

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO.3051 OF 2012

IN THE MATTER OF THE ESTATE OF NJOROGE KUNGU – DECEASED

JAMES ICHARIA KUNGUAPPLICANT

VERSUS

KUNGU MUTHUA.....1ST RESPONDENT

JAMES MUTI NJOROGE.....2ND RESPONDENT

R U L I N G

On 24th March 1993, Kungu Muthua and James Muti Njoroje (the Respondents) petitioned the then Githunguri Resident Magistrate’s Court for a grant of letters of administration intestate in respect of the estate of Njoroje Kungu (deceased). The deceased is said to have died on unknown date in 1952. The Respondents petitioned the said court in their capacity as children of the deceased. They listed the properties that comprised the estate of the deceased as: LR. Nos. Githunguri/Nyaga/378A, Githunguri/Nyaga/378B, Githunguri Nyaga/T.507 and Githunguri/Nyaga T.510. The said court issued a grant of letters of administration intestate to the Respondents on 18th August 1993. The Respondents applied for the grant to be confirmed. James Icharia Kungu (the Applicant) protested to the grant being confirmed to the Respondents. His main reason for the protest to the confirmation was because he did not agree with the mode that the Respondents proposed the properties that comprise the estate of the deceased to be distributed. The Applicant stated that the deceased was the brother of his late father Gabriel Icharia Kungu. The deceased was registered by his wife as the owner of all the parcels of land that are the subject of these succession proceedings long after his death. In particular, he deponed that his late father was entitled to the parcel of land registered Githunguri/Nyaga/T.507 (suit parcel of land). The Applicant complained that the Respondents had excluded him as a beneficiary of the estate of the deceased yet they were aware that he had resided and lived on suit parcel of land since 1959. He therefore urged the court to include his name as a beneficiary to the estate of the deceased.

When the matter was listed before the then Senior Resident Magistrate (Margaret Rungare), she referred the dispute to be arbitrated upon by the District Officer Githunguri. The court ordered the arbitrator to file his award within ninety (90) days of the date of the order. The order was issued on 8th December 1994. From the record, it was apparent that the District Officer did not arbitrate the dispute alone, but rather did so with the help of the elders appointed respectively by the Applicants and the Respondents. The award was sent to the court on 27th December 1995. In the intervening period, the court extended the period upon which the said District Officer was required to present the award in court. The award, which was adopted as a judgment of the court read thus:

“The elders however felt that the land in dispute was not suitable for further splitting/subdivision since a section of it is very stonny. They felt that if the complainant got two plots (of 0.25 acre each) from Muthua Kungu, that would be not only fair compensation since its value is roughly equal to that of 1.0 acre of shamba but also economically viable. The elders award therefore is that Muthua Kungu owes Icharia Kungu 2 plots (each of 0.25 acres) to make ?2 an acre. Since they are plots the elders considered them adequate compensation (in terms of value). In other words Muthua Kungu will have given up 0.25 acre plot in place

of 1.0 acre of cultivable land.”

The District Officer’s award was adopted as the judgment of the court. The Respondents were aggrieved by the decision. Pursuant to **Section 50(1)** of the **Law of Succession Act**, the Respondents appealed to the High Court. Section **50(1)** of the **Law of Succession Act** provides thus:

“An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court shall be final”.

The appeal is **Nairobi High Court Civil Appeal No.271 of 1996**. The appeal was heard by Khamoni J. In a Judgment delivered on 10th February 1998, the appeal was dismissed. One would have thought that the matter would have come to an end. That was not to be.

When the Applicant sought to enforce the judgment of the court by having the grant confirmed in terms of order of the court, the Respondents filed an objection to the application. In fact, the Respondent went ahead and filed another application seeking to have the grant confirmed. In the application, the Respondents disowned the decision made by the subordinate court and confirmed by the High Court in the appeal. In their affidavit in support of the application (sworn by Kungu Muthua), the Respondents raised issues which are not germane to the main issues in dispute. On his part, the Applicant urged the court to adopt the decision made by the previous courts and confirm the grant in terms of the proposal that he has made.

During the hearing of the applications for confirmation of grant, this court heard oral rival submission made by the Applicant, who was acting in person and by Mr. Kinuthia for the Respondents. The parties more or less reiterated the facts of this case as stated earlier in this Ruling. The issue for determination by this court is whether the Respondents can reopen a case which has been conclusively been determined. It is clear from the above facts that any dispute regarding whether or not the Applicant was a beneficiary or whether or not the Applicant was entitled to a share of the properties that comprised the estate of the deceased was resolved by the decision of the High Court. The Respondents did not appeal against that decision to the Court of Appeal. It will not do for the Respondents to seek to re-litigate an issue that had been conclusively determined more than fifteen (15) years ago. This court is of the view that this is a case where the Respondents should be told in no uncertain terms that litigation must come to an end. The Respondents cannot seek to re-litigate issues which have been conclusively determined under the guise of a protest to an application for confirmation of grant.

In the premises therefore, this court directs that the properties that comprise the estate of the deceased shall be inherited as proposed by the Applicant in his application, particularly in paragraph 6 of the affidavit in support of his application for confirmation of grant dated 1st March 2013. To obviate the necessity of the Applicant making an application to compel the Respondents to execute the necessary conveyancing documents in his favour, the Deputy Registrar of this court is hereby authorized to perform the function. The Applicant shall have the costs of the Application.

DATED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2014

L. KIMARU

JUDGE