



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MERU**

**Succession Cause 350 of 2006**

**IN THE MATTER OF THE ESTATE OF AYUB MBAYA MWONGERA (DECEASED)**

**NANCY KANUGU MBAYA ..... PETITIONER**

**VERSUS**

**M'MWONGERA MIRURI ..... APPLICANT**

**RULING**

The applicant to the summons dated 21<sup>st</sup> July 2009 is M'Mwongera Miruri hereinafter called Miruri. Miruri and Ayub Mbaya Mwongera (deceased) hereinafter called Mwongera purchased from Elijah Nkubi land No. Kiirua/Kiirua/227. Miruri and Mwongera agreed that both their shares be combined in one title being parcel No. 324 hereinafter called the suit property. That suit property it was agreed would be registered in the name of Mwongera. Mwongera died before excising the two acres which Miruri claims are his. On his death, the wife of Mwongera filed this succession cause. Prior to the death of Mwongera, Miruri had filed Meru Chief Magistrate court case No. 807 of 1995. Miruri deponed incorrectly in his summons dated 21<sup>st</sup> July 2009 that that suit is yet to be determined. The correct position as seen from a replying affidavit filed by the petitioner in this succession is that that suit abated and todate has not been revived. Miruri said that despite him having possession of two acres of the suit property, the petitioner failed to indicate the same when petitioning for grant herein. That it was not until the petitioner went to his land with surveyors and a purchaser that he realized that his two acres had been included in this succession cause. Miruri by his present application prayed that the court would revoke the grant issued to the petitioner and also sought inhibition to be issued over the suit land. The petitioner in her replying affidavit stated that the grant had been confirmed and that she was simply carrying out her duties as an administrator in dividing the suit land to the beneficiaries. Further, the petitioner stated that Miruri is not entitled to the two acres of the suit property. The conditions upon which a grant may be revoked as pertaining to the present application are to be found in section 76 (a), (b) and (c) of the Law of Succession Act. They are as follows:-

**“76. A grant of representation, whether or not confirmed may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-**

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

**(b) that 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) that 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.”**

I am unable to find from the facts brought before me that the process of obtaining grant by the petitioner can be faulted in any way under those sub sections above. The applicant stated that he had been on the land since 1976 but the mere fact of occupation does not suffice for the purpose of revocation of a grant. Miruri needed to have his rights over the suit property determined by a court before such a right could be recognized under the Succession Act. He made an attempt to have that right determined in the lower court but as stated before, the suit abated. His rights to the two acres to date remains undetermined. That being so, his right if any cannot be termed as a liability or a debt of the estate of Mwongera, deceased. The petitioner therefore had no obligation to inform the court in this succession cause of his presence on the suit land. There is no basis for revoking the grant and therefore there is no basis for issuing an order of inhibition. Further, it does not escape my attention that the Miruri did not obtain consent from the Land Control Board for the transaction between himself and Mwongera. See the Land Control Board Act Cap 302. Such consent should have been obtained within 6 months of the agreement between Miruri and Mwongera. The date of that agreement is 11<sup>th</sup> June 1990. The Court of Appeal considered a transaction where consent was required and in the case of **Karuri Vs. Gituru** [1981] KLR where they stated:-

**“The provisions of Land Board Act are of an imperative nature, there is no room for the application of any doctrine of equity to soften its harshness.”**

The same court in the case of **Wamukota Vs. Donati** [1987] KLR commented as follows:-

**“The sale of agricultural land is void for all purposes, unless the Land Control Board has given its consent to the sale.....The respondent has no legal or equitable claim, and the only redress available is to recover the money or valuable consideration paid in the cause of the void transaction as per the Land Control Act (Cap 302) Section 7.”**

Since the applicant had not paid Mwongera any money, both having been purchasers, the estate of Mwongera does not owe Miruri any money. On that ground too, I find that the application by Miruri must fail. It is important to state at this stage that when an applicant approaches the court with an *ex parte* application seeking *ex parte* orders it is paramount that he be candid to the court. He should act with *uberrima fides* (utmost good faith). A party should not suppress any material which is relevant to the case when he approaches the court in the absence of the other party. There should be full disclosure. See the case of **The King Vs. The General Commissioners for the purposes of the Income Tax Acts for the District of Kensington** [1917] KB 486. Miruri the applicant stated in his affidavit which the court relied upon at *ex parte* stage to grant interim orders that CMCC No. 807 of 1995 was still pending for hearing and determination. That was not true because that suit had abated and it is even on record that Miruri had made attempts to revive that suit but had failed. To therefore have made a statement in his affidavit that the suit was still pending was intended to mislead the court to grant *ex parte* orders of

inhibition. When a court concludes that an applicant was not candid and did not fairly state the facts but stated them in such a way as to mislead the court as to the true facts the court ought for its own protection and to prevent an abuse of its own process to refuse to proceed further with examinations of the merits of the case. See the case of **The King Vs. The General Commissioners for the purposes of the Income Tax Acts for the District of Kensington** [1917] KB 486. The Court of Appeal in Civil Application No. Nairobi 140 of 1995 between **Uhuru Highway Development Limited Vrs. Central Bank of Kenya & Others** stated:-

*“..... I would add my voice to that of my learned brothers that there cannot be any legal authority for obtaining an ex parte injunction on one basis, and when it comes to the inter partes hearing of the application, a totally different or even a more detailed basis is advanced to support the ex parte order. A party who has obtained an ex parte order must be able to support that order, at the inter partes hearing, on the very same grounds upon which he was able to obtain it in the first place.”*

The fact that Miruri misled the court will further lead this court to find that the prayers he seeks cannot be entertained. In the end, the summons dated 21<sup>st</sup> July 2009 is hereby dismissed with costs to the petitioner. The *ex parte* order issued by this court on 22<sup>nd</sup> July 2009 ordering an inhibition be registered against parcel No. Kiirua/Kiirua/324 be and is hereby vacated.

Dated and delivered at Meru this 5<sup>th</sup> day of November 2009.

**MARY KASANGO**

**JUDGE**