



**REPUBLIC OF KENYA**  
**IN THEN HIGH COURT OF KENYA AT MERU**  
**SUCCESSION CAUSE NO. 26 OF 2006**

*In the Matter of the Estate of M’ Ikinya M’ Anjuri (Deceased)*

**JULIUS NYAMU NKIRUTA.....PETITIONER**

**Versus**

**STEPHEN MUTAI M’ IMANYARA.....1<sup>ST</sup> RESPONDENT**

**HONESTY KANYUA MANYARA.....2<sup>ND</sup> RESPONDENT**

**SALOME KIIJA NKIRUTA.....INTERESTED PARTY/APPLICANT**

**RULING**

[1] I have before me a Summons for Revocation of Grant brought pursuant to Section 76 (1) of the Law of Succession Act and Section 68 (1) of the Land Registration Act 2012, wherein the Interested Party has sought the following orders:

**1. ....spent**

**2. ....spent**

**3. ....spent**

**1. THAT the certificate of conformation of grant made to the Petitioner on 25<sup>th</sup> September 2013 be revoked.**

**2. THAT costs of this application be provided for.**

[2] The said application is premised on the following grounds:

**1. THAT the Interested Party is the daughter of the deceased and a proper beneficiary of the estate.**

**2. THAT the grant made to the Petitioner was obtained fraudulently by the concealment of material information from the court.**

**3. THAT the proceedings to obtain the said grant were defective in substance.**

**4. THAT the grant was obtained by an untrue allegation of fact in point of law.**

[3] Briefly the Interested Party's case is that she was a beneficiary in the estate of the deceased by virtue of being his daughter. She was presently a resident of Kijija location having returned home in March 2015 after she left her matrimonial home in Nkubu. She stated that, during her brief stay, she realized that strangers were visiting her father's property in what seemed to be a surveying process and that upon inquiry they disclosed that they were representing some purchasers who had apparently paid some consideration to the administrator of the estate. She confronted her brother, the Petitioner, who briefed her regarding the instant succession cause. It was her contention that this cause was instituted secretly and without her knowledge and consent despite being a daughter of the deceased. She asserted that neither the original Petitioner nor the present one ever disclosed to her the existence of this succession cause. Consequently, she contended that she had been disinherited of her father's property.

[4] The application was also supported by an affidavit sworn by the Petitioner herein who deposed inter alia that the applicant was her younger sister and that she married by the time he took over this matter from his deceased brother as a grant had already been issued. Consequently he urged the court to revoke the grant to enable him follow the law.

### **Application opposed vehemently**

[5] The application was opposed by the 1<sup>st</sup> Respondent via a replying affidavit filed in court on 14<sup>th</sup> July 2015 where he deposed inter alia that the application was not made in good faith as the applicant was acting in cahoots with Julius Nyamu Nkiruta and that further there was absolutely no evidence that the applicant was a child of the deceased.

### **Submissions**

[6] When the matter came up for hearing on 25<sup>th</sup> April 2016, it was agreed that the matter be canvassed by way of written submissions and affidavits. It was submitted for the Interested Party that the initial Petitioner had no justifiable cause in declining to include the Interested Party in the distribution of the estate for she was a proper beneficiary. Again, it was submitted by the Interested Party that the initial Petitioner caused a substantial portion of the estate to be distributed to a non beneficiary and a total stranger to the estate. Consequently, she urged the court to revoke the grant issued to the Petitioner herein.

[7] The Petitioner also submitted to confirm that the Interested Party was a daughter of the deceased as deposed in her affidavit dated 19<sup>th</sup> May 2015 and that further this cause was filed without her knowledge, consent and that the Interested Party did not mention her existence and that she was not disclosed as a heir and that further the Interested Party did not renounce her rights as a daughter of the deceased and a beneficiary of the estate as provided by Rule 18 of the Probate and Administration Rules. Consequently it was submitted that that the proceedings to obtain the grant were obtained by concealment of a material element and that the same were defective in substance.

[8] But, the Respondents submitted that there was no evidence that the Interested Party was a daughter of the deceased and that further the present application was brought shortly after the dismissal of the Petitioner's application for Revocation of Grant and that the same must have been brought at the Petitioner's prompting.

### **DETERMINATION**

[9] This application presents very difficult circumstances. But, as a court of law, we are experienced at unravelling such scary-edge cases. Upon careful consideration of this application; the rival submission and the authorities relied upon by the parties, I take the following view of the matter. This application is brought inter alia pursuant to section 76 of the Law of Succession Act CAP 160 of the Laws of Kenya and looking at the arguments before me, I should be concerned to decipher whether:

(a) *The proceedings to obtain the grant were defective in substance;*

**(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;**

**(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;**

[10] The Interested Party has contended *inter alia* that this cause was instituted secretly and without her knowledge or consent despite being a daughter of the deceased. The Respondents on the other hand submitted that there was no evidence that the Interested Party herein was a daughter of the deceased. Ncabira M Nkiruta alias Elizabeth Nkiruta swore an affidavit deposing that she was the deceased's wife and mother to the Petitioner and the Interested Party herein. She also confirmed that the Interested Party was her daughter and that the Interested Party was not involved in the distribution of her father's estate. The averments in this affidavit were not challenged. Similarly, the Petitioner in this cause deposed that the Interested Party was her sister and therefore a beneficiary of the estate. I have no reason to doubt these averments. Accordingly, in the absence of evidence to the contrary, the averments in these two affidavits and the Interested Party's own affidavit bring conviction upon this court that, on a balance of probability, the Interested Party is a daughter of the deceased. In any event, such is a matter of great significance and should be given an opportunity for intense evaluation by the court through the hearing of the cause on merit rather than use it and without substantiation to sustain a grant that is clearly a candidate for revocation. Thus, the only question that remains for determination is whether the Interested Party has been left out of these succession proceedings.

[11] I have carefully perused the Amended Certificate of Confirmation of Grant dated 25<sup>th</sup> September 2013; indeed the Interested Party has been omitted and no provision has been made for her. Similarly no provision had been made for her in the original Confirmation of Grant dated 12 March, 2008. I have also not been shown any consent by her consent or renunciation of her rights in applying for administration. See Rule 26 of the Probate and Administration Rules. In this case there is no evidence that the Interested Party was notified of these proceedings; or that she renounced her rights. Of significance again, no provision was made for her in both the original and the subsequent Confirmation of Grant. From the circumstances of this case am satisfied that the Grant herein was obtained by concealment from the court of something material to the case namely: the Interested Party was the daughter and, therefore, a beneficiary of the estate of the deceased. The omission of the Interested Party from these proceedings was quite substantial one in law and will certainly blow away any grant so issued. Secondly, neither her consent or renunciation of right to apply for administration was sought by the Petitioner. Thus, the proceedings to obtain the grant were defective in substance.

### ***Res judicata* does not arise**

[12] I heard arguments by the Respondents that the instant application was brought in collusion with the Petitioner; there was no concrete or conclusive evidence to that effect. The said assertions seemed to be hinged on the fact that the Petitioner had filed a similar application earlier but which was dismissed. As a matter of law, the Interested Party is staking an independent claim from that of the Petitioner; also the grounds upon which this application and the earlier one by the Petitioner are based are different, thus, the two applications are different. Therefore, there is nothing that would prevent this court from entertaining this application. Even if one was to consider the principle of *res judicata*, it would not apply in such case. The Interested Party was not even a party to this cause at the time.

[13] From the circumstances of this case and having come to the above conclusion, I find the instant application to be meritorious and I accordingly allow the same. Accordingly, the grant and the certificate of conformation of grant made to the Petitioner on 25<sup>th</sup> September 2013 is hereby be revoked. This being a succession matter there will be no order as to costs.

**Dated, signed and delivered in open court at Meru this 13<sup>th</sup> day of September 2016**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

M/s. Nyagah advocate for interested party/applicant

M/s. Njenga advocate for petitioner

Mr. Kariuki advocate for Mr. Gatari advocate for respondents

**F. GIKONYO**

**JUDGE**