



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISC. SUCCESSION CAUSE NO. 67 OF 2013**

**IN THE MATTER OF THE ESTATE OF KIRAGU MBUCHI.....DECEASED**

**AND**

**MAGONDU MIANO.....APPLICANT**

**VERSUS**

**JANE WAINOI.....1<sup>ST</sup> RESPONDENT**

**JOHN WACHIRA KIRAGU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the estate of the late **KIRAGU MBUCHI** (hereinafter to be referred to as deceased herein) who died on 20<sup>th</sup> December, 2010 domiciled in Thita, Kirinyaga County. A grant of representation in respect to the said estate was issued in this cause on 25<sup>th</sup> January, 2013 to **JANE WAINOI KIRAGU** (widow to the deceased) and **JOHN WACHIRA KIRAGU** (son to the deceased herein). **Magondu Miano**, the applicant herein, took out summons under **Section 76 of Law of Succession Act** for revocation of the said grant dated 4<sup>th</sup> July, 2013 asking this Court to revoke the said grant on the following grounds namely:-

***(i) That the proceedings to obtain the same were***

***defective in substance.***

***(ii) That the grant was obtained fraudulently by making***

***of false statement.***

***(iii) That there was concealment of material facts***

***particularly of the existence of a parallel and pending succession cause No. 230 of 2011 over the same estate.***

2. The applicant in his supporting affidavit sworn on 4<sup>th</sup> July 2013 has deposed that he was also an administrator to the estate of the late Kiragu Mbuchu having been appointed in a parallel succession cause filed vide Kerugoya Senior Principal Magistrate's Court Succession Cause No. 230 of 2011 on 29<sup>th</sup> June, 2012. He has contended that he was in the process of applying for confirmation of grant when the

respondents herein filed protest. He has further deposed that prior to applying for letters of administration he had cited Jane Wainoi, the 1<sup>st</sup> respondent as the widow to the deceased because of her initial reluctance to take out letters of administration.

3. The Applicant has further contended on oath that he was laying claim on one of the assets forming the estate of the deceased herein (i.e. **INOI/THAITA/90**) because in his view the property was transferred to the deceased in an irregular manner during his lifetime as he argues that he never signed the transfer form of the said property.

4. **Jane Wainoi**, the 1<sup>st</sup> respondent herein has sworn a replying affidavit on her own behalf and on behalf of her son, John Wachira Kiragu the 2<sup>nd</sup> respondent. In her affidavit in response to the summons before this Court, the 1<sup>st</sup> Respondent has deposed that the Applicant was unknown to her as he was not a dependant of the deceased or a family member and only came to learn about him when citation was served on her vide Kerugoya Senior Principal Magistrate's Court Succession cause No. 230 of 2011. In her view, the Applicant had no interest in **INOI/THAITA/90** as at the time of the citation the said property was encumbered with a loan of Kshs.1,000,000/=. She has further faulted the jurisdiction of the subordinate court to entertain the cause stating that the estate of the deceased herein was valued more than Kshs.100,000/= which was the monetary limit of the jurisdiction of the subordinate court then. She has urged this Court to invoke its powers under **Section 76** of the **Law of Succession Act** and nullify the grant issued to the Applicant because the grant in her view was irregularly issued by a court lacking jurisdiction.

5. The respondent has further claimed the property in dispute was registered in the name of the deceased in 1971 and has exhibited in her affidavit a copy of the register (Green Card) to demonstrate the same. She has further claimed that the family of the deceased has been in possession of the said property for more than 40 years. She has denied any wrongdoing alleging that she was unaware that another grant had been issued to the Applicant when she applied for one in this cause.

6. The Respondents have further through their learned counsel M/S P.M. Muchira Advocates made written submissions to oppose the summons to revoke the grant issued to them.

7. The respondents have faulted the application before court for being incompetent because in their view the summons offends mandatory provisions of **rule 44 (1)** of **Probate and Administration Rules** which they contend requires that such summons should be taken within the cause from which the grant was issued. The respondents contend that the applicant was wrong procedurally by choosing to file the application through a miscellaneous cause rather than through High Court Succession Cause No. 319 of 2012. The respondent has contended that the summons before court is therefore an abuse of court process and improperly before court.

8. The respondents have also faulted the grant issued to the applicant in the lower court pointing that the same was irregular as the same in their view was issued before citation proceedings took place and besides that they allege that the petition was not gazetted in the Kenya Gazette as required by law.

9. The respondents have conceded that it was irregular to have two parallel causes in respect to the same estate but has faulted the grant issued to the Applicant on 12<sup>th</sup> September, 2011 for irregularity and also for breaching **rule 22 (5)** and **(7)** of the **Probate and Administration Rules**.

10. I have considered this application and the response made. I have also considered the written submissions made by the respondents through learned counsel P. M. Muchira. The Summons for Revocation of Grant has raised the following basic issues for determination;

(i) Whether the application is competent and properly before court.

(ii) Whether the summons taken has raised sufficient ground(s) for

revocation of grant issued to the respondents herein.

11. The respondents have attacked the applicant's application for offending the provisions of **Rule 44(1)** of the **Probate and Administration Rules**. It is true that the Law of Succession Act clearly stipulates its own procedures for various reliefs that a litigant requires from court. A party moving the court to revoke/annul a grant under **Section 76** of the Act is required to, under **rule 44 (1)** of the **Probate and Administration Rules**, apply to court by summons in Form 107 that is provided at the back of the Act. The summons requires to be issued by the Deputy Registrar of the High Court within the cause that the grant was issued. If the grant was issued by a resident magistrate then the summons will be issued through the High Court registry nearest to that resident magistrate's registry. A litigant would then be in order to file a miscellaneous cause before the said High Court through which the summons for revocation of grant can issue. That is the correct position in law in my view and I agree with the respondents that the applicant's application falls short in two respects which is not uncommon in our courts.

(i) In the first place the applicant wrongly filed a miscellaneous cause to revoke a grant that was issued by this court vide High Court Succession Cause No. 319 of 2012 instead of filing his application within the same cause (Succession Cause No. 319 of 2012) as provided by **rule 44 (1)** of **Probate and Administration Rules**.

(ii) Secondly the Summons for Revocation taken does not strictly comply with the rules cited as it falls short of Form 107 provided by the rules which must be issued or signed by the Deputy Registrar of this court to qualify to be referred to as summons. Summons are usually issued by court and it requires the party summoned to respond to the said summons in the specified manner.

12. This Court therefore finds that the Summons for Revocation before this Court is incompetent going by the procedural requirements cited above. I am however, minded in view of the provisions of **Article 159 (d)** of the **Constitution** to overlook the inadequacy of the application as the application is properly before court and it is desirable to base my decision on substantial justice rather than procedural technicalities.

13. The Applicant herein has conceded that he is not a dependant or related to the deceased herein. He has contended that he moved the court vide Senior Principal Magistrate's Court Succession Cause No. 230 of 2011 for a grant of letters of administration after the 1<sup>st</sup> respondent became reluctant to take out letters in respect to the estate of her late husband, the deceased herein when he had a claim or interest in part of it as aforesaid. I have considered the citation proceedings which the respondent has impugned and I must say that the same was apparently not properly conducted. I say apparent because the proceedings I have are scant and not clear on when the hearing took place. The citation was filed by the Applicant vide Senior Principal Magistrate's Court Succession Cause No. 230 of 2011 on 11<sup>th</sup> August, 2011. The record in that cause shows that the citee entered appearance on 6<sup>th</sup> September, 2011. Under the provisions of **rule 22 (7)** of **Probate and Administration Rules** the 1<sup>st</sup> respondent after being cited was required within 30 days to apply for a grant of representation failure to which the applicant (citor) could then move the court under **sub rule (b)** and **(c)** of the same rule for a grant. However, a look at the record shows that the subordinate Court issued a grant on 12<sup>th</sup> September 2011 before entertaining any hearing on citation when the record shows that appearance had been entered and objection filed. I have noted that the citor's counsel issued a hearing notice to the 1<sup>st</sup> Respondents inviting for hearing a hearing scheduled for 23<sup>rd</sup> September, 2011. I therefore agree with the Respondents that the grant issued to the Applicant herein was clearly riddled with irregularities because besides this the Gazette Notice No. 4934 of 13<sup>th</sup> April, 2012 shows that gazettement of the petition was done after the grant had already been issued. Having said that, it is also true that a grant duly issued by a court of law remains valid unless or until the same is nullified. This Court finds that at the time (19<sup>th</sup> December, 2012) the respondents herein were granted letters of administration vide High Court Succession Cause No. 319 of 2012 in respect to the estate of the late Kiragu Mbuchi, the deceased herein, there existed a parallel grant issued on 29<sup>th</sup> June, 2012 by subordinate court vide Senior Principal Magistrate's Court Succession Cause No. 230 of 2011 over the same estate and same deceased person. That in itself was an irregularity and inadvertence because a grant cannot issue when a parallel grant over the same estate exists. Two wrongs cannot make a right and when a grant is issued by a court due to some mistake or inadvertence, the provisions of **Sections 76 (1)** of the

**Law of Succession Act** must come into play but before I invoke my powers under the section, this Court also finds that the lower court irregularly entertained the cause vide Succession Cause No. 230 of 2011 when the value of the estate was beyond its monetary jurisdiction. The now repealed **Section 48** of the Act gave resident magistrates jurisdiction to entertain causes where the estate's value did not exceed Kshs.100,000/=. A proviso also existed under the Section that where both the High Court and a resident magistrate's court existed, all matters should be filed in the High Court. This Court takes judicial notice of the fact that this High Court was established in 2012 and Succession matters pending in subordinate courts were transferred to the High Court. The subordinate court therefore apart from lacking jurisdiction to entertain the cause should have downed its tools the moment this Court was established and advise the parties to move the High Court accordingly. In the light of this, I find that the grant made to the applicant vide Senior Principal Magistrate's Court Succession Cause No. 230 of 2011 on 12<sup>th</sup> September, 2011 and dated 29<sup>th</sup> June, 2012 was irregular as the citation proceedings leading up to the issuance of grant was defective and the subordinate court which made the grant lacked jurisdiction to do so pursuant to the provisions of **Section 48** of the **Law of Succession Act**.

14. In the premises this Court shall invoke its powers under **Section 76** of the **Law of Succession Act** and on its own motion annul/revoke the grant issued to the Applicant in Kerugoya Senior Principal Magistrate's Court Succession Cause No. 230 of 2011. In the same vein, the grant issued to the Respondents vide Succession Cause No. 319 of 2012 stands annulled/revoked because it was issued through inadvertent mistake. This Court was at the time unaware of the existence of another grant issued vide Senior Principal Magistrate's Succession Cause No. 230 of 2011. Having revoked both the said grants this Court finds that the Respondents are, under the provisions of **Section 66** of **Law of Succession Act** the right persons who should have applied and granted the letters of administration in respect to the estate of the late Mbuchi Kiragu, the deceased herein. Under **rule 73** of **Probate and Administration Rules** I hereby appoint them as the administratrix and administrator respectively to the estate of the deceased herein. The Applicant's claim on the estate in my view is beyond the scope of Law of Succession Act and should be entertained or canvassed in a proper forum and in a proper court which in this case is the Environment and Land Court. **Law of Succession Act (Cap. 160)** is limited in scope and is applicable only to intestate or testamentary succession of the estates of deceased persons and the administration of their estates. The Applicants' claim in this cause is a chose in action against the administrators which as I have observed can properly be ventilated in a court seized with the jurisdiction to deal with the same. Having nullified both grants, and made the order I have made above besides the observations I have also made, it is only fair that each party shall bear own costs.

*Dated and delivered at Kerugoya this 12<sup>th</sup> day of January, 2017.*

**R. K. LIMO**

**JUDGE**

12.01.2017

Before Hon. Justice R. K. Limo J.,

Court Assistant Naomi Murage

Muchira for the Respondent present

Ngigi holding brief for Mwai for applicant present.

**COURT:** Ruling signed, dated and delivered in the open court in the presence of Muchira for respondent and Mr. Ngigi holding brief for Igati Mwai for the applicant.

**R. K. LIMO**

**JUDGE**

12.01.2017