



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 276 OF 2008**

**In the Matter of the Estate of M' Makinya M' Itimitu Alias Makinya Itimitu (Deceased)**

MARGARET GACUKU SIMON.....PETITIONER

-VS-

MARISELA NKATHA MAKINYA.....OBJECTOR/APPLICANT

**RULING**

[1] Before me is a Summons for Revocation of Grant brought pursuant to Sections 47 and 76 of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules and Section 68 of the Land Registration Act of 2012 and all other enabling provisions of the law. In the application, the Applicant seeks the following orders:

1. ....spent
2. **THAT this honourable court be pleased to annul and/or revoke the Grant of Letters Administration issued to Margaret Gacuku Simon in this cause on 24<sup>th</sup> August 2009.**
3. **THAT this honourable court be pleased to issue an order of inhibition inhibiting any dealings on Land Parcel No. Nyaki/Munithu/357 pending the hearing and determination of this application.**
4. **THAT the Estate on M' Makinya M' Itimitu (deceased) be distributed in accordance with the Grant of letters of Administration issued to Marisela Nkatha Makinya by this honourable court on 4<sup>th</sup> June 2010 in Meru Succession Cause NO. 516 of 2009.**
5. **THAT the District Registrar be ordered to cancel the name of Margaret Gcuku Simon as the proprietor of Land Parcel No. Nyaki/Munithu/357 and instead register the name of Marisela Nkatha Makinya as the proprietor thereof.**
6. **THAT the costs of this application be provided for.**

[2] At the heart of application is inter alia allegation that the proceedings to obtain the grant were defective in substance and that the grant was obtained fraudulently by making false statements and concealment of material facts from the court. But facts on the relationships among the parties herein are important. The Applicant stated that the deceased was her father and that the Petitioner was wife to her

nephew Simon Gitara ( now deceased) who was son to her brother M' Mururu M' Itimitu (now deceased). She stated further that the deceased had the following children:

1. M' Mururu Makinya (deceased)
2. Elizabeth Michira
3. Marisela Nkatha Makinya (Applicant)

But, the Petitioner filed this succession cause without her consent, knowledge and/or authority. She stated that though the chief letters that the petitioner used in filling this cause bore her name as a daughter of the deceased, the consent form filed did not bear her name. Accordingly, she said that she was deliberately omitted throughout the cause.

[3] She also submitted that when the Grant was issued by the court and later confirmed on 24<sup>th</sup> August 2009, the Applicant was excluded from the distribution of the estate of the deceased and that the Respondent did not make it known to the court that there was a daughter /beneficiary of the deceased estate. On that she beseeched the court should find that the Grant was obtained by concealment of something material to the case. She also submitted that, the Applicant had also petitioned for Letters of Administration in respect of the deceased estate in High Court Succession Cause No. 516 of 2009 and the grant was confirmed by this honourable court on 4<sup>th</sup> June 2010.

#### **Petitioner says is entitled to apply**

[4] On the other hand, the Petitioner submitted that as the granddaughter of the deceased and the fact that she had lived on the suit property since she was married in 1977, she was entitled to apply for Grant of Letters of Administration. Further, she posit that the Applicant although a daughter of the deceased got married away and had never lived or occupied any part of the land. It was further submitted that the Petitioner was seeking a share of the estate through M' Mururu Makinya the only son of the deceased. The petitioner took the view that it was not correct for the Applicant to submit that she ranks in priority over her and that should the court find that the Applicant was entitled to a share of the estate, the court should find that her right was equal to that of her brother M' Mururu Makinya through whom the Petitioner claims for the benefits of his descendants. She beseeched the court to grant the Petitioner appropriate share of the land of the deceased.

#### **DETERMINATION**

[5] I have carefully considered this application and the rival submissions by the parties. It is not in dispute that the Applicant herein is a daughter of the deceased whereas the Petitioner is wife to the grandson of the deceased. It is also not in dispute that the Applicant had also petitioned for letter of administration of the estate of the deceased in High Court Succession Cause NO.516 of 2009 which Grant was confirmed on 4<sup>th</sup> June 2010. But, the Applicant's main contention is that the Petitioner did not disclose that the Applicant was the daughter/beneficiary of the deceased; an act she says amounts to obtaining the Grant by concealment from the court of something material to the case. The first question is; whether the Petitioner was notified of the filing of these proceedings.

[6] Although the Petitioner argued that; she informed all the family members including the Applicant when she filled this succession cause; that they all agreed; and that the Applicant was all along aware of the existence of this cause, one requirement betrays that averment. The Consent form filed was not signed by the Applicant or her sister Elizabeth Michira. These two were persons of priority to the petitioner in applying for letters of administration yet they were even not mentioned in the consent form. I also do not find any recognized renunciation of right to apply or to inherit by the Applicant. Accordingly, her claim that she was not involved in these proceedings cannot be an afterthought as it has been claimed by the Petitioner. Clearly they did not give their consent. Similarly, in the affidavit in support of Summons for Confirmation of Grant of Administration intestate, the Applicant never gave her consent and the Petitioner has not mentioned her as a beneficiary of the estate. Again the Certificate of Confirmation of

Grant dated 18<sup>th</sup> December 2009, shows that the suit property will be inherited wholly by the Petitioner; the Applicant has not been provided for. From the foregoing, it is evident that either the Applicant was not consulted prior to filing of this succession cause and or she did not give her consent as required by law. Being a daughter of the deceased she ought to have given her consent and or notified of these proceedings. I will place these facts and findings on the scale of law.

[7] Section 76 of the Law of Succession Act CAP 160 of the Laws of Kenya provides the circumstances under which a Grant can be revoked or annulled. Of significance is to ask whether:-

- (a) The proceedings to obtain the grant were defective in substance; or**
- (b) 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; or**
- (c) 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**

The circumstances of this case is evident that the Grant herein was obtained by concealment of a material fact to the case in that the court was not made aware that the Applicant was a daughter of the deceased and therefore a beneficiary of the estate. In addition, the Applicant was not provided for at all. That aside, she did not give her consent to and she was not notified of these proceedings. See the case of SAMUEL WAFULA WASIKE -vs- HUDSON SIMIYU WAFULA CA NO.161 OF 1993 (Kwach, Omolo and Tunoi JJA) where it was held:-

**“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”**

**In consequence thereof, having come to the above conclusion, I revoke the Grant and subsequent confirmation thereto for having been obtained fraudulently by concealment of material facts to the case. In the end result I find the Applicant’s application to be meritorious and I accordingly allow it in terms of prayer 2, 3 and 5. Given the age of this cause, I hereby exercise my final discretion under section 66 of the Law of Succession Act and appoint the Petitioner and the Applicant as joint administrators of the estate herein. Parties are further directed as follows:**

- (1) The Objector shall apply for confirmation of the grant and serve the application within 30 days of today;**
- (2) Upon such service, the Petitioner shall file and serve separate mode of distribution- unless she agrees with the Objector- within 21 days thereof.**
- (3) This being a succession matter there will be no order as to costs.**

Dated, signed and delivered in open court at Meru this 21<sup>st</sup> day of February 2017

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F. GIKONYO

JUDGE

In the presence of:

Mr. Mutunga advocate holding brief for Mr. Murango advocate for petitioner

Mr.Nyenyire advocate for Rimita advocate for objector

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F. GIKONYO

JUDGE