



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 728 OF 2011**

**IN THE MATTER OF THE ESTATE  
OF BARANYA KATHIORI alias M'BARANYA KADIORI .....  
DECEASED**

**NJAGI BARANYA ..... PETITIONER**

**-VERSUS-**

**KASI GIRIGORIO BARANYA ..... 1<sup>ST</sup> OBJECTOR**

**EMILY IGOKI MIRITI ..... 2<sup>ND</sup> OBJECTOR**

**ROSE MUKWANYAGA MWANDIKI ..... 3<sup>RD</sup> OBJECTOR**

**IDAH MUKWANJIRU RIUNGU ..... 4<sup>TH</sup> OBJECTOR**

**LUCYLINE MUYA MBAE ..... 5<sup>TH</sup> OBJECTOR**

**CHARITY KAGENDO MIRITI ..... 6<sup>TH</sup> OBJECTOR**

**SYLVIA GACHUNKU ..... 7<sup>TH</sup> OBJECTOR**

**FAITH KAARI MIRITI ..... 8<sup>TH</sup> OBJECTOR**

**VALENTINE MUKWA MUGO ..... 9<sup>TH</sup> OBJECTOR**

**J U D G M E N T**

The Applicants/objectors through the summons for revocation and/or annulment of grant issued to the Respondent/Petitioner dated 30<sup>th</sup> July, 2013 seek the following orders:-

- (a) That this Honourable court be pleased to revoke and/or annul the grant issued to Njagi Baranya on 30<sup>th</sup> May, 2011 and confirmed on 20<sup>th</sup> September, 2011.
- (b) That the Chuka Succession Cause No. 46 of 2011 be forwarded to this Honourable court.
- (c) That costs be provided to the Respondent.

The application is based on the grounds on the face of the application and supportive affidavit of the 1<sup>st</sup>

Respondent. The Respondent filed a Replying Affidavit in opposition to the Applicant's application. That when the application came up for hearing both the Applicants/objectors and the Respondent/Petitioner agreed that the application be determined by way of their respective affidavits.

I have very carefully considered the application, affidavits in support, and the annexures thereto and the petitioner's replying affidavit and the annexures thereto. I have also considered the relevant provisions of the Law of Succession Act and the issue for determination arising out of the pleadings can simply be reduced to the following:-

- (a) Whether the trial court had jurisdiction to entertain the succession cause presented before it.
- (b) Whether the Applicants/objectors have satisfied the conditions for revocation or annulments of the grant.
- (c) Whether court can issue further orders in the interest of justice.

On the first issue the Applicants/Objectors content that the deceased estate comprised of four original parcels of land namely:- MUTHAMBI/CHAMUNGA/25,857, 234 and 226 whose value they gave as Kshs.2.5 million and MUTHAMBI/CHAMUNGA/27 valued at Kshs.1.5 million. The petitioner in his Form P&A 5 gave total estimated value at Kshs.800,000/- as of the time of petitioning for the grant.

Section 48(1) of the Law of succession Act provides:-

**“48 . (1) Notwithstanding any other written law which limits**

**jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as maybe expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:**

**Provided that for the purpose of this section in any place where both the High Court and a resident magistrate's court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act”.**

It is apparently clear from the above-mentioned Section the Resident Magistrate, or Principal Magistrate and the Chief Magistrate shall have jurisdiction to entertain any application other than an application under Section 76 and determine any dispute under the Law of Succession Act and pronounce such decrees and make such orders therein as may be expediate in respect of any estate the gross value of which does not exceed one hundred thousand shilling (underlining mine to emphasis the jurisdiction limitation in succession matters). The lower courts therefore have no jurisdiction to entertain any application in respect of any estate whose gross valued exceeds one hundred thousand shillings. In the instant cause the petitioner had given the gross value of the deceased estate at kshs.800,000/- whereas the applicants give a gross value of Kshs. 4 million. That whether the gross value is Kshs.800,000/- or Kshs. 4 million the trial court lacked jurisdiction as the gross value as indicated was above Kshs.100,000/- The Applicants contention that the trial court lacked jurisdiction is well founded and I find the trial court acted without jurisdiction and all what it did was and is a nullity.

The second issue for consideration is whether the objectors have satisfied the conditions for revocation or annulment of the grant. The applicants have deponed that the 1<sup>st</sup> Applicant is wife to the deceased and mother to the petitioner and 2<sup>nd</sup> to 9<sup>th</sup> Applicants. This fact is not controverted by the petitioner in his affidavit. The Applicants contended that the petitioner did not seek their consent nor did he petition for the grant with the applicants' knowledge. The petitioner claims the deceased had left a will and he did not act wrongfully as each party got what the deceased had bequeathed to each of his heirs. He attached what he purported to be a will as annexure “NBI”. The purported will is made in Kimeru language translated into English. Without going to the alleged will it should be pointed out that the petitioner is not

the person appointed as the executor of the purported will. I will leave the rest of the matters to be dealt with later if the alleged will is to be sought to be enforced or challenged.

In the instant cause the petitioner petitioned for letters of administration intestate. That in his application for confirmation of the grant the petitioner did not mention the existence of any will. The grant was confirmed in respect of the estate intestate.

Rule 26(1) & (2) of the Probate and Administration Rules states:-

**“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.**

**(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”**

The petitioner did not contest the applicants assertion that he had not given them notice as persons entitled in the same degree as or in priority when he petitioned for the grant. That the petitioner did not demonstrate that any of the Applicants who were entitled in a degree equal to or lower than that of his did renounce or issued written consent in Form 38 or 39 nor did the petitioner file an affidavit in support or tendered any evidence as required under Rule 26 of the Probate and Administration Rules. I therefore find that the petitioner in petitioning for the grant acted contrary to rule 26(1) of the Probate and Administration Rules. On confirmation of the grant the consent of the other beneficiaries is necessary before confirmation of the grant.

Rule 40(8) of the Probate and Administration Rules provides:-

**“40(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit”.**

However considered the Applicants affidavit and that of the petitioner I have no doubt in my mind that the petitioner deliberately through the Chief's letter dated 28<sup>th</sup> January, 2010 and in form P&A 5 failed to disclose the names of the Applicants. That he deliberately failed to notify them of his intention to seek grant. He also failed to notify them of his actions and seek their consent contrary to Rules 26(1) and (2) and their consent in confirmation of the grant contrary to Section 40(8) of the Probate and Administration Rules.

I therefore find that the grant of representation issued and confirmed in favour of the petitioner was obtained fraudulently by making of a false statement or by concealment from the court something material to this cause. That I further find and hold the proceedings to obtain grant were defective in substance. The grant issued to the petitioner and confirmed ought therefore to be annulled for reasons of lack of jurisdiction and fraud on part of the petitioner.

The upshot is that the applicants application is allowed. I therefore make the following orders:-

(a) That grant issued to Njagi Baranya on 30<sup>th</sup> May, 2011 and confirmed on 20<sup>th</sup> September, 2011 be and is hereby annulled.

(b) That all parcels of lands **MUTHAMBI/CHAMUNGA/969, 970, 971, 972,**

**MUTHAMBI/KANDUNGU/226 AND MUTHAMBI/UPPER KARIMBA/1735 AND 1736 do  
revert into the name of the deceased M'BARANYA KATHIORI M'BARANYA.**

(c) Parties are at liberty to petition afresh for grant of letters of administration.

(d) Costs of the cause to the Applicants.

**DATED AT MERU THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2014.**

**J. A. MAKAU**

**JUDGE**

Delivered in open court in the presence of:-

Applicants/objectors in person – present

Petitioner/Respondent in person – present

**J. A. MAKAU**

**JUDGE**