



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MIGORI**  
**SUCCESSION CAUSE NO. 324 OF 2015**

*(Formerly Migori Senior Principal Magistrate's Succession Cause No. 67 of 2005)*

**IN THE MATTER OF THE ESTATE OF MICHAEL NYAMWAYA OWUOR (DECEASED)**

**-between-**

**BENEDICT OWUOR NYAMWAYA.....PETITIONER/RESPONDENT**

**-versus-**

**FLORENCE NYANCHAMA GISEMBA**

**SAMUEL ONYANGO SAMITA.....OBJECTORS/APPLICANTS**

**RULING**

1. The Petitioner herein, **BENEDICT OWUOR NYAMWAYA**, who is one of the sons of the deceased in this matter petitioned for and a grant of representation of his father's estate was issued to him on 15/06/2005. The grant was confirmed on 15/03/2006. That was before the Senior Principal Magistrate's Court at Migori.
2. Around 9 years later the Objectors/Applicants herein filed a Summons for Revocation of the grant evenly dated 17/09/2015 seeking to revoke the grant issued to the Petitioner herein. The summons were made on six grounds and was supported by an affidavit jointly sworn by the Objectors/Applicants.
3. When the said summons came up for hearing before me on 27/04/2016 the second Objector/Applicant herein informed the Court that the dispute was indeed a boundary dispute with the Petitioner as the Petitioner had encroached into their parcel of land, hived it off and was busy selling it to third parties. Based on that position this Court declined jurisdiction and directed that the matter be instead filed before the appropriate court. The summons for revocation was hence struck out accordingly.
4. One week later (that is on 05/05/2016) the Objectors through the firm of Messrs S.M. Sagwe & Co. Advocates filed a Notice of Motion dated 04/05/2016 seeking to vacate the orders made on 27/04/2016 and that the Summons for Revocation of the grant dated 17/09/2015 be reinstated for hearing. It is the Objectors Counsel's contention that the Co-Objector misled the Court on the cause of action as contained in the revocation application and that the same ought not to have been struck out since the Objectors are beneficiaries of the deceased's estate. The Respondent did not file any response to the application under consideration.
5. The Motion was heard on 30/11/2016 and this is its resultant ruling.

6. I have patiently considered this matter noting that the same involves land, which without say, remains a very emotive one. The matter involves the estate of the deceased herein one **Michael Nyamwaya Owuor** who died on 20/12/1998. The Petitioner is one of the sons of the deceased. When the Petitioner applied for the grant, he disclosed that the deceased owned several parcels of land and attached thereto their respective Official Searches. One of the parcels of land is known as **SUNA EAST/WASWETA 'I' /11196** which was registered in the deceased's name on 09/09/1997 (hereinafter referred to as '**the land**').

The land therefore forms part of the estate of the deceased and was rightly dealt with under the succession cause. According to the Certificate of Confirmation dated 15/03/2006, the land wholly devolved to the Petitioner.

7. In seeking the revocation of the grant in this cause, the Objectors swore a joint supporting affidavit on 17/09/2015 wherein they *inter alia* explained their locus in the matter. It is alleged that the deceased purchased the land in the early 1970's before the Government demarcated and registered land generally in the area from the second Objector's father which land was part of a larger parcel of land which was later on registered as **SUNA EAST/WASWETA 'I' /79**. That original larger parcel was then sub-divided to the present **SUNA EAST/WASWETA 'I' /11196** and registered in the name of the deceased. In 1979 the second Objector herein together with his brother sold the same parcel of land which was later registered as **SUNA EAST/WASWETA 'I' /11196** to the first Objector's husband. It is also contended by the Objectors that when the deceased eventually managed to register the land in his name and since it was occupied by the first Objector, he agreed to transfer the same to the first Objector but that did not happen before the deceased died. It is further alleged that the Petitioner has now refused to transfer the land to the first Objector and instead he is busy sub-dividing and selling it out to third parties hence the Summons for revocation.

8. It is on this background that the second Objector pointed out to the Court on 27/04/2016 that the matter related to a boundary dispute.

9. The matter has several contentions. The two main ones are how the land was purchased by who and from who and how the first Objector ended up being on the land and secondly if it's true that the deceased had undertaken to transfer the land to the first Objector and what steps were taken to actualize that. In other words the parties are wrestling on who is the rightful owner of the land.

10. The Objectors are not contending that they are the children or relatives of the deceased or that they used to be maintained by the deceased prior to his death. Neither are they saying that they are entitled to the land on account of some inheritance or that they are the deceased's creditors. Their claim is simply that the land belongs to the first Objector since the second Objector and his brother sold the same to the first Objector's husband and not to the deceased.

11. Can the foregone dispute therefore be said to be one falling within the parameters and jurisdiction of a succession Court?. This Court is called upon by the Constitution and the law to first satisfy itself that it has the jurisdiction over any matter before it deals with the same. That was the finding in the *locus classicus* case of **The Owners of Motor Vessel "LILIAN "S" -vs- Caltex Oil Kenya Ltd (1989) 1 KLR 1** where Nyarangi, JA. stated at page 14 that: -

***“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

12. Further the Court of Appeal in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** had the following to say on the centrality of the issue of jurisdiction:-

***“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to***

*be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain."*

13. This Court, being a High Court, is a creature of **Article 165 of the Constitution** and which Article also defines its jurisdiction. Under **Article 165(5)** the Constitution excludes the High Court from exercising jurisdiction over matters falling within the jurisdiction of the courts contemplated in **Article 162(2)**. **Article 162(2)** of the **Constitution** provides that the mandate to deal with disputes relating to the use, occupation and title to land is a legal preserve of the Court contemplated under that Article. That Court is now the Environment and Land Court.

14. By applying the foregone to this matter, it becomes clear that the dispute between the parties herein is clearly on ownership and title to land and that it falls within the preserve of the Environment and Land Court and is not among those disputes contemplated under the Law of Succession to be handled by the High Court. This Court is therefore not seized of jurisdiction to determine the dispute between the Objectors and the Petitioner in this matter and that is why the Court downed its tools. Any attempt therefore to deal with that dispute will be an act in futility and that is why the Notice of Motion dated 04/05/2016 seeking to vacate the orders made on 27/04/2016 and that the Summons for Revocation of the grant dated 12/09/2015 be reinstated for hearing cannot succeed.

15. The Notice of Motion dated 04/05/2016 is hereby dismissed with costs.

**DELIVERED, DATED and SIGNED at MIGORI this 23<sup>rd</sup> day of January 2017**

**A.C. MRIMA**

**JUDGE**