



**IN THE MATTER OF ESTATE OF CHARLES KARIUKI GACHERU (DECEASED)**

STEPHEN NJOROGI KARIUKI ..... 1<sup>ST</sup> APPLICANT

JOHN KIHAIKO KARIUKI ..... 2<sup>ND</sup> APPLICANT/PETITIONER

MARTHA WAITHERA

GACHERU ..... 3<sup>RD</sup> APPLICANT/PETITIONER

BENSON RAINI KARIUKI ..... 4<sup>TH</sup> APPLICANT/PETITIONER

SAMUAEL NJENGA KARIUKI ..... 5<sup>TH</sup> APPLICANT/PETITIONER

SIMON WAWERU KARIUKI ..... 6<sup>TH</sup> APPLICANT/PETITIONER

VERSUS

JAMES GICHUHI KARIUKI ..... 1<sup>ST</sup> RESPONDENT/DEFENDANT

ELIZABETH MURUGI

KARIUKI ..... 2<sup>ND</sup> RESPONDENT/DEFENDANT

MARY RUGURU KARIUKI ..... 3<sup>RD</sup> RESPONDENT/DEFENDANT

**R U L I N G**

Before the Court is an application by summons dated 22<sup>nd</sup> August, 2011. It seeks an order that the Confirmation of Grant confirmed by the Court on 21<sup>st</sup> October, 2008 on a Grant issued to the Respondents herein be varied, revoked, quashed and/or be set aside. It also prays that the costs of this application be in the Cause.

The application is supported by the annexed affidavit of Stephen Njoroge Kariuki, the 1<sup>st</sup> Applicant, and is based on the grounds that –

- 1. The Applicants did not consent to the confirmation of grant of letters of administration made to James Gichuhi Kariuki and Elizabeth Murugi Kariuki as to the meaning of Section 29 of the Laws of Succession.***
- 2. The Applicants did not give consent to the mode of distribution of estate of the deceased as within the meaning of Section 29 of the Laws of Succession Act.***
- 3. The Applicants were not served with the application/summons for confirmation of grant of letters of administration intestate as under Section 71 (1) of the Laws of Succession Act, Chapter 160 Laws of***

## ***Kenya and other enabling laws.***

The application is opposed by a replying affidavit sworn by the 1<sup>st</sup>

Respondent, James Gichuhi Kariuki on 20<sup>th</sup> September, 2011 on behalf of himself and the other Respondents. At the oral canvassing of the application, Mr. Kimathi appeared for the Applicants while the Respondents appeared in person. Mr. Kimathi submitted that the grant sought to be set aside was confirmed without the consent of the beneficiaries and therefore there was fraud on the face of the record. Secondly, Elizabeth Murugi Kariuki was described as a wife while she was a daughter of the deceased. On their part, the Respondents appeared in person and Mr. Gachuhi, on behalf of himself and the other Respondents invited the Court to rely on their affidavits and write its ruling on the basis of those affidavits.

In order to place this matter in its proper context, I feel constrained to track down its history from its cradle to the present. Charles Kariuki Gacheru was the father of the siblings engaged in this dispute. He died on 7<sup>th</sup> May, 2004. Stephen Njoroge Kariuki, the 1<sup>st</sup> Applicant, then applied for a Grant of Letters of Administration intestate and the grant was duly made on 28<sup>th</sup> April, 2006.

By an application dated 29<sup>th</sup> August, 2006, and filed in Court on 30<sup>th</sup> August, 2006, which was only 4 months after the grant was made, Elizabeth Murugi and James Gichuhi Kariuki, some of the beneficiaries, applied for revocation of the grant made to Stephen Njoroge Kariuki. The application was made on behalf of the two Applicants and also Mary Ruguru Kariuki. The matter was heard before Judge Kubo who, in a ruling delivered on 21<sup>st</sup> November, 2007 rendered himself by stating, *inter alia*, that he “... **accepted that Objector/Applicant, Elizabeth Murugi Kariuki and her co-objectors, James Gichuhi Kariuki and Mary Ruguru Kariuki, also known as Mary Ruguru Njogu, entered appearance under High Court Succession Cause No. 3325 of 2005 but heard no more from the Petitioner/Applicant, Stephen Njoroge Kariuki about that Succession Cause.**” The learned Judge also accepted “**Objector/Applicant, Elizabeth Murugi Kariuki’s evidence to the effect that the Petitioner/Applicant, Stephen Njoroge Kariuki quietly went behind the backs of Elizabeth Murugi Kariuki, James Gichuhi Kariuki and Mary Ruguru Kariuki and petitioned for letters of administration of the estate of Charles Kariuki Gacheru (Deceased) under the present High Court Succession Cause No. 83 of 2006 without consulting the aforesaid objectors. That is a fraud of a very high order on the part of the said Petitioner/Applicant, Stephen Njoroge Kariuki and the grant issued solely to him on 28<sup>th</sup> April, 2006 under the present High Court Succession Cause No. 83 of 2006 cannot be allowed to stand ...**”.

The learned Judge accordingly made orders that –

***(a) Prayer 1 in the summons for revocation dated 29<sup>th</sup> August, 2006 is granted and the grant of letters of administration intestate of the estate of Charles Kariuki Gacheru (Deceased) made to Stephen Njoroge Kariuki on 28<sup>th</sup> April, 2006 be and is hereby revoked.***

***(b) In place of the grant revoked under (a) above, a new grant is hereby issued to James Gichuhi Kariuki and Elizabeth Murugi Kariuki.***

***(c) Costs shall be in the Cause.***”

The grant made on 21<sup>st</sup> November, 2007 by Judge Kubo was

followed by an application by summons for confirmation dated 19<sup>th</sup> June, 2008. Following closely on the heels of that application was another application dated 31<sup>st</sup> July, 2008 and made by Stephen Njoroge Kariuki for review and/or revocation of the grant made by Judge Kubo. It is not clear what happened to that application at that time but the grant was subsequently confirmed by Judge Rawal on 21<sup>st</sup> October, 2008. That confirmation was followed by an application for “**judgment review and revocation of the**

**grant”** The application was dated 26<sup>th</sup> November, 2008 and was filed by Stephen Njoroge Kariuki and others against Elizabeth Murugi Kariuki, James Gichuhi Kariuki and Mary Ruguru Kariuki. In a ruling delivered on 11<sup>th</sup> May, 2010, Judge Dulu dismissed it with costs. That dismissal was followed by the application dated 22<sup>nd</sup> August, 2011 which is the subject matter of this ruling.

The application dealt with by Judge Dulu was brought by “**summons for judgment review and revocation for grant**” dated 26<sup>th</sup> November, 2008. That was after the grant had been confirmed by Judge Rawal on 21<sup>st</sup> October, 2008. Since by the date of the application dated 26<sup>th</sup> November, 2008 the grant had already been confirmed, the Applicants should not have confined their application to challenging the grant alone. They should and ought to have challenged not only the grant, but also the subsequent confirmation itself in the same application. In the same vein, the grounds pleaded in the application dated 22<sup>nd</sup> August, 2011 should and ought to have been pleaded in the application dated 26<sup>th</sup> November, 2008. Put in a different way, the Applicants had an opportunity in the earlier application of obtaining the same relief they are now seeking. They should and ought to have sought that relief at that time since the issue of confirmation of the grant was directly and substantially in issue in the former application. The issues of the grant and confirmation, therefore should have been heard and finally decided together in the same application.

Instead of doing that however, what the Applicants have done is to dismember a cause of action into several limbs, and then converted each limb into the subject matter of a distinct application. That amounts to litigation by installments and offends the doctrine of *res judicata* which is intended, *inter alia*, to bring litigation to an end. If the practice adopted by the Applicants were to gain ground by being accorded some judicial imprimatur, the litigation in this matter would proceed for generations to come, which would also lead to wastage of precious time and resources.

Having found that this application should and ought to have been brought and argued at the same time with the application dated 26<sup>th</sup> November, 2008 for revocation of the grant, and that the same is *res judicata*, I find no merit in the application and hereby dismiss it with costs to the Respondents.

Orders accordingly.

**DATED and DELIVERED at NAIROBI** this 28<sup>th</sup> day of February, 2012.

**L. NJAGI**  
**JUDGE**