



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS SUCCESSION CAUSE NO.56 OF 2013**

**IN THE MATTER OF THE ESTATE OF NJERU MACHARIA CIORUKABA (DECEASED)**

**AGNES MUTITU MWAURA**

**JOSPHAT MURIITHI MWAURA .....APPLICANTS**

**OCTAVIAN MURAGE**

**VERSUS**

**JANE NJOKI GACHOKI .....RESPONDENT**

**RULING**

**AGNES MUTITU MWAURA, JOSPHAT MURIITHI MWAURA** and **OCTAVIAN MURAGE** the applicants herein have come before this court vide summons for revocation of grant dated 23<sup>rd</sup> October 2009. They have asked this court to revoke a grant issued to **JANE NJOKI GACHOKI** on 14<sup>th</sup> December 2007 and confirmed on 16<sup>th</sup> September 2009 by Senior Resident Magistrate's Court Kerugoya. The applicants have in their second prayer in the application asked that the orders of P.T.NDITIKA –Senior Resident Magistrate Kerugoya issued on 16<sup>th</sup> September 2009 be reviewed, altered, varied, annulled and /or set aside.

The applicants have further prayed that the distribution of the estate of the late **NJERU MACHARIA CIORUKABA** (deceased) be done as per paragraph 5 of their affidavit sworn on 24<sup>th</sup> November 2008 where they proposed that **JOSEPHAT MURIITHI** and **OCTAVIAN MURAGE MWAURA** be given 5 acres each from the estate, **PATRICK NJERU MWAURA** 4 acres while **AGNES MUTITU MWAURA** and the five daughters do share out the remaining 3 acres from the estate .

The applicants have cited the following grounds in their application.

- i. *That the proceedings to confirm grant was defective in substance.*
- ii. *That there is latent and patent error on the face of the record.*
- iii. *That the grant was confirmed fraudulently by making of a false statement and the concealment from the court of something material to the case.*
- iv. *That the grant was confirmed by means of an untrue allegation of a fact.*
- v. *That the respondents counsel spoke in English, a language that the applicants did not understand and the court below never sought their views.*
- vi. *That the order issued by the court below contrivances the contents of the affidavit filed on 5<sup>th</sup> December 2008.*
- vii. *That the order was made in favour of a total stranger to the estate and to the succession*

*cause and has completely rusted the applicants and beneficiaries from the estate of the person contrary to express provisions of the Law of Succession Act Cap 160.*

viii. *That this Honourable court can move to correct the anomalies cited above.*

ix. *That it is mete and just that the prayers sought are granted.*

The applicant filed a common supporting affidavit sworn on 23<sup>rd</sup> October, 2009 in support of the prayers sought. From the supporting affidavit the applicants have deponed under paragraph 4 of the said affidavit that they protested to the confirmation of grant on 5<sup>th</sup> December 2009 but that the confirmation was done on 16<sup>th</sup> September 2009. They have also deponed that they had filed a proposal on how the estate ought to have been distributed on 5<sup>th</sup> December 2008. The supporting affidavit appear disjointed and not reflective of the actual proceedings in the Senior Resident Magistrate's Court but I will come to that later in this ruling.

The parties in this cause preferred to dispose of the summons for revocation of grant herein by filing of submissions and affidavits which they did. The applicants filed their submissions on 16<sup>th</sup> March 2015 and the submissions appears to be a reproduction of their submissions earlier filed on 31<sup>st</sup> January 2011 in response to a preliminary objection raised by the respondent herein. The applicant submitted as follows:

- a. *That the respondent and Nancy Muthoni – a sister to the respondent are married with their own respective parcels of land and under kikuyu customary law and Section 33 of the Law of Succession Act they were not entitled to a share in their deceased father's estate.*
- b. *That even if respondent was to get a share then Sections 38 and 40 would have been applicable and that in view of the fact that the deceased in this cause was married to two wives the estate should have been distributed with the first house (belonging to the respondent and Nancy Muthoni) getting 3.77 acres while the second house should have got 13.22 acres to be shared among the children from the second house.* The applicants in their submissions have not given the number and names of beneficiaries in the second house to share out the 13.22 acres but from the supporting affidavit sworn on 23<sup>rd</sup> October 2009, they indicated that would wish to have the share of the second house divided among the three of them, with 2<sup>nd</sup> and 3<sup>rd</sup> applicant getting 5 acres each while Patrick Njeru Mwaura a son to the deceased having 4 acres while the 1<sup>st</sup> applicant be given 3 acres to hold in trust for her daughters.

The applicants in their submissions have also raised the issue of jurisdiction stating that the Senior Resident Magistrate's Court lacked jurisdiction to entertain the cause as the net value of the estate was worth more than kshs 100,000/- which is beyond the monetary jurisdiction of the Senior Resident Magistrate's Court. They have further contended that the forms filed in the subordinate court were deceitful and that there was nondisclosure of a material fact which was the fact that the respondent has sued their late father in Civil Case NO. 122 of 1998 during the lifetime of the deceased which suit was dismissed. They have also alleged that they were not notified of the cause in the Senior Resident Magistrate's Court though they came to learn of it all the same.

The respondent has opposed the summons for revocation of grant herein through a replying affidavit sworn on 10<sup>th</sup> November 2014. The respondent contends that the summons for revocation of grant taken out by the applicants herein is an afterthought aimed at stalling the administration of the estate of **NJERU MACHARIA CIORUKABA** (deceased). The respondent has pointed out the full participation of the applicants in the Senior Resident Magistrate's Court to show that they were fully aware of the succession cause and even filed a notice of appeal when the judgment was delivered in the cause. The respondent has taken issue with the grounds cited by the applicant contending that they do not warrant revoking of the grant herein.

The respondent's contention on jurisdiction of the Senior Resident Magistrate's Court is that though the magistrate may have lacked monetary jurisdiction nothing has been exhibited to demonstrate that the Senior Resident Magistrate's Court lacked monetary jurisdiction and that the applicants have failed to

demonstrate any misrepresentation or fraud made in obtaining the grant that the applicants are seeking to revoke. The respondent has further submitted that the applicants have not demonstrated any prejudice suffered from the confirmation of grant.

In her submissions through her counsel Ndata Mugo advocates, the respondent has added the following in opposition to the summons for revocation/annulment of grant issued at the Senior Resident Magistrate's Court.

- i. *That there was no objection filed to oppose the grant being issued to the respondent and that what was filed was a protest to the mode of distribution. The respondent has submitted that the protest was determined on merit by the Senior Resident Magistrate's Court upon hearing all the parties in the cause.*
- ii. *That the issues raised in the applicants submissions can only be canvassed on appeal and not in an application of this nature.*
- iii. *That the applicants have raised grounds which are not relevant under Section 76 of Laws of Succession Act.*
- iv. *That dismissal of a protest is not a ground to revoke a grant.*

This court has considered the application filed together with submissions from the applicants on one hand and the response filed together with submissions as elucidated above. It is on the basis of that same that I framed the following issues I consider fit for determination;

- a. *Whether the Senior Resident Magistrate's Court was seized with monetary jurisdiction to entertain the succession cause.*
- b. *Whether the dismissal of the protest filed is a ground of appeal rather than a ground to revoke a grant.*
- c. *Whether the grounds cited by the applicants warrants annulment of grant.*

This court shall first examine the grounds cited by the applicants in order to determine whether the grounds are within the provisions of **Section 76 of the Laws of Succession Act (Cap 160 Laws of Kenya)** to warrant this court to annul or revoke the grant issued and confirmed in the Senior Resident Magistrate's Court. It is apparent from the grounds cited and the supporting affidavit sworn on 23<sup>rd</sup> October 2009 that there is some disconnect between the grounds and the submissions filed by the applicants. One would have expected that the submissions would flow from the grounds on the application and the supporting affidavit which is not the case in this application. The applicants cited in one of their grounds in support of the summons for revocation of grant that the proceedings in the Senior Resident Magistrate's Court were defective in substance. However the submissions filed does not clearly disclose the defect. Instead the submissions points out a distinct ground which is the fact that the confirmation of grant was done contrary to the provisions for **Section 33 of Law of Succession Act**. The applicants have taken issue with the fact that the respondent and her sister are married and should not have been considered in the distribution of the estate of **NJERU MACHARIA CIORUKABA**. Assuming that the two issues are what the applicants considers as a defect in the proceedings that led to the confirmation of grant in the Senior Resident magistrate's Court this court wishes to point out the correct position in law. In the first place, the estate to which this succession relates to is situated within Kirinyaga County. **Section 33 of the Law of Succession Act** excludes property or estates of deceased persons situated in the districts listed under **Section 32 of the Act** from the application of **Law of Succession Act** and provides that the law applicable in those districts named is the custom applicable to the deceased's community or tribe. The law states;

**“The law applicable to the distribution on intestacy of the categories of**

**property specified in Section 32 shall be the Law or custom applicable to the deceased's community or tribe as the case may be”.** A look at **Section 32** shows that Kirinyaga is definitely not among the Districts listed thereon to support the applicant's view that the court below should have used Kikuyu customary law in the distribution of the estate in the cause. It is also erroneous and contrary to **Law of Succession Act** and indeed the **Constitution** to contend that married daughters are not entitled to

a share in the distribution of an estate of a deceased person. The law makes no discrimination on grounds of sex or gender when it comes to the distribution of an estate save for exceptions given under **Section 2 (2) of Law of Succession Act** which exempts estates of deceased persons dying before commencement of **Law of Succession Act (1<sup>st</sup> July 1981)** from being subjected to the Law of Succession Act but allowing customary law to be applied in so far as it is not repugnant to justice. The deceased in this case died on 22<sup>nd</sup> March 2001 long after the **Law of Succession Act** had come into operation. The contention by the applicant that the applicable law in the distribution of the estate of **NJERU MACHARIA CIOROKABA** is Kikuyu customary law is erroneous and has no basis in law and the present constitutional dispensation.

The applicants in one of their grounds pointed out that there was a latent and patent error on the face of record but with due respect to the counsel of the applicants no effort was made to demonstrate any error in the proceedings in the Senior Resident Magistrate's Court to warrant this court to invoke its powers under **Section 76 of Law of Succession Act**.

The applicants contention that the grant was confirmed fraudulently and through concealment of material facts is not supported by facts deponed on the supporting affidavit. But this court has noted from the protest filed dated 8<sup>th</sup> January 2008 that the applicants pointed out that the respondent had failed to disclose that she had sued his late father in his lifetime Vide a Civil NO. Kerugoya Senior Resident Magistrate's Court case NO. 122 of 1998. This court has noted the said suit and the judgment of the trial court and noted that the respondent herein had sought to enforce her inheritance rights during the lifetime of her late father and the court below in my view correctly dismissed the claim. The suit however plus the outcome is immaterial to the succession proceedings which were commenced after the demise of the deceased in this cause. The nondisclosure did not and could not affect the succession cause in any way. It cannot therefore be ground to revoke the grant herein.

The supporting affidavit filed by the applicants appear disjointed and not reflective of the grounds cited or the actual proceedings before the court below. The applicants have for example deponed that they filed protest on 5<sup>th</sup> September 2009 while the grant which they were protesting about was issued on 16<sup>th</sup> September 2009. The record however shows that affidavit of protest against confirmation was first filed on 8<sup>th</sup> January 2008 while the 2<sup>nd</sup> protest was filed on 5<sup>th</sup> December 2008. Summons for confirmation of grant was filed by the petitioner who is the respondent herein on 28<sup>th</sup> August 2008. The proceedings show that the protest was heard by Senior Resident Magistrate's Court by way of viva voce evidence after which the court found no merit in the protest and proceeded to decide that the distribution of the estate was to be done according to paragraph 7 of the affidavit in support of the summons for confirmation of grant.

The applicants have indicated or suggested that they did not understand the language that was used during the hearing of their protest. While I doubt the contention in view of the extensive participation during the hearing of the protest, I do not see how the same can be a ground to revoke a grant under **Section 76 of the Act**. The grant was not issued to a stranger as alleged by the applicants in their grounds in support of the summons for revocation of grant. They have elsewhere admitted that the respondent is their sister and a daughter to the deceased. The ground cited as such cannot hold. I also find that all the grounds cited are not well demonstrated.

**(b) Whether the dismissal of the protest filed by Senior Resident Magistrate's Court is a ground of appeal rather than a ground to revoke the grant.**

The respondent has made submissions that the applicants summons for revocation of grant issued at the lower court is an afterthought and that the points raised in their submissions can only be canvassed on appeal. This contention raises an important point of law which need to be addressed by this court. It is true that the applicants filed protest which was heard and determined on merit. Being dissatisfied with the outcome of the protest, the applicant filed a notice of intention to appeal dated 9<sup>th</sup> October 2009, but appears to have abandoned the option to appeal when they filed the summons now before court on 29<sup>th</sup> October 2009. In the summons for revocation of grant, the applicants have also prayed under prayer 2 for

review, alteration and /or setting aside of the decision of the court delivered on 16<sup>th</sup> September 2009. The question that begs answers is whether this court can be asked to exercise its appellate jurisdiction under **Section 76 Law of Succession Act** because basically that is what the applicants are asking this court to do. This court in my view can only exercise its appellate jurisdiction when sitting on an appeal. If the Senior Resident Magistrate's Court erred in applying the law as submitted by the applicants, then the right forum was an appeal as indicated from the notice of appeal filed by the applicants. This court can only be moved to revoke a grant of representation issued to a party on the grounds provided under **Section 76 of Law of Succession Act**. A party who is dissatisfied with the distribution of an estate of a deceased person by a court upon hearing all the parties on the same subject of dispute can only appeal. It will be an abuse of due court process if a party is allowed to reopen the same subject for determination again in order to have a second bite on the subject. Litigation must come to an end.

The applicants herein were clearly dissatisfied with the decision of the Senior Resident Magistrate's Court on distribution of the estate that is why they filed notice of appeal and the summons for revocation of grant herein. However I can exercise my appellate jurisdiction only when the jurisdiction is invoked which can only be done through an appeal. It will be an abuse of court process as I have said if the applicants are allowed to invoke my appellate jurisdiction through summons for revocation of grant under **Section 76 of Law of Succession Act**.

**(c) Whether the Senior Resident Magistrate's Court, was seized with monetary jurisdiction to entertain and determine the succession cause.**

The applicants have raised an important point in their submissions concerning the jurisdiction of the Senior Resident Magistrate's Court to entertain the cause when the net value of the estate exceeded kshs 100,000/-. Under **Section 48 (1) Law of Succession Act** the jurisdiction of Magistrate's Court is limited to estates whose monetary value does not exceed kshs 100,000/-. The applicants however for unknown reasons never raised the issue before the lower court which would have triggered consideration by court and maybe the attendant valuation of the estate. The applicants in their grounds for revocation and supporting affidavit were silent on the issue of monetary jurisdiction. There was no evidence tendered to help this court determine the value of the estate despite a ruling on preliminary objection raised by the respondent which touched on the subject. The applicants for unexplained reasons and with due respect to their counsels both in the Senior Resident Magistrate's Court and in this application, chose not to address the subject in any substantial way. I do not understand why for example the applicants did not swear an affidavit deponing the value of the estate and the fact that the Senior Resident Magistrate's Court did not have jurisdiction. Can this court be called upon through written submissions of the applicants to make assumptions that the net value of the estate is beyond kshs 100,000/-? The answer is in the negative as a party who alleges existence of a fact is under an obligation to prove it. This court is inclined to agree with the respondent that the issue is an afterthought because why would a party duly represented not raise the issue in the Senior Resident Magistrate's Court or swear an affidavit and place material before court to show that the Senior Resident Magistrate's Court exceeded its monetary jurisdiction?

In the end I am not persuaded by the grounds upon which this summons were taken. I also need to point out that summons for revocation of a grant ought to be taken in accordance with **Rule 44 (1) of Probate and Administration Rules** which prescribes the form which must be used as a matter of practice. I note that the summons for revocation of grant herein does not comply with form 107 but that is not the reason why I am going to dismiss the application. I find no merit in the summons for revocation of grant dated 23<sup>rd</sup> October, 2009. The same is dismissed with costs. The confirmation by the Senior Resident Magistrate's Court is upheld and in order to bring this long standing matter to an end I invoke my powers under **Section 47 of Law of Succession Act** to make the following orders :-

- i. The distribution of the estate of the late NJERU MACHARIA CIORUKABA shall be done as per the confirmed grant herein.
- ii. The District Surveyor is directed to visit the parcel of land forming the estate i.e. land parcel NO. GICHUGU/SETTLEMENT SCHEME/237 and carry out the survey work and place beacons on respective shares of the beneficiaries named in the confirmed grant. The survey fees shall be

- shared among the beneficiaries.
- iii. The Executive officer of this court do execute the requisite documents to facilitate transmission if some beneficiaries are reluctant.
  - iv. The District Land Registrar do dispense with production of PIN or identity card or any other documents by any beneficiary who is reluctant.
  - v. The OCS Kianyaga police station do provide security for the above exercise.

It is so ordered.

**R.K. LIMO**

**JUDGE**

**DATED SIGNED AND DELIVERED AT KERUGOYA THIS 24<sup>TH</sup> DAY OF APRIL 2015** in the presence of

Mr Mwangi holding brief for Kariithi counsel for the applicants

Mr Igati Mwai holding brief for Ndata Mugo counsel for the respondent

Willy Court clerk