



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. SUCCESSION CAUSE NO. 127 OF 2011

(In the matter of the Estate of NJOKA NJAGI - Deceased)

AND

FRANCIS MWAI MUCHINA.....APPLICANT

VERSUS

NJAGI NJOKA.....RESPONDENT

R U L I N G

This is the application dated 6/4/2011. It's brought under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. It seeks orders of revocation of a grant issued in respect of the estate of Njoka Njagi vide **Gichugu Senior Resident Magistrate's Succession Cause No. 14 of 2005**. The grounds are:

- 1. Proceedings to obtain grant were defective in substance.**
- 2. It was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case.**

The Applicant says he is a beneficiary of the deceased and he depended on him and had been given ½ acre of land LR. **Baragwe/Giriamama/506** where he lives and even buried his parents.

He also raises the issue of jurisdiction of the learned trial magistrate's court. The Applicant has also filed two further affidavits by (1) Evans Murimi Njagi and (2) Eric Kagai Njoka both of whom are relatives of the Respondent herein. The two say the Applicant was given land by the deceased and has been living on that land and even buried his parents there.

The Respondent filed a Replying Affidavit sworn on 1/8/2011 disputing all the Applicants' averments. He says the Applicant was well aware that the succession had been filed yet he never objected. He says the Applicant was never a dependant of the deceased. Both counsels for the parties filed written submissions by consent.

I appreciate the authorities filed by learned counsels. I have considered all the issues raised. Two issues have been raised here.

- 1. Jurisdiction.**
- 2. Whether the Applicant is a dependent.**

The grant complained of was issued on 14/2/2007 and confirmed on 14/5/2008, and rectified on 15/3/2011 by Gichugu Senior Resident Magistrate's Court. It is not indicated what the rectification was all about.

I will first of all deal with the second issue. The advocates herein on 21/7/2011 agreed to file further affidavits and submissions in respect of this application. The Applicant says he was a dependant and beneficiary of the deceased Njoka Njagi. He has also got two people who claim to be relatives of the deceased and the Respondents and have sworn affidavits confirming the Applicants averments. On the other hand the Respondent had filed a long Replying Affidavit showing how the Applicant was not given any land by the father (deceased). In Para 13-19 the Respondent has raised issues which need to be addressed by way of *viva voce* evidence. The fact that the Applicant benefitted from his own fathers' estate per se does not preclude him from benefitting from any other.

I think there are material facts which are yet to be properly brought out, and I cannot deal with those issues as no evidence has been adduced here. This case can be well distinguished from the case of **FRASIA *WANJIRU MAINA VS THUKU MAGU KITHENYI HCA NO. 17 OF 1991 Nakuru** when the Hon. Justice Kimaru was able to use the evidence adduced before the magistrate's court in objection proceedings to determine the issue of dependency.

In the present case, those who have filed the affidavits have not been cross examined to test their credibility. It would be fair and just to give the Applicant an opportunity to establish his claim if any.

On issue of jurisdiction there is no two way about it. The Magistrate's court derives its jurisdiction in Succession matters under Section 48(1) of the Act Cap 160. The ceiling of the value of the estates they deal with has not been amended i.e. Shs.100,000/=.

The copy of Form P&A 5(FMM1) puts the value of the estate at Shs.500,000/=. Even the magistrate dealing ought to have seen that as they signed and forwarded the forms to the Principal Registry Nairobi and advised the parties therein accordingly. I agree with the holding of Hon. Justice Wanjiru Karanja in the cases of:

1. Embu HCCA No. 27A of 2007

Beth Muthoni Gichobi Vs Alice Wamarua Gichobi

2. Embu HC JR No. 40 of 2008

Mugo Mukere Vs provincial Land appeals Committee & Another

In the current case the value of the estate herein was indicated as Shs.500,000/=. The learned trial magistrate lacked jurisdiction to distribute the estate. I therefore grant the prayer for revocation of the grant issued by the Senior Resident Magistrate Gichugu on 14/2/2007, and confirmed on 14/5/2007 and rectified on 15/3/2011. The certificate of grant is cancelled.

This court will issue a grant in the name of Njagi Njoka. The lower courts file to be forwarded to this court forthwith. An Application for confirmation of the grant will then be filed in this court as required by law with all parties being informed. There shall be no order as to costs.

DELIVERED, SIGNED AND DATED AT EMBU THIS 2ND DAY OF FEBRUARY 2012.

**H.I. ONG'UDI
JUDGE**

In the presence of:-

Mr. Kagio for Applicant

Mr. Igati for Respondent

Njue CC