



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI
[CORAM: A. C. MRIMA, J.]
SUCCESSION CAUSE NO. 11 OF 2017
(Formerly Kisii High Court Succession Cause No. 325 of 2014)
IN THE MATTER OF THE ESTATE OF MUKIRA NYAMBIRI (DECEASED)
-BETWEEN-
ROBI MUKIRA NYAMBIRI.....OBJECTOR/PLAINTIFF
-VERSUS-
SAMWEL CHACHA NYAMBIRI.....1st DEFENDANT/PETITIONER
NYANGIGE CHACHA NYAMBIRI.....2nd DEFENDANT/RESPONDENT
MAGAIGWA CHACHA NYAMBIRI.....3rd DEFENDANT/RESPONDENT
SUGUTA NYAMBIRI.....4th DEFENDANT/RESPONDENT
RULING NO. 1

1. This ruling is in respect to the Summons for revocation dated 21/03/2017 (hereinafter referred to as '**the application**'). The application was evenly filed by **Robi Mukira Nyambiri** (hereinafter referred to as '**the Objector**').
2. The application was supported by **Suguta Nyambiri**, the 4th Respondent/Defendant (hereinafter referred to as '**Suguta**'). **Samwel Chacha Nyambiri** (hereinafter referred to as '**the Petitioner**') opposed the application. **Nyangige Chacha Nyambiri** (hereinafter referred to as '**Nyangige**') also opposed the application. **Magaigwa Chacha Nyambiri** (hereinafter referred to as '**Magaigwa**') the 3rd Respondent/Defendant did not participate in the hearing of the application.
3. It is imperative to note that these proceedings began in **Kisii High Court Succession Cause No. 325 of 2014**. The matter was transferred to this Court upon the establishment of this station.
4. The parties proposed and this Court approved the hearing of the application by way of *viva voce* evidence. To that end the parties testified. The Objector did not call any witness. The Petitioner called two witnesses being **Samson Mwita Marwa** (hereinafter referred to as '**DW1**') and **Jackson Chacha** (hereinafter referred to as '**DW2**'). Suguta and Nyangige did not call any witnesses. The Objector, the Petitioner and Suguta were represented by Counsels. Nyangige appeared in person.
5. The Objector's case was well captured in the Affidavits and the evidence in Court. She was the wife of **Mukira Nyambiri**, the deceased herein. Her main contention was that the Petitioner did not involve her in the succession proceedings in respect of the estate of her husband, the deceased herein. She denied the allegations of service on herself contained in the Affidavit of Service in **Kisii High Court Misc. Succession Cause No. 20 of 2014**. Those were citation proceedings taken out by the Petitioner against the Objector.
6. The Objector contended that since she is still alive, ready and able to administer the estate of her husband then the grant of representation granted to the Petitioner and eventually confirmed ought to be revoked and the confirmation thereof set-aside.
7. Suguta reiterated the Objector's position. Suguta was a brother to the deceased. He was therefore a brother-in-law to the Objector. Suguta was also a brother to the father of the Petitioner. He was as well a brother-in-law to Nyangige and an uncle to the Petitioner.
8. The Petitioner vehemently opposed the application. He denied not involving the Objector in this matter. The Petitioner admitted that he took out citation proceedings against the Objector. He gave the reason why he took out the citation proceedings. He testified that there was a parcel of land known as **Bukira/Bwisaboka/702** (hereinafter referred to as '**the land**'). The land was registered in common by 4 owners. Each of the 4 owners had equal shares, that is $\frac{1}{4}$ thereof each. The Petitioner also stated that both the deceased and himself were among the said owners.
9. The Petitioner further testified that he wanted to get his share of the land. By then the deceased was dead and had left behind the Objector. The Petitioner posited that he approached the Objector to take out succession proceedings but the Objector decried lack of funds. In essence the Objector was not interested in administering the estate of her husband. He further posited that he filed the citation proceedings.
10. According to the Petitioner the citation proceedings were rightly conducted. That, the Objector was duly served with the citation, but she declined the invitation. The Petitioner averred that the matter was rightly dealt with by the Court and he was granted leave to institute the succession proceedings in respect of the estate of the deceased.
11. It was the Petitioner's testimony that he took out the proceedings in **Kisii High Court Succession Cause No. 325 of 2014**. A grant was issued to him on 15/04/2015. It was confirmed on 18/12/2015. That, the $\frac{1}{4}$ share of the land belonging to the deceased was duly rightly allocated to the Objector.
12. The Petitioner explained at length how his name found its way to the land which was his grandfather's. He stated that his grandfather was called **Nyambiri Chacha Kegocha** (hereinafter referred to as '**Kegocha**'). That, Kegocha had 3 sons. They were Chacha Nyambiri, Suguta Nyambiri and Mukira Nyambiri. Suguta Nyambiri is the 4th Respondent/Defendant and Mukira Nyambiri was the deceased. He testified that Kegocha registered his three sons on the land and each had $\frac{1}{4}$ thereof. It was the Petitioner's testimony that the last $\frac{1}{4}$ thereof was left to the wife of Kegocha. The Petitioner further testified that the wife of Kegocha loved him so much as the Petitioner was the only grandson who lived with her.
13. The Petitioner went on and stated that during the land adjudication processes in 1973 the 3 children of Kegocha were each registered on the land owning $\frac{1}{4}$ portion thereof. The sons were to be registered together with their mother who was then still alive. However, their mother, who was the Petitioner's grandmother, instead gifted her portion to the Petitioner. The Petitioner was then registered in her place as Turunya Nyambiri. Turunya Nyambiri then got $\frac{1}{4}$ of the land.
14. The Petitioner clarified that he was also known as **Turunya Nyambiri** who is the co-owner appearing on the land. He further clarified

that he later changed his name from Turunya Nyambiri to Samwel Chacha Nyambiri so as to conform to his current names as appearing in the national identity card.

15. Nyangige supported the application. She was the mother of the Petitioner. She vouched the Petitioner's evidence. She affirmed that the Petitioner was also known by the name of Turunya Nyambiri and that he appeared in the land title documents as a co-owner.

16. DW1 was a Member of Parliament for Kuria Constituency between 1969 and 1974. He knew the parties herein quite well.

17. He testified that he bought a portion of the land which was the share of Suguta way back in 1981. He conducted an official search and found that the land was registered in the names of 4 co-owners. That, the transaction went on well and the Petitioner signed on the part of Turunya Nyambiri. DW1 testified that he knew, and it was well known within the village, that the Petitioner was also known as Turunya Nyambiri.

18. DW1 further testified that the sale aborted. He then sued the 4 co-owners of the land in **Kisii High Court Civil Case No. 33 of 1992**. The suit is still pending, but the Petitioner testified as Turunya Nyambiri.

19. DW2 was a brother to the Petitioner. He worked as a Librarian at the Egerton University in Nakuru.

20. He testified that he did not know of any of his uncles by the name of Turunya. He was, however, aware that the Petitioner had a traditional name. The name was Turunya. He was named after their grandfather. Like his brother, DW2 also had a traditional name called Machage.

21. The Petitioner prayed that the application be dismissed with costs and that the certificate of confirmation be effected so as to bring this longstanding dispute to an end.

22. The Objector countered the Petitioner's position. She vehemently denied that the Petitioner was also known as Turunya Nyambiri. To that end, she filed **Migori ELC (O.S.) No. 92 of 2018**. The suit is still pending. The suit *inter alia* seeks to ascertain whether the Petitioner is the same as the Turunya Nyambiri.

23. The Objector prayed that the grant be revoked. She further prayed that the issue as to whether the Petitioner was the same as Turunya Nyambiri be stayed pending the outcome of the **Migori ELC (O.S.) No. 92 of 2018**.

24. At the close of the parties' cases, Counsels for the Objector and the Petitioner filed written submissions.

25. I have carefully perused the application and the responses together with the evidence and the submissions.

26. There are two main issues for determination herein. The first one is whether the Objector was aware of the citation proceedings in **Kisii High Court Misc. Succession Cause No. 20 of 2014**. The second one is whether the *status quo* ought to be interfered with by the grant of the prayers sought in the application.

27. On the first issue, I have carefully perused the **Kisii High Court Misc. Succession Cause No. 20 of 2014**. The matter came up for hearing before **Sitati, J.** on 25/07/2014. The Petitioner was present, but the Objector was absent. The Court was satisfied that the Objector was duly served. It allowed the matter to proceed. The Petitioner argued the citation. The Court then granted the Petitioner leave to take out the succession proceedings in place of the Objector herein.

28. The Court relied on the Affidavit of a Process Server one **Duncan Mauti** sworn on 23/07/2014 and filed in 25/07/2017. The Court was satisfied that the Objector was duly served with the Court process.

29. The Objector denied service. She however did nothing more. Instead, she submitted that it was the Petitioner who was to avail the Process Server for examination before Court.

30. I find the Objector's proposition that the Petitioner was to avail the Process Server for examination not a serious one. I say so because it was the Objector who denied service. The onus was therefore on her to apply, if she so deemed necessary, to examine the deponent. Otherwise, who else was to examine the deponent and for what purpose.

31. I therefore find and hold that the Objector was properly served with the citation and that she chose not to participate in the citation proceedings. The Petitioner rightly, and in line with the Order of the Court, instituted the succession proceedings in **Kisii High Court Succession Cause No. 325 of 2014**.

32. On the second issue, the application is for the revocation of the grant and the confirmation thereof. The basis thereof is **Section 76** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya (hereinafter referred to as '**the Act**').

33. **Section 76** of the **Act** provides as follows: -

A 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 allegation was made in ignorance or inadvertently;

d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either -

i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow: or

ii) to proceed diligently with the administration of the estate: or

iii) to produced to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (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.

34. All the grounds upon which a grant may be revoked are based on facts. A party seeking to revoke a grant must hence prove any or a combination of the grounds by way of evidence.

35. The Objector has not availed any evidence in proof of any of the grounds. The grant was long confirmed. The Petitioner has severally been in Court seeking to enforce the certificate of confirmation, but for the Objector.

36. There are however two other issues which I will address. The first one is the existence of **Migori ELC (O.S.) No. 92 of 2018**. The pendency of that suit is not in dispute. The suit was filed against the Petitioner. The suit has direct relevance to the issues before this Court. For instance, if it is decreed that the Petitioner is not the same as the co-owner registered as Turunya Nyambiri then that will definitely change the current scenario. The Petitioner's name in the title documents will have been expunged. That will be the case even in the Certificate of Confirmation of the grant. The land will have to be re-distributed. The Petitioner's entitlement to the land will then have to be through the portion which will eventually devolve to his father.

37. The second issue is the fact that although the Objector was indolent and failed to take part in the matter, she has now woken up and intends to take over from the Petitioner. The Objector is the wife of the deceased.

38. I am in agreement with the Petitioner that the purpose of taking out the citation proceedings and obtaining the grant was not to disinherit the Objector. The Petitioner was only interested in what he described as his share; the share of Turunya Nyambiri. That share is however disputed.

39. The Petitioner is the current administrator of the estate of the deceased. The principal legal duty of an administrator is to be accountable

to the Court and the beneficiaries in respect to the estate. The administrator must also ensure that the estate of a deceased person is fully transmitted to the beneficiaries. An administrator may or may not be a beneficiary.

40. It is for that reason that an administrator must be appointed by a Court. It also explains why an administrator can be changed by the Court at any time.

41. Given that the Petitioner acted in good faith in obtaining the grant and since the Objector now wishes to take over from him, I do not see any serious hindrance thereto even in the face of the fact that the Objector has failed to satisfy this Court under **Section 76** of the Act.

42. It is fair that the affairs of the deceased are dealt with by his wife more so in a case where the wife is now prepared to do so. (**Article 159(2)(d)** of the **Constitution**). I am also alive to the fact the Petitioner and the Objector are the main protagonists in **Migori ELC (O.S.) No. 92 of 2018.**

43. Having said so, I must also say that it will be fair that the Objector shoulders the costs.

44. By taking into account the unique circumstances of this a matter and in view of the forgone discussion, I hereby make the following orders: -

(a) The Grant of Letters of Administration made to Samwel Chacha Nyambiri on 15/04/2015 and confirmed on 18/12/2015 be and is hereby revoked and a Fresh Grant shall issue in the name of Robi Mukira Nyambiri.

(b) The new grant to Robi Mukira Nyambiri shall stand confirmed at issuance.

(c) The distribution of the parcel of land known as Bukira/Bwisaboka/702 shall remain as in the Certificate of Confirmation of a Grant dated 18/12/2015 pending the determination of Migori ELC (O.S.) No. 92 of 2018.

(d) The Objector shall bear the costs incurred by the Petitioner in obtaining the Grant of Letters of Administration dated 15/04/2015 and shall further bear the costs of the Summons for revocation of the Grant dated 21/03/2017. The costs shall be agreed upon or be taxed by the Deputy Registrar.

(e) Parties be at liberty to apply.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of November 2019.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of:

Mr. Kerario Marwa Counsel instructed by Messrs. Kerario Marwa & Company Advocates for the Objector/Plaintiff.

Mr. Orina Counsel instructed by Messrs. Orina & Company Advocates for the Petitioner/1st Defendant.

Mr. Agure Odera Counsel instructed by Messrs. Agure Odera & Company Advocates for the 4th Respondent/Defendant.

Evelyne Nyauke – Court Assistant