



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Succession Cause 995 of 2009**

**IN THE MATTER OF THE ESTATE OF HABEL MWANGI GITHAIGA ALIAS ABEL MWANGI GITHAIGA –  
DECEASED**

**KENNETH GITHAIGA MWANGI.....PETITIONER**

**VERSUS**

**ONESMUS WAWERU GITHIOMI.....1<sup>ST</sup> OBJECTOR**

**GERALD MACHARIA MWANGI.....2<sup>ND</sup> OBJECTOR**

**LEONARD NDUATI MWANGI.....3<sup>RD</sup> OBJECTOR**

**LOISE NJERI MWANGI.....4<sup>TH</sup> OBJECTOR**

**JUDGMENT**

When **HABEL MWANGI GITHAIGA** alias **ABEL MWANGI GITHAIGA** passed on, **KENNETH GITHAIGA MWANGI** hereinafter referred to as “the Petitioner”, filed a petition for Letters of Administration intestate in respect of his Estate vide **MURANG’A P.M.C. SUCC.C. NO. 280 of 1999**. A grant of Letters of Administration were issued to the Petitioner on 30<sup>th</sup> June 2000. When Onesmus Waweru Githiomi, hereinafter referred to as the “1<sup>st</sup> Objector” learnt that the Petitioner had obtained a grant of representation, he filed an application for revocation of grant dated 15<sup>th</sup> November 2000 vide **NYERI H.C. MISC. APPLICATION NO. 205 OF 2000**. The aforesaid application was heard and dismissed by the Hon. Mr. Justice Makhandia on 20<sup>th</sup> November 2008. The dismissal of that application paved the way for the Petitioner to list for hearing the Summons for Confirmation of Grant dated 24<sup>th</sup> January 2001. When the aforesaid application came up for hearing on 12<sup>th</sup> June 2009 before Nzioka, learned Senior Principal Magistrate, Mr. Kirubi, learned advocate for the 1<sup>st</sup> Objector, applied for the matter to be transferred to the High Court. The learned Senior Principal Magistrate consequently made the order to transfer the Succession Cause to this Court and is registered as **NYERI H.C. SUCCESSION CAUSE NO. 995 OF 2009**. **GERALD MACHARIA MWANGI** and **LEONARD**

**NDUATI MWANGI**, hereinafter referred to as the “2<sup>nd</sup> and 3<sup>rd</sup> Objectors” respectively, filed a joint affidavit of protest to oppose the Summons for Confirmation of Grant. The 1<sup>st</sup> Objector joined the fray and he too filed what he referred to as a further affidavit of protest against the confirmation of grant. **LOISE NJERI MWANGI**, hereinafter referred to as the “4<sup>th</sup> Objector”, filed an affidavit of protest to oppose the application for Confirmation of Grant. When the Summons for Confirmation of Grant and the Protest came up for directions on the mode of hearing, learned counsels appearing in this matter recorded a consent order with the approval of this Court to have the dispute disposed of by affidavit evidence and submissions.

I have considered both the affidavit evidence and the written submissions filed on record. The main issues raised by the Objectors to oppose the Summons for Confirmation of Grant are twofold:

First, it is alleged that the deceased died testate and that they had appointed the 1<sup>st</sup> Objector as the executor of his Will.

Secondly, that the grant of Letters of Administration is void *ab initio* because the same was made by a court which did not have the pecuniary jurisdiction to entertain the succession proceedings.

In response to the first question, the Petitioner stated that the issue regarding the Will was dealt with by this Court in the ruling of Makhandia J. delivered vide **NYERI H.C. MISC. APPLICATION NO. 205 OF 2000** on 20<sup>th</sup> November 2008. The Petitioner further argued that the 1<sup>st</sup> Objector has not proposed the mode of distribution but instead relied on the Will without regard to the aforesaid ruling. The Petitioner also alleged that the aforesaid will left out several dependants and other assets. I have considered the rival submissions tendered by the parties. There is no dispute that the Petitioner applied for a grant of Letters of Administration in respect of the Estate of Habel Mwangi Githaiga alias Abel Mwangi Githaiga, deceased. He specifically stated that the deceased died intestate. The 2<sup>nd</sup> and 3<sup>rd</sup> Objectors annexed to the joint affidavit of protest, a copy of a Will allegedly left behind by the deceased. In his replying affidavit to the affidavit of protest, the Petitioner did not deny the existence of a Will. He simply stated that the issue was dealt with by this Court in the ruling of 20<sup>th</sup> November 2008 vide **NYERI H.C. MISC. APP. NO. 205 OF 2000**. I have perused in detail the ruling of Mr. Justice Makhandia. The Honourable Judge did not determine the issue as to whether or not a Will existed; consequently this Court has a right to consider the issue. The Petitioner has proposed to distribute the deceased's Estate on the basis that the deceased died intestate. On the other hand the Objectors have opposed the same on the basis that the distribution should be done in accordance with the Will. A careful perusal of *Section 53* of the Law of Succession Act will reveal that the law provided for separate modes of presenting applications for forms of grants in cases where there was a Will (testate) and in cases where there was no Will (intestate). The question here is whether or not the deceased died testate or intestate? Under *rule 14* of the Probate and Administration Rules where a wrong procedure has been used in applying for a grant, the law provides for an amendment or withdrawal of the application for grant. The Petitioner has posed the following questions: (i) If ever they wish to have the Estate shared as per the alleged Will, what is the fate of the persons not named therein? (ii) Will they have to be thrown out of the estate, thereby be disinherited? I think

the law envisaged such questions to arise. *Section 26* of the Law of Succession Act clearly takes care of such situations. The aforesaid section stipulates that a Will is not absolute. Where there is a contention, the Court has the discretion to interfere and to even make a provision for a dependant left out of inheritance. In my view I am convinced the issues raised by the Objectors have merit hence the grant cannot be confirmed until those issues are sorted out.

The second issue raised by the Objectors relates to the competency of the subordinate court to issue the grant. The petitioner did not deem it fit to address his mind to this issue. There is no doubt that the learned Senior Principal Magistrate appreciated the fact that the subordinate court lacked the pecuniary jurisdiction to hear and determine the dispute because the estate was in excess of the value of Ksh.1000,000/=. The learned Magistrate subsequently transferred the cause to this Court. I have perused the affidavit of Kenneth Githaiga Mwangi sworn on 8<sup>th</sup> September 1999 and filed in support of the Petition for the Grant of Letters of Administration filed before the Principal Magistrate's Court. In paragraph 6 of the aforesaid affidavit, the Petitioner gave the total estimated value of the assets of the Estate to be Ksh.200,000/=. This figure was also restated in the affidavits of the sureties. Under *Section 48 (1)* of the Law of Succession Act, the Magistrate's Court was allowed to hear and determine a succession dispute where the estate's gross value does not exceed Ksh.100,000/=. The Principal Magistrate's court therefore erred when it purported to make a grant to the Petitioner yet it was quite obvious that the gross value of the Estate was in excess of Ksh.200,000/=. The subordinate court therefore acted without jurisdiction hence whatever orders were made must be vacated.

In the end I find the Protest to be well founded. In the circumstances of this case it is only just and fair to make the following orders:

- (i) **That since the Subordinate Court had no jurisdiction to issue orders to grant Letters of Administration intestate the order is set aside thus the Grant of Letters of Administration given to the Petitioner is revoked.**
- (ii) **In view of the fact that there is a confusion as to whether or not the deceased died intestate or testate the grant cannot be confirmed because it is difficult to determine the schedule of distribution.**
- (iii) **Either party to apply for issuance of the grant/probate after taking into account what this Court has pointed out.**
- (iv) **The Summons for Confirmation of Grant is struck out.**
- (v) **Since the dispute involves members of the same family, I direct that each party meets his or her own costs.**

*Dated and delivered at Nyeri this 17<sup>th</sup> day of September 2010.*

J. K. SERGON  
JUDGE

In open court in the presence of Mr. Mwaura holding brief Gathoni for 3<sup>rd</sup> Protestor and Wambugu holding brief Gacheru for Petitioner.