nkumari/1648 to Tarsisio Gichuru the applicant's witness. He also confirmed that subdivision of LR Nkuene is entitled to LR Nkuene/Nkumari/138 resulted into LR 1648, 1649 and 1650.

He said that it was not true that the deceased wanted to give LR 138 to his sons. He said Josephat Kauro's daughter used to use LR 1650 but it was not clear to whom the deceased wanted LR 1650 to go to. He said he got land in Mitunguu and Nkumari. He said LR Nkuene/Mitunguu/57 was the deceased persons homestead. He admitted that Patrick Kithinji was no son to the deceased but he bought LR 497 from Magdaline. Cyprian said that he was afraid that if Josephat Kauro is given LR 1650 he would sell it and he has a family of 6 people. He said Kaura sold LR 999.

He said in re-examination that LR 1650 was meant to go to Josaphat Kauro's wife Irene Karim to share with Charity Ngungi Kauro's daughter.

2<sup>nd</sup> Petitioners witness Kithinji testified and relied on his statement. Jeneiffer Ncabiria M'Arithi testified that she was 1<sup>st</sup> born daughter of the deceased and that a family meeting resolved that LR 1650 be given to Charity the daughter of the applicant herein.

At the close of petitioners case directions were taken that submissions be filed within 21 days but so far there are no submissions in the court file.

From the evidence on record for the applicant and the petitioner the bone of contention is LR Nkuene/Nkumari/1650 which the petitioner at the close of his testimony says should be given to the wife and daughter of the applicant herein. The petitioner and his sister Jeniffer Ncabiria M'Arithi have not given satisfactory reason why property that the applicant is entitled to as an inheritance from the deceased should be given to his wife and daughter when he is still alive. The daughter and wife of the applicant and other members of the family of the applicant didn't file statements or affidavits objecting to applicant benefitting from LR/1650. In any case the petitioner Cyprian Mwiti also got their share of LR 138 and sold their portions even before the succession cause was filed and it is not a good reason to say that if LR 1650 is transmitted to applicant he will sell it. I dare to say that Cyprian Mwiti and Jeniffer Ncabira have no authority to dictate what a beneficiary does with their inheritance. In the circumstances, I do find that the application for revocation succeeds partly in that grant made to Magdaline Muthoni on 26<sup>th</sup> February 2008 and confirmed on 19<sup>th</sup> December 2008 and on 27.7.2017 made to Cyprian Mwiti is revoked to extent that the Administrtrtion of the estate herein shall now be made to the applicant herein and Cyprian Mwiti jointly. That the Parcel of Land No. LR Nkuene/Nkumari/1650 that had earlier on been devolved to Magdaline Muthoni itirai will now be devolved to the applicant and registration into the name of Magdalina Muthoni M'Itirai shall now be cancelled.

It appears that there is no contention with other assets forming the estate i.e LR No. 1648/Nkuene/Nkumari – was for Cyprian Mwiti the petitioner herein. LR Nkuene/Nkumari/1649 was for the late Francis Guantai and if still available should be shared equally amongst his family members the wife and children.

LR Nkuene/Nkumari/497 was said to have been devolved to the wife of deceased (Now deceased) and she sold to Patrick Kithinji. There was also no dispute that LR. Nkuene/Mitunguu/57 was subdivided by the deceased and shares given to his sons.

LR. No. Nkuene/Mitunguu/1974 should therefore be registered in the name of applicant. LR No. Nkuene/Mitunguu/999 should go to applicant and survivors of a brother he says is deceased. LR 976 should go to the family of the late Franics Guantai – wife and children to share equally.

Costs of this application shall be borne by each party.

**HON. A.ONG'INJO**

**JUDGE**

**RULING DELIVERED, DATED AND SIGNED IN COURT ON THE DAY OF 7<sup>th</sup> MARCH 2019**

**HON. A.MABEYA**

**JUDGE**