



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 27 OF 2015

(FORMERLY MERU SUCCESSION CAUSE NO. 488 OF 2014)

IN THE MATTER OF THE ESTATE OF THE LATE M'NTHAKA KIBATA (DECEASED)

MUTIIRIA NGARUNI GICHUMBA.....PETITIONER/APPLICANT

VERSUS

IGNATIUS MURIUKI NKUNGA.....RESPONDENT

RULING

1. This cause relates to the estate of the late **M'NTHAKA KIBATA** who died on 17th September 1976 at Kyeni Hospital. The petition filed herein indicates that he died intestate unmarried and that his estate comprised the following properties:-

a) Karingani/Gitarene/660 &

b) Karingani/Gitarene/1042

2. The record of proceedings shows that there has been a lot of pull and push between both the Applicant and the Respondent herein this court on 1st March, 2017 appointed both the protagonist as joint administrators. They were also both given liberty to individually or jointly apply for confirmation of grant. On 15th April 2017 the Respondent, Ignatius Muriuki applied for Summons for Confirmation of Grant dated 30th March 2017 and appeared in this court on 2nd October 2017 for mention. On that date the Applicant through counsel asked this court for time as he intended to put in objection or protest to the proposed mode of distribution. It transpired that despite being served in May 2017 with the said Summons for Confirmation of Grant, he had not filed any protest. Nonetheless this court granted him limited period of 7 days to file protest. On 9th October 2017 the matter came up for mention to confirm whether any protest had been filed but none had been and this court duly confirmed the grant as per the proposed mode of distribution. On that date both the present applicant and his counsel was absent in court and no reason was given for that absence.

3. Mutiiria Ngatuni Gichumba (the Applicant herein) has now moved this court by way of Summons for Revocation of Grant dated 13th May 2019 seeking revocation of the said grant among other subsidiary reliefs on the following grounds namely:-

i. That the grant was obtained through misrepresentation and concealment of material facts.

ii. That the administrator/Respondent is a distant relative who should not inherit the estate of the deceased.

iii. That the proceedings to obtain the grant was defective in substance.

iv. That the grant was obtained fraudulently by making false statement to the court.

v. That the trial court lacked pecuniary jurisdiction to hear and determine this case.

4. The Applicant has supported this application with his affidavit sworn on 13th May 2019. The Applicant alleges that the deceased was a brother to him and nephew to the Respondent. He depones that the Respondent is a son to the late sister of the deceased known as Margaret Ciamwari (deceased). In his view he is more close to the deceased than the Respondent who should claim inheritance from his father.

5. The Applicant has further disposed that he had instructed Ms Thibaru & Co. Advocates who failed to inform him on when the matter was coming up for hearing and that the mistake of Counsel should not be visited on him.

6. He further claims that he came to learn about this cause when the matter had been finalized and when the surveyors visited the estate for purposes of subdivision. He has however failed to state when this took place or which property comprising the estate was being subdivided.

7. In his written submission the Applicant has reiterated the grounds above adding he should not be made to suffer due to mistake or blunders of Counsel. He has cited the decision of ***Philip Kiptoo Chemwolo and Another -vs- Augustine Kubende [1986] eKLR*** to support his contention urging this court to determine his claim on merit pursuant to **Article 159 (d)** of the **Constitution**.

8. He has urged this court to balance the right of the Respondent to enjoy the property as opposed to the consequences of shutting out the Applicant from losing on inheritance. He further urges this court to consider the higher risk of injustice and grant the Applicant time to file his protest.

9. The Respondent has opposed this application through a Replying Affidavit sworn on 6th June 2019 and grounds of opposition.

10. The Respondent has pointed out that the application herein is fatally defective as the firm of Advocate filed the application on 14th May 2019 before filing Notice of Change of Advocates which was filed on 20th May 2019.

11. The Respondent further contends that the application lacks in merit as the Applicant is not candid on what really transpired in the proceedings leading up to the confirmation of grant and has faulted him for failing to explain why protest was not filed on time or at all despite being notified of Application for confirmation of grant and the subsequent application dated 14th December 2017. The Respondent deposes that on both occasions the applicant and his counsel were absent and no reasons have been advanced.

12. The Respondent asserts that that it is misleading for the Applicant to allege that grant was obtained through misrepresentation and fraud when all the legal procedures were followed and with his full knowledge.

13. The Respondent insists that the grounds raised in this application are unsupported by any material evidence and has faulted the Applicant stating that he is guilty of laches and indolent in pursuit of his claim adding that he is not related to the deceased.

14. Analysis and Determination

The main issues raised by this application and the response filed is whether the applicant has established sufficient cause for the grant issued on 2nd March 2017 to be revoked or annulled.

15. The main grounds relied upon by the applicant in this application is that the grant was obtained by misrepresentation and concealment of materials facts. He also claims that the proceedings were defective in substance and the court lacked jurisdiction to hear and determine this cause.

16. From the onset, the Applicant appears conflicted and convoluted in so far as the grounds upon which this application/summons is based. The reason is that the grant which the Applicant seeks to annul as I have observed in the brief summary above was issued on 2nd March 2017 by consent. The grant was issued to both the applicant and the Respondent by this court on the compromise and consent of both parties. This court also took into consideration the provisions of **Section 66** of **Law of Succession Act** in issuing the grant to both parties in this application. How then can the Applicant turn back and say there was misrepresentation or concealment?. In my considered view the applicant is not only being not economical with the truth candid but he is conflicted as well.

17. Secondly when he states that the proceedings are defective, he is the same person who originated the proceedings vide ***Chuka Principal Magistrate's Court Succession Cause No.171/2008*** and obtained the grant issued on 26th March 2010 and confirmed on 20th April 2011 before the same was revoked by this court sitting in Meru vide ***Meru HCC Misc. Application Cause No.245 of 2014***. The cause was later transferred here vide the present cause number. How then can the applicant fault his own petition for Letter of Administration for being defective without specifically point out the defect? How does he expect to be believed?.

18. Thirdly he has stated that **"the court"** lacked monetary jurisdiction to issue the grant. Now again it is this court that issued the grant, the subject of this Summons for Revocation of Grant and the question of jurisdiction in my view cannot arise. The Applicant is a bit vague on the question of jurisdiction and it is not clear whether he is faulting the jurisdiction of this court and even if he was to fault I would still have found no merit on the same because the jurisdiction of this court to entertain and determine probate matter is hinged of **Section 47** of **Law of Succession Act** and **Article 165** of the **Constitution**.

19. The other reason why the Applicant is seeking for revocation of grant though not listed as ground on the body of the application but in the affidavit in support is that the Respondent is just a nephew to the deceased and therefore ranks lower than him because he claims to be brother to the deceased. The Applicant has however raised this issue belatedly and in an attempt to cover some mischief. The applicant had the time, chance and opportunity to raise this issue through a protest or objection to the Summons for Confirmation of Grant dated 30th March 2017.

20. The proceedings herein as I have summarised above shows that the Applicant was served with the said Summons for Confirmation of Grant in May 2017. When the matter came up for confirmation on 2nd October 2017, the Applicant's counsel pleaded for more time though she really had no plausible explanation why any protest had not been filed despite having been served 5 months prior to that date. This court nonetheless indulged and gave to his request but on condition that he filed the protest if any within 7 days. When the matter came up on 9th October, 2017, the Applicant had filed no protest and on that date neither he nor his counsel were present in court. No reason(s) were advanced to explain the absence and omission to file a protest if any existed. This court had no other option but to confirm the grant as per the proposed mode of distribution. This was on 9th October, 2017. Another application dated 14th December 2017 was presented on 1st

March 2018 to have the grant executed. The matter came up in court on 1st October, 2018 and I directed the Respondent herein to serve the Applicant herein when the matter came up on 15th October, 2018 the Applicant in that application had duly served the Respondent (now the Applicant) herein as per an affidavit of service sworn on 15th October 2018. He and his Counsel was absent in court on 15th October 2018 despite service.

21. It is therefore evident that the Applicant herein was fully aware or at least was expected to be aware of what was going on in court. But for two years he was asleep and took no action to ventilate his claims. He now says he only came to learn about this matter when surveyors went to the firm to "**subdivide the suitland**" but I do not believe him. The reasons why I think he is less than candid are: -

i. There was no parcel to the subdivided in the certificate of confirmation of grant issued by this court and therefore the question of subdivision must be misleading. Simply put the Applicant is being economical with the truth.

ii. The Applicant has not stated when the administrator and the surveyors visited the estate if at all.

22. What is perhaps more glaring in this Application is a vain attempt by the Applicant to heap blame on his erstwhile advocate for his mistake of omission and indolence with a view to persuade this court not to punish him for "**mistake of Counsel.**" There is now a growing habit by litigants when put in a corner to explain their inaction or omissions in litigations in court they turning to the well written script, "**mistake of Counsel**" and the same has been turned into some sort of a punching bag to explain or musk all manner of excuses (read indolence, inaction etc) whose end product or result is to cause delay of cases in court and cause unnecessary costs and prejudices because justice delayed is justice denied. It is about time that courts of law should put its foot down, stop this charade and change the script by categorically stating that it is not business as usual and that is no longer tenable to heap blame on former Counsel without any tangible action to show that the blame has been made in good faith. This practice of parties turning up in court with new advocates in tow ready to throw mnd at former Counsel with a view to re opening cases must stop. In my considered view a party blaming his erstwhile Advocates should only be taken seriously if he/she demonstrates that he has taken parallel action against the advocate for professional negligence or misconduct. That way there will be basis to show that he has approached the court with clean hands and requires to be treated with equity. This court believes that allowing litigants to get away with indolence and laches on the pretext of "**mistake of Counsel**" is undesirable because in the long run it will impede the overall need to dispense justice timely without delay and render such noble objectives a mirage.

23. The present application and the grounds advanced is a classic example of the above. The applicant has made no attempts at all to explain his inaction for 2 years i.e from 2nd October 2017 when he was last in court to 14th May 2019 when he lodged this Application. He has also known that he did not file any protest, and has not given any explanation for inaction. He has not established any of the grounds under **Section 76 of Law of Succession**. He is not asking for a window to be allowed to file a protest in order to address his concern perhaps because he knows route may not take him far and instead he has chosen to come to court and applied for revocation of grant giving grounds that are clearly unfounded and unsustainable. By doing so he is abusing the court process and this court cannot allow such. This court gave him so much latitude to ventilate his claim but for some reasons known to him, he chose not to take his chances. I have already ruled that he cannot hang on "**mistake of Counsel**" without demonstrating good faith.

In the end the Summons for Revocation of Grant dated 13th May 2019 lacks in merit. I have not even touched on the fact that the present Counsel appears to have put the cart before the horse by filing this application and later filing a notice of appointment. He ought to have done the latter first of course but I was inclined not to determine this matter on a technicality because of the provisions of **Article 159 (d)** of the **Constitution**. The long and short of this is that Summons for Revocation dated 13th May 2019 is disallowed with costs because of Applicant's past conduct.

Dated, signed and delivered at Chuka this 1st day of October, 2019

R.K. LIMO

JUDGE

8/10/2019

Ruling dated, signed and delivered in open court in presence of Murithif or Respondent and Kirimi holding brief for Kijaru for Applicant.

R.K. LIMO

JUDGE

8/10/2019