



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 380 OF 2011**

**IN THE MATTER OF THE ESTATE OF KIAWA KAVUI (DECEASED)**

**JULIUS MUSAU KIAWA.....APPLICANT**

**VERSUS**

**ZACHARIA MULEI KIAWA.....RESPONDENT**

**RULING**

1. By Summons for revocation or annulment of grant dated 14<sup>th</sup> March, 2018, the Applicant herein seeks that the grant of letters of administration and certificate of confirmation issued herein on 27<sup>th</sup> July, 2012 to **Zacharia Mulei Kiawa** be revoked.
2. According to the applicant, the deceased who was his father was survived by a wife 6 daughters and 2 sons and the Respondent is his brother. However, the Respondent petitioned for the letters of administration alone and failed to inform him and instead forged the signatures of his 3 sisters and proceeded to misrepresent to the court that he was present during the confirmation of the grant. It was therefore his case that the respondent was guilty of concealment of material facts from the court.
3. It was further deposed that the respondent has used the confirmed grant to disinherit him and evict him from his permanent home.
4. It was the applicant's case that he did not participate in these proceedings and only came to know about them during the said eviction case being SPMCC No. 84 of 2015.
5. In his reply, the respondent deposed that the grant was issued on 13<sup>th</sup> December, 2011 and that all the beneficiaries signed the petition save for the applicant who threatened the Respondent with a machete. According to him, the court being satisfied with the application for confirmation confirmed the same and he was issued with a certificate of confirmation dated 31<sup>st</sup> July, 2012 and he registered LR No. Kangundo/Isinga/877 in his names on 22<sup>nd</sup> October, 2012.
6. According to the Respondent, the applicant had been allocated Yatta Mavoloni Kwa Kulu Plot 102 by the deceased while 2 of the sisters were allocated were allocated Yatta Mavoloni Kwa Ndolo Plot No. 970. However, the applicant sold the said sisters' plot no. 970 and has built a house on Yatta Mavoloni Kwa Kulu 102. It was averred by the Respondent that the deceased allocated LR No. Kangundo/Isinga/877 to him though the same was never transferred to him. Accordingly, he filed Kangundo CMCC No. 84 of 2013 against the applicant to vacate the said property and on 18<sup>th</sup> October, 2017 judgement therein was delivered in his favour, the court noting that the applicant had never for the last 5 years that the suit was in court contested the confirmed grant.
7. It was the Respondent's view that this application is an afterthought and is aimed at reviewing or appealing the judgement in the said case whose judgement the applicant never appealed against. According to the Respondent, the applicant was all along aware that succession proceedings had been conducted and is hence estopped from denying knowledge of their existence. The respondent disclosed that in the year 2013 when the Kangundo CMCC No. 84 of 2013 was filed, the confirmed grant was issued therein hence the applicant was aware of these proceedings. The Respondent denied that he forged the signatures of the other beneficiaries as they signed on their own free will.
8. In a rejoinder, the applicant stated that he owns plot no. 970 as his privately purchased property and that at no time was the same allocated to him by his father.

**Determination**

9. I have considered the issues raised in this application. The sole ground disclosed in the application upon which this application is based is that the applicant was never involved in these succession proceedings. Though parties have gone at length in matters touching on how the deceased distributed his properties and who is entitled to what, the only issue for consideration is whether these proceedings are caught up by section 76 of the **Law of Succession Act**.

10. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

*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;*

11. Section 51 (2) of the **Law of Succession Act** provides that:-

*An application shall include information as to-*

*(a) the full names of the deceased;*

*(b) the date and place of his death;*

*(c) his last known place of residence;*

*(d) the relationship (if any) of the applicant to the deceased;*

*(e) whether or not the deceased left a valid will;*

*(f) the present addresses of any executors appointed by any such valid will;*

*(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;*

*(h) a full inventory of all the assets and liabilities of the deceased; and*

*(i) such other matters as may be prescribed.*

12. In this case, it is clear that the Respondent herein did not rank in priority to the Applicant since they are both brothers, the sons of the deceased. Part VI Rule 26(1) of the **Probate and Administration Rules** provides that:

*Letters of administration shall not be granted to any applicant without notice of every other person entitled in the same degree as or in priority to the applicant.*

13. Therefore, what the law requires is that a notification be given to every person entitled in the same degree as or in priority to the applicant. The Applicant herein has however gone further and contended that he ought to have been cited.

14. Rule 22(1) of the **Probate and Administration Rules** (hereinafter referred to as “the Rules”) provides that:

*A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.*

15. A citation, it was held in **In the Estate of Sheikh Fazal Ilahi [1957] EA 697** in which the Court relied on **Henderson on Testamentary Succession (4<sup>th</sup> Edn)**, is an instrument issued by the court, citing persons to come in and show cause why a grant should not issue to a particular person. It was therefore held in **Maamun Bin Rashid Bin Salim El-Ruhmy vs. Haider Mohamed Bin Rashid El-Basamy [1963] EA 438** that:

**“Where a person claiming to be an heir (or the heir of an heir) of a deceased person applies for a grant of administration, citations should not be issued to other heirs whose existence is disclosed in the petition having an equal right as a matter of course but only when for some special reason the court sees fit to make such an order. The object of a non-contentious citation is to call upon a person who has a superior right to a grant to take the grant. Thus any person who is interested in having an estate administered may apply for a grant of representation, but if there are persons who have a superior right to obtain the grant, he must cite such persons calling upon them to apply for the grant. If the person cited fails to apply for a**

grant or renounce their right to it, the grant may, subject to the usual conditions, be given to the *ctor*. It follows that, save in cases where the court thinks it necessary to do so; non-contentious citations should not be issued unless the petition discloses that the person seeking the grant has a lesser right than some other person who has failed to take the necessary steps to obtain it... If on the other hand the person cited concedes that the person who has applied has a right to the grant but contends that he has a superior right, then, the proper course for him to adopt (after he has been served with citation) is to enter appearance to the citation and himself apply for a grant to be made to him if he so wishes. If the person cited enters appearance but takes no further step, the *ctor* may apply on summons for an order that the person cited to take the grant within a stated time and in the event of the latter neglecting to do so, the grant will be ordered to be made to the *ctor*...*The only issue before the court in a cause brought as a result of a caveat being entered is whether or not the person who has applied for the grant is entitled to it* and there is no issue as to whether he or some other person has a better right to the grant.” [Emphasis supplied].

16. It was therefore held by **Kneller, J** (as he then was) in **Kiboko vs. Assistant Land Registrar and Others [1973] EA 290** that:

**“Citations need not be ordered to issue to all persons shown as heirs in the petition of the deceased for a grant of letters of administration of the estate. They need not be ordered as a matter of course to issue for heirs shown in the petition to have an equal right. They should go forth to anyone shown to have a superior right to take up the grant or for any other special reason.”**

17. It is therefore clear that unless the Court thinks otherwise, the *Citor* must be a person who is himself entitled to a grant, in the event that a person with a superior right fails to take up the grant or for any other special reason. Where two or more persons have equal rights to grant of representation, there is no necessity for a citation to be made unless when for some special reason the court sees fit to make such an order. In those circumstances, one of them is at liberty to apply for grant and the Court may in its discretion join the other persons if it deems fit. This is my understanding of section 66 of the ***Law of Succession Act***, Cap 160, Laws of Kenya which provides that:

***When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—***

***(a) surviving spouse or spouses, with or without association of other beneficiaries;***

***(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;***

18. Under Part V of the Act, the children of a deceased person rank equally. In this case the Applicant and the Respondent are brothers. Accordingly, there is no superior right to a grant as between the two. Accordingly, there was no need to issue a Citation.

19. There is however no evidence that the Applicant was notified as required in Part VI Rule 26(1) of the ***Probate and Administration Rules*** despite the fact that the Applicant and the Respondent were entitled in the same degree being children of the deceased. The Respondent however contends that the Applicant was difficult and violent and threatened the Respondent with a machete. To my mind the Respondent could have notified the Applicant of the intention to take out letters of administration in any other manner or he could have sought an order from the court dispensing with such notice. However, it does not necessarily follow that if a notice is not issue as required under the said provision, the grant must be revoked or annulled. In **Re The Estate of the Late Suleman Kusundwa [1965] EA 247**, it was held that:

**“The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased’s property as he was entitled to dispose of by will under the applicable law of inheritance.”**

20. As appreciated by **Khamoni, J** in **Re Estate of Gitau (Deceased) [2002] 2 KLR 430**:

**“Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the Law of Succession Act should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.”**

21. In making a decision whether or not to revoke a grant the court must consider whether in the circumstances it is in the interest of justice that the said order be issued. In this case, it is clear that the only property that was disclosed in these succession cause was LR No. Kangundo/Isinga/877 which is now registered in the name of the Respondent pursuant to these proceedings. The Applicant became aware of these proceedings by latest 18<sup>th</sup> October, 2017 when the judgement in Kangundo CMCC No. 84 of 2013 was delivered against him. He did nothing until 15<sup>th</sup> March, 2018 when these proceedings were instituted. He has not appealed against the decision of that court by which the court found that his continued occupation of the said land parcel was unlawful and constitutes illegal trespass and proceeded to order him to vacate and hand over the possession to the Respondent herein. It is clear that the Applicant has slept on his rights. It is an equitable maxim that delay defeats equity or equity aids the vigilant and not the indolent. I agree that by granting the orders sought in this application and revoking the grant while the order in Kangundo Case remains unchallenged would have the effect of reversing the said decision through the

backdoor.

22. In the premises, I decline to grant this application which I hereby dismiss but with no order as to costs.

23. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 4<sup>th</sup> day of November, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the absence of the parties.**

**CA Geoffrey**