



REPUBLIC OF KENYA

High Court at Nakuru

Judicial Review 49 of 2010

IN THE MATTER OF AN: APPLICATION BY THE APPLICANTS RACHAEL GATHONI WAIHENYA, CAROLE WACHEKE MBAKI, MARY WANGARI WAIHENYA AND WAIRIMU NJOROGE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF:

- 1. CERTIORARI – TO BRING TO THE HIGH COURT FOR PURPOSES OF BEING QUASHED THE ORDERS OF THE PRINCIPAL MAGISTRATE’S COURT AT NAIVASHA SUCCESSION CAUSE NO.116 OF 2009 TO GRANT LETTERS OF ADMINISTRATION GRANTED ON 14TH OCTOBER, 2009 IN THE MATTER OF THE ESTATE OF WILSON WAIHENYA NGIMA (DECEASED) AND THE CONFIRMATION OF GRANT OF LETTERS OF ADMINISTRATION DATED 29TH JANUARY, 2010 IN SUCCESSION CAUSE NO.116 OF 2009 IN THE MATTER OF THE ESTATE OF LYDIA KAGECI WILSON (DECEASED) ANY OTHER GRANTS OF PROBATE AND/OR CERTIFICATES OF GRANT ISSUED THEREIN**
- 2. MANDAMUS – COMPELLING THE COMMISSIONER OF LAND TO FORTHWITH REVOKE ANY TRANSFER, CHARGE LEASE AND/OR ALIENATION AND DEALING CARRIED OUT PURSUANT TO PROCEEDINGS IN THE PRINCIPAL MAGISTRATE’S COURT IN NAIVASHA SUCCESSION CAUSE NO.116 OF 2009**

IN THE MATTER OF: THE SUCCESSION ACT CAP 160 OF THE LAWS OF KENYA

BETWEEN

**REPUBLIC.....APPLICANT
VERSUS**

PRINCIPAL MAGISTRATE COURT, NAIVASHA.....1ST RESPONDENT

DAN KAMUNYA WAIHENYA.....2ND RESPONDENT

COMMISSIONER OF LANDS.....3RD RESPONDENT

EX PARTE

RACEHL GATHONI WAIHENYA

CAROLINBE WACHEKE MBAKI

MARY WANGARI WAIHENYA

WAIRIMU NJOROGE

RULING

Pursuant to leave granted to the *ex parte* applicant on 16th April, 2010, a motion was brought for an order of *certiorari* to quash the grant of representation issued by the 1st respondent (The Principal Magistrate's Court, Naivasha) in Naivasha Succession Cause No.116 of 2009 on 19th October, 2009 as well as an order of mandamus to compel the 3rd respondent (The Commissioner of Lands) to forthwith revoke any transfers, charges, leases and/or alienation arising from the aforesaid Naivasha succession cause.

The application is based on the following grounds:

- i) that the proceedings to obtain the grant and its subsequent confirmation was *ultra vires* the Law of Succession Act;
- ii) that the proceedings to obtain the grant were defective in substance;
- iii) the grant was obtained fraudulently by the making of a false statement and by the concealment of material facts regarding the beneficiaries of the deceased;
- iv) the grant was obtained fraudulently by the making of a false statement and by the concealment of material facts regarding the true and full inventory of all the deceased's assets and liabilities;
- v) the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant;
- vi) the Grant of Letters of Administration was issued by a Principal Magistrate Court in Naivasha which had no pecuniary or territorial jurisdiction to do so;
- vii) the Principal Magistrate in Naivasha ignored the provisions of the **Civil Procedure Act CAP 21 Sections 11 to 18** and Gazette Notice No.1756 as published on 27th February, 2009 in regard to practice directions relating to the filing of suits, applications and references in proper courts and which clearly states that the courts and filing registries must strictly observe the provisions as to the place of suing allowing only those that comply and rejecting those that do not;
- viii) the Magistrate issuing the said letters of administration did not confirm the identities and shares of all beneficiaries in the deceased's estate before signing the confirmation of Grant of Letters of Administration.

It is the contention of the applicants that the 2nd respondent, Dan Kamunya Waihenya petitioned for a grant in respect of the estate of Wilson Waihenya Ngima (the deceased) in Naivasha Succession Cause No.116 of 2009 and included the name of Christopher Kagema Gichuhi, a stranger to the estate, as a beneficiary; that the total value of the estate was undervalued at Kshs.100,000/= instead of over Kshs.10m and further that the assets are located in Nyeri. It follows that if the value of assets and liabilities of the estate exceed Kshs.10m and located in Nyeri, then magistrate court at Naivasha lack both pecuniary and geographical jurisdiction to entertain the petition; that the grant issued was therefore *ultra vires*. **Sections 48, 49, 51(1)(d), 67, 68, 69, 70 and 72 of the Law of Succession Act.**

It is deposed also that in order to justify the confirmation of the grant before the expiry of six months, the 2nd respondent swore a false affidavit that he needed to travel overseas for medical treatment; that although the deceased person's widow, Lydia Kageci Wilson was also deceased, the grant in respect of her estate was issued in the same cause as that of the deceased in Naivasha Succession Cause No.116 of 2009 without a separate petition being filed.

The applicants have deposed that the 2nd respondent is now using the grants in respect of the deceased

and his deceased wife, Lydia, to transfer and charge the properties. The applicants maintain that the 1st respondent, i.e the Principal Magistrate Court at Naivasha being aware of all the irregularities and illegalities, proceeded to grant the Letters of Administration.

In response to these allegations, the 2nd respondent after confirming that the 1st to 3rd applicants are his sisters, while the 4th applicant is his niece, goes ahead to make most unusual concession; that indeed the grant was obtained irregularly through misrepresentation of one Samuel Kihara, an agent of a purchaser of one of the properties, one Christopher Kagema Gichuhi. He avers in the replying affidavit as follows:

“9. THAT even though I have appended my signature to many of the documents leading to the Grant of Letters of Administration in respect of our late father’s estate, the entire mess is solely attributable to the acts and omissions of the said SAMUEL KIHARA.

10. THAT by reason of the foregoing it is my prayer that the application dated 4th May, 2010 be allowed and the order sought therein be granted as prayed with no orders as to costs.”

That is indeed a strange response. But his advocate in his submissions opposed the application on the grounds of the procedure adopted in bringing it and on the ground that there was no evidence of the value of the estate. He submitted, correctly in my view, that this application ought to have been brought under the Law of Succession Act.

For the Commissioner of Lands, learned State Counsel submitted from the bar that the applicants had remedies alternative to judicial review, which is a special procedure, not available in probate matters.

It is now established that the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. In reviewing the decision of the body or tribunal, the High Court must ensure that it does not substitute its opinion for that of the decision-making organ or act as a Court of Appeal from the body or tribunal concerned. See **Republic V. National Environment Management Authority & Another** *Ex parte Richard Michael Ashley*.

Certiorari, therefore, will issue to quash a decision made by an inferior court or public authority without jurisdiction or in excess of jurisdiction, or where the body or authority fails to comply with the rules of natural justice. The jurisdiction of magistrates’ court as provided for under **Sections 48 and 49** of the **Law of Succession Act** in matters of probate is subject only to both geographical and pecuniary

The Chief Justice can, however gazette a magistrate to represent the High Court in places where there is no High Court. None of the properties forming part of the estate are in Naivasha where the cause was filed. Similarly, there is no evidence that the deceased died in Naivasha. The only explanation, from what can be gleaned from the record why the cause was filed in Naivasha, is the fact that the 2nd respondent appears to reside and work in Naivasha. That being the case, even if it was proved that the magistrate was gazetted to entertain probate matters there would be no justification to file the cause at Naivasha. Regarding pecuniary jurisdiction, the applicants have not produced any evidence, such as valuation report, that indeed the estate is over Kshs.10m. Finally on non-compliance with the rules of natural justice, it is not controverted that not all family members were involved in the taking out of the grant.

Clearly, the proceedings in obtaining the grant were irregular. But what is significant, in view of the averments of the 2nd respondent admitting those irregularities., is the procedure adopted in challenging the grant. The relief sought in this application would ordinarily be brought under the Law of Succession Act and not by judicial review. Indeed, the grounds upon which this application is premised and which I have set out at the beginning of this ruling are the same ones provided for the revocation and/or annulment of the grant under **Section 76** of the Act and part VIII of the Probate and Administration Rules.

With that observation and bearing in mind the concession by the 2nd respondent and submissions of his advocate, it would be prudent that all the beneficiaries of the estate with the help of their respective counsel proceed to resolve this matter as pointed out in this ruling in order to avoid further delay and expense.

In the result and for the reasons stated, the application fails and is dismissed with no orders as to costs.

Dated, Signed and Delivered at Nakuru this 17th day of October, 2012.

**W. OUKO
JUDGE**