



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 313 OF 2014**

**In The Matter of the Estate of Nkiunga Kirichu Nchebere (Deceased)**

**ALOISE KIRIGIA KIUNGA.....PETITIONER/APPLICANT**

**VERSUS**

**KENDI KIUNGA.....OBJECTOR/RESPONDENT**

**RULING**

[1] This decision relates to an application dated 16<sup>th</sup> January 2017 by way of summons and which is expressed to be made under Section 9 and 70 of the Law of Succession Act CAP 160 Laws of Kenya and any other enabling provisions of the law. The applicant seeks the following orders:

***That this application be certified as urgent and be heard on priority basis.***

***This honorable court be pleased to issue special citation or witness summons otherwise as may seem necessary in all circumstances of this cause to the following persons that (JACK MITHIKA) THE ASSISTANT CHIEF AKAIGA LOCATION, CIAMURURU KIUNGA (widow) and SIMON NCHEBERE.***

***That this honorable court be pleased to lift the orders issued against the petitioners/applicants bank account no. 491850208806 DHABIT SACCO – MIKINDURI BRANCH.***

***Cost be at the cause.***

That this honorable court be pleased to issue further direction to meet ends of justice in this matter.

[2] The application is premised upon the supporting affidavit sworn by the Applicant sworn on 16<sup>th</sup> January 2017 and submissions filed on 12<sup>th</sup> July 2017. He deposed inter alia that the Respondent is his step-sister who was left by her mother under his care after her mother separated from the Deceased. That the Deceased had two daughters and seven sons surviving him and several parcels of land which before his demise he had shared among all his children save for two parcels of land, MBEU 6576 Plot No. 18B and 99. He insisted that before his death the Deceased had shared and transferred his land to all beneficiaries herein. According to him, that is why this succession was filed in respect of only the plots above and bank accounts which the Deceased left undivided for reasons that they were meant not to be sold or subdivided. Plot No. 1053/ANKAMIA adjudication section was left un-transferred which after the issuance of the grant he transferred the same to his brother ROMANO KAMENCHU. He stated further that, the rental premises standing on plot number 18B KUNATI MARKET was to be transferred to COSMAS GITONGA after payment of Kshs. 300,000/= to the beneficiaries still under the names of his late father. Again, the rental premises standing on plot number 99 Mbeu Market was before the death of the Deceased sub-divided and the beneficiaries shown their portions but Deceased died before effecting the transfer. The proceeds of the said premises goes to the Deceased's bank accounts and shared among the brothers for the education of their children of which also the Objector was the potential beneficiary as per the will.

[3] The Petitioner continued to state that, pursuant to Section 9 of CAP 160 an oral will shall not be valid unless it is made before two or more competent witnesses. That is why he seeks for a special citation and/ or witness summons against her mother, uncle and assistant chief Akaiga location to shed more light with regard to the oral will made by the Deceased before his demise. For an oral will is valid unless revoked under Section 18 and 19. He averred that he is the sole owner of bank account No. 491850208806 DHABIT SACCO-MIKINDURI BRANCH and not the Deceased's as alleged by his step sister.

[4] The Applicant filed a further affidavit sworn on 22<sup>nd</sup> February 2017, and deposed that it is not true to state that he moved the land district and settlement office for sub-division after the Respondent had applied for revocation. The Respondent has perjured herself by lying on oath that the properties were transferred after filing the application to revoke, when indeed the application was filed on 25<sup>th</sup> June 2015. The said application was never served upon him or land office stopping the ongoing transaction. That once a grant is issued and confirmed to stop the

ongoing process of transfer can only be averted by an order of the court but not by filing an application for revocation.

[5] The Applicant filed his submissions on 14<sup>th</sup> July 2017 and reiterated what he had already stated. Although, he further submitted that there is need to issue special citation to the witnesses in proof of the oral will as provided for in law. A special citation is mandatory as far as there is dispute on the issue of oral will.

#### **Application was opposed**

[6] This application was opposed by way of a replying affidavit sworn on 6<sup>th</sup> February 2017 by KENDI KIUNGA, the Respondent. She deposed that by the ruling of this court on 22<sup>nd</sup> November 2016 the grant was revoked and the court ordered the Applicant to provide the alleged will within 14 days of which he did not. Instead, he filed this application which is a clear indication that there is no will. The application is meant to circumvent and delay the finalization of this matter. In relation to the Applicant's annexures dated 11<sup>th</sup> August 2015, the Applicant moved the District Land and Settlement office Tigania East to try and divide the estate to the family after she had applied for revocation and the Applicant had been appointed as the sole beneficiary vide grant dated 18<sup>th</sup> May 2015. He cannot say that the properties were distributed by the Deceased yet he rushed to distribute the same after she had applied for revocation. As per annexure 'AKK2' the Deceased had transferred 2 Acres to the Applicant from No.640 and gave Jennifer 1 Acre of which they are aware of but the Applicant did not state this. The proceeds collected from the rental houses are all deposited in A/C No. 491850208806 DHABIT SACCO-MIKINDURI BRANCH as seen from the copies of deposit slips from tenants annexed. It evidences that the monies belong to the estate. But the proceeds go to the Applicant's pockets alone. If indeed the Applicant had applied to distribute Plot No 99 & 18B and Standard Chartered A/c No. 01050161149900, then why doesn't the grant read other properties? The court to dismiss the application and issue a fresh grant to her and her brother COSMAS GITONGA KIUNGA to distribute the estate properly and fairly for his intention is clearly to disinherit her

[7] The Respondent filed her submission dated 21<sup>st</sup> November 2017 where she reiterated what she has stated above. However, she further submitted that this application is misconceived in law and an attempt to further delay this matter. Since provisions of Section 9 and 70 of CAP 160 have nothing to do with the orders of the court dated 22<sup>nd</sup> November 2016 for if the Applicant thinks he has any evidence to bring to court then he can bring witnesses at the hearing during the time of distribution as the grant has been revoked. There is no disposition by any person on the contents of any oral will by the Deceased.

#### **Determination**

[8] You will have noted that the court has literally rehashed what the parties deposed to and submitted upon. This is for good reason as shall become clear later. Of significance is that on 22<sup>nd</sup> November 2016 this court revoked the grant herein but at the same time required the Petitioner to provide details of the oral will he had alluded to in his earlier submission to the court. The court also postponed the appointment of administrator or administrators to allow the Petitioner time to provide details of the alleged oral will. I see a spirited attempt to try and bring these proceedings within Section 9 of CAP 160 which provides:

*“(1) No oral will shall be valid unless—*

*(a) it is made before two or more competent witnesses; and*

*(b) the testator dies within a period of three months from the date of making the will:*

*Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.*

*(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.”*

[9] Rule 13 of the Probate and Administration Rules provides for the application of proof of an oral will as:

*“(1) An application for proof of an oral will or of letters of administration with a written record of the terms of an oral will annexed shall be by petition in Form 78 or 92 and be supported by such evidence on affidavit in Form 4 or 6 as the applicant can adduce as to the matters referred to in rule 7, so far as relevant, together with evidence as to—*

*(a) the making and date of the will;*

*(b) the terms of the will;*

*(c) the names and addresses of any executors appointed;*

*(d) the names and addresses of all the alleged witnesses before whom the will was made;*

*(e) whether at the respective dates both of the making of the will and of his death the deceased was a member of the armed forces or merchant marine engaged on the same period of active service;*

*(f) whether the deceased at any time executed or caused to be executed a written will.*

*(2) Subject to the provisions of subrule (1) the provisions of these Rules relating to applications for probate of written wills or of letters of administration with such wills annexed shall apply in relation to applications for the proof of oral wills.”*

[10] I note that this application is based on Section 70 of the said Act which provides:

**“Whether or not there is a dispute as to the grant, every court shall have power, before making a grant of representation—**

**(a) examine any applicant on oath or affirmation; or**

**(b) call for further evidence as to the due execution or contents of the will or some other will, the making of an oral will, the rights of dependants and of persons claiming interests on intestacy, or any other matter which appears to require further investigation before a grant is made; or**

**(c) issue a special, citation to any person appearing to have reason to object to the application.”**

[11] The court’s power in section 70 of the Law of Succession Act is not in doubt. But, it is to be exercised on certain legal considerations. In so far as special citation is concerned, it ought to be issued upon such person or persons who have reason to object to the application for grant. In, this case, the Petitioner was to provide details of an alleged oral will within a given period of time. He did not give the required details of the alleged oral will. He has not satisfied any of the matters referred to in rule 7 of the Probate and Administration Rules, and more specifically, evidence as to—

**(a) the making and date of the oral will;**

**(b) the terms of the will;**

**(c) the names and addresses of all the alleged witnesses before whom the will was made;**

**(d) whether the deceased died with three months of the making of the oral will**

The Applicant has merely engaged in a fishing expedition- he has cast his net too wide in the sea in the hope that he will catch one or two or a number of edible fish or crab. A court of law does not act on perception or whims of a party; in this case, it will act only upon such cogent evidence being filed on the oral will with sufficient details of named witnesses thereto who should be called upon to prove the oral will. There is absolutely nothing tangible here. I agree with the Respondent that this application is calculated to waste court’s precious time and cause delay in the finalization of these proceedings. There is no basis whatsoever laid for the issuance of special citation to the Assistant Chief of Akaiga Location or to the mother of the Petitioner. The request thereto is not founded on anything and it is blown away. In any case, during confirmation proceedings, the court will hear all interested parties and witnesses including what the petitioner is saying, before it makes its final pronouncement. I have fulfilled the promise I made that rehashing of the arguments herein was deliberate.

[11] Secondly, the order issued against the bank account No. 491850208806 DHABIT SACCO – MIKINDURI BRANCH, is aimed at preservation of the estate property. No doubt, rental income from the estate is banked in that account. Whether the account stands in the name of the Applicant or not, estate income is traced to it and as such the income shall be followed to where it is. See receipts produced by the Respondent. Such ought to be the estate account. I say so as the Petitioner was the administrator of the estate when all these things were taking place and must account to the court as well as the beneficiaries of the estate. I will restate that no party should divert the court from its core functions as was sated in **re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** to be:

**“...to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”**

[12] In light of the foregoing, the application dated 16<sup>th</sup> January, 2017 is dismissed. As the policy of law is that, no estate should remain without an administrator, I direct each interested party in these proceedings to intimate to this court in writing, within 7 days, the person or persons who should be appointed as administrator or administrators of the estate. Upon expiry of seven days from today, this court shall exercise its final discretion under section 66 of the Law of Succession Act, and appoint administrator. Of course after taking into account filings in respect thereof and the best interest of all persons concerned. It is so ordered.

**Dated, signed and delivered in open court at Meru this**

**5<sup>th</sup> March, 2018.**

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**F. GIKONYO**

**JUDGE**

In the presence of :

M/s. Njenga for interested party

M/s. Thibaru holding brief for Mugambi for petitioner

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**F. GIKONYO**

**JUDGE**