



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCCESSION CAUSE NO. 147 OF 1994**

**KARURI GACHOGU ..... DECEASED**

**AND**

**MAINA KARURI ..... PETITIONER**

**versus**

**TERESIA KABUI KARURI ..... APPLICANT**

**RULING**

1. By summons general under rule 49 & 73 P & A rules the applicants David Gachogu Karuri, Stephen Weru Karuri and Maina Karuri moved the court for order that the application of confirmation of grant issued on 23rd May 2007 be set aside and the applicants granted leave to file the affidavit of protest against the application for confirmation of grant and affidavit of protest be allowed to be duly filed upon payment of the court fee.
2. The application was supported by the first affidavit of the applicant in which they deponed that they were never served with the application for confirmation of grant and that the distribution proposed by the administrator/respondent and confirmed by the court sharing the estate equally between the four (4) houses of the deceased in accordance with Kikuyu customary law was oppressive.
3. It was further deponed that prior to the death of the deceased he had distributed his properties as per paragraph 7 of the respondents affidavit sworn on 11th November 2008 save that the applicants were not given any land and that land which the deceased gave and blessed to the second house LR. MWERUA/KAGIO/232 was solely to be the property of the applicants.
4. It was deponed that L.R. 19 Kiganjo was sold by Michael Maina Karuri, Johnson Mwangi Karuri, Kanyi Wamae and Stephen Weru Karuri excluding the applicants yet they are sharing L.R Kiine/Kagio/232 which was given to the applicants. It was further deponed that KIINE/NYANGIO 295 is not part of the estate of the deceased as it was allotted to one of the step brothers son KARURI GACHOGU S/O KANYI WAMAE then he was 3 years old and that the said Karuri s/o Gachogu is still alive.
5. It was deponed that the distribution proposed by the respondent and confirmed by the court was oppressive and unfair.
6. On behalf of the Respondent TERESIA KABUI KARURI on 17th September 2012 filed a replying affidavit in which she deponed that the applicant were involved in the entire succession proceedings for the filing of petition to the confirmation of the grant and that all the issues the applicants have raised were considered by the entire family before the grant was confirmed and the applicants signed an agreement before the assistant chief.
7. It was further deponed that the deceased property were divided according to Succession Law as per section 40 of the Law of Succession and that before his death the deceased had given some of

- his property to his adult sons which were therefore not part of the succession. It was further deponed that on 8th October 2003 the applicants signed an agreement before the district Officer Ndia as regards Kiganjo property.
8. It was deponed that David Gachigu Karuri was given GATUMBERI/MUTITU/343 and MWEA/KIANDEGWA/TENANT while his brother MAINA KARURI the 3rd applicant was given MWERUA/KAGIO-INI/310 and that L.R MWERUA/KAGIO/38, 230 and 231 were given to GEORGE KARANI KARURI, GEOFFREY GIKUNJU KARURI and JOSEPH MWANGI KARURI respectively.
  9. It was further deponed that the applicants should have filed a protest at the confirmation of the grant that the grant was confirmed as per the proposed mode of distribution which already been executed.
  10. Directions were given that the application be determined by way of written submissions which have now been filed.

### **HISTORY**

11. Before going into the written submissions and for the purposes of this ruling it is necessary for the court to set the brief history of this matter. Maina Karuri applied for grant of letters of administration to the estate of KARURI GACHUGU alias KARURI KINYANJUI and named the following assets of the estate:

L.R. MWERUA/KAGIONI/235 - 14.0 acres

L.R. KIINE/NYANGIO/295 - 5.0 acres

L.R. NO. 9395/12 KIGANJO

12. The petitioner named the following as surviving the deceased.

- Maina Karuri
- Kanyi Wamae
- George Karani Karuri
- David Gachogu Karuri
- Francis Mwangi Karuri
- Michael Maina Karuri
- Stephen Weru Karuri
- Johnson Mwangi Karuri
- James Maina Karuri
- Teresia Kabui Karuri

13. On 5th July 1994 all the other beneficiaries entered appearance as objectors to citation and on 9th November 1994 Michael Maina Karuri and Kanyi Wamae filed an application to be granted leave to file their objection to the petition out of time and on 4th June 2004 the parties herein filed a consent that the letter of administration be issued to the respondent TERESIA KABUI KARURI who was the only surviving widow of the deceased and grant issued on 21st July 2004.
14. On 14th April 2005 the respondent filed an application for confirmation of grant and proposed that the estate of the deceased be distributed equally amongst the deceased four houses. On 23rd

- May 2007 the grant was confirmed on the strength of the agreement on the mode of distribution by the parties.
15. On 11th August 2008 David Gachogu Karuri one of the applicants herein filed an application for rectification of grant on the basis that in 1967 he was allotted 6 acres out of MWERUA/KAGIO-INI/232 by the deceased which he had distinctively occupied to the exclusion of others and that each house amongst the four houses of the deceased was allocated a distinct portion. On 18th November 2005 the said application was withdrawn
  16. On 29th January 2009 the petitioner filed an application for the court to authorize the Deputy Registrar to execute all the relevant documents which application was allowed on 11th May 2009. On 23rd June 2009 the applicant herein DAVID GACHOGU KARURI filed an application for revocation/annulment of grant on the basis that the portion of land allocated to his late mother was land known as LR MWERUA/KAGIO-INI/232 and therefore should not have featured as one of the properties for distribution and further that BEATRICE MUTHONI KARIUKI was not entitled to LR. No. 9395/12 KIGANJO as she was not a bona fide purchaser.
  17. The application by the applicant was heard by Justice Sergon who on 11th February 2011 dismissed the said application. On 23rd February 2011 the applicant filed a notice of appeal against the said judgment dismissing his application for revocation of grant.
  18. At the time of this ruling there is an affidavit of protest filed by one Francis Mwangi Karuri on 18th March 2014 in which of importance to this ruling he stated that Kiine/Nyangio/295 was not the estate of Karuri Kinyanjui since it had been allocated to Karuri Gachogu son of Kinya Wamae as a gift by a different clan and that the petitioner had acquired as a whole the L.R. No. 9395/12 plot at Kiganjo which plot ought to be distributed equally to the four houses. He has further stated that plot No. 19 was not the property of the deceased the protestor having bought it directly from his brothers.
  19. There is also a replying affidavit filed by PETER MAINA KEIBORI on 4th April 2012 in which he deponed that together with LUCY WAMUYU MWANGI they had purchased a portion of land measuring approximately 1 acre to be excised out of parcel No. MWERUA/KAGIO-INI/232 the subject matter of this ruling for MICHAEL MAINA KARURI being the sole beneficiary in the house of Nyawira Karuri whose share is 3.5 acres, they therefore opposed the application herein.
  20. On 24th April 2014 one EUNICE MUCHUGU KIANGANGI filed an application for stay of the execution of the grant herein in respect of KIINE/NYANGIO/295.
  21. There is also an application filed by Francis Mwangi Karuri through the law firm of Ng'ang'a Munene & Co. Advocates on 21st March 2012 for the revocation of grant on the basis that there were two certificates of grant which are fundamentally different as regards Loc. No. 9395/12/

## **SUBMISSIONS**

22. On behalf of the applicant it was submitted that the applicants consent was not sought when the grant was confirmed and neither were they served with the application and that distribution was not done as per section 40 of the Law of Succession. It was submitted that all the property of the deceased must be considered to be party of the deceased estate for purposes of determining the distribution.
23. It was submitted that part of 19 Kiganjo was sold before the grant was confirmed and therefore that was intermeddling with the estate so the sale is null and void. It was submitted that KIINE/NYAGIO/295 is not part of the estate of the deceased and that distribution of plot No. 9395/12 Kiganjo to Beatrice Muthoni Muriuki is unfair and does not conform with what was agreed. It was submitted that since the deceased transferred most of his property in contemplation of his death it is only fair and just that the application be allowed and the matter heard by oral evidence and in support thereof the case of IN THE MATTER OF ESTATE OF KIBWEEN KOMEN NAKURU SUCCESSION CAUSE NO. 500 OF 1997 was relied upon.
24. On behalf of the respondent it was submitted that the applicants have not been able to demonstrate to court that the process of obtaining grant was flawed to warrant an order for setting aside the certificate of confirmed grant. It was submitted that the applicants were aware of the process and therefore executed an agreement before the Mukure Assistant chief stating that they all agreed that the deceased property be shared as per law.
25. It is submitted that all the deceased property were shared equally among all the four houses of the

- deceased as is required in a polygamous family and in accordance with the law. It is further submitted that the applicants failed to file a protest. It was submitted that the properties given out by the deceased in his life time do not form part of his estate.
26. As regards Nanyuki property it was submitted that all the parties herein signed an agreement on its sale and how the proceeds therefore were to be shared. On LR KIINE/NYANGIO/295 it was submitted that the same is part of the estate of the deceased and is available for distribution and that is why the land registrar registered transmission in respect thereof.
  27. It was submitted that the applicant herein had filed an application for revocation or annulment of grant which application was dismissed and further his application for rectification of grant was also dismissed.
  28. From the proceedings and submission herein the only issue for determination is whether the applicant having failed to have the grant revoked can bring an application to set aside the said grant and if so what are the grounds upon which this court can set aside a certificate of confirmed grant.
  29. A clear reading of the law of succession will confirm that the only avenue available to a party who is aggrieved by grant of representation is to apply for revocation or annulment of grant under the provisions of section 76 of the Act. This position has been confirmed by the court of Appeal in NAIROBI CIVIL APPEAL NO. 279 OF 2003 JOSEPHINE WAMBUI WANYOIKE V MARGRET WANJIRU KAMAU & ANOTHER [2013]eKLR in which the court held that the provisions for setting aside is not one of the rules of civil procedure which have been imported into the Law of Succession Act vide rule 63(1) of the Probate and Administration rule. The court went further and stated that the Law of Succession Act is a self sufficient Act of parliament with its own substantive law and rules of procedure.
  30. I therefore take the view that the certificate of confirmation of grant can only be set aside if the grant was not properly confirmed and since the issues upon which the applicants would want the court to set aside the confirmation of the grant were adjudicated upon and determined by Justice Sergon in his ruling delivered on 11th day of February 2011 the application herein is therefore resjudicata.
  31. In the final analysis I find that the applicant has not placed any new material before the court which was not placed before justice Sergon to enable one exercise any discretion in his favour to set aside the certificate of confirmation of grant having failed in his application for revocation of grant.
  32. I further note that the application herein is an abuse of the court process this being the third application being filed by the applicants against the respondent and take the view that litigants unless for good cause should come to an end at each stage of the legal system and having filed a notice of appeal the best forum available to the applicant would be to pursue the intended appeal to the court of appeal.
  33. I therefore find no merit on the application dated 9th February 2012 which I hereby dismiss with cost to the respondent.

Dated, signed and delivered at Nyeri this 20th June 2014.

J. WAKIAGA

JUDGE

Court: Ruling read in open court in the presence of Miss Muhoho for A. Kariuki for applicant. Miss Kahinga for Wachira for respondent. Mr. G. Mwangi for Mr. Kimunya for interested party.

J. WAKIAGA

JUDGE

20/6/2014