



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Succession Cause 239 of 1999

In the Matter of the Estate of KIRIGO WARUHIU (Deceased)

PETER MUNUHER KIARA.....APPLICANT

VERSUS

MURIMI KIARA.....1ST PROTESTOR

STEPHEN MURIMI NGARAGARI.....2ND PROTESTOR

RULING

By an application dated 18th October, 2007 and filed in court the following day, **PETER MUNUHE KIARA**, hereinafter referred to as “*the Applicant*” sought to have the grant issued herein on 13th May, 2002 and confirmed on 26th June, 2007 revoked on grounds that:-

(I) It was obtained fraudulently by making of a false statement or by the concealment from Court of something material to the cause.

(II) It was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

The application was expressed to have been brought pursuant to the provisions of *Section 76* of the Law of Succession Act and *Rules 44* and *73* of the Probate and Administration Rules. In support of the application, the Applicant swore an affidavit in which he deposed in pertinent paragraphs that **MURIMI KIARA** and **STEPHEN MURIMI NGARAGARI** whom I will hereinafter refer to as the 1st and 2nd Respondents respectively had failed to disclose in their application for confirmation of grant that “*the 1st Respondent*” was not entitled to any portion of either **MAGUTU/GATHEHU/251** or **IRIAINI/CHEHE/66** hereinafter referred to as “the suit premises.” That the 1st Respondent’s entitlement was in respect of **MAGUTU/GATHEHU/241** registered in the name of his deceased father in which he had always lived, developed together with his other brothers **GATERE NDOTO, MUNENE KIARA** and **NGUNYO KIARA**. The Applicant went on to depone that he had occupied and developed the suit premises namely **MAGUTU/GATHEHU/251** which he occupies alongside the 2nd Respondent to the exclusion of all other beneficiaries. It was on this basis that the Applicant sought the revocation and or annulment of the confirmed grant.

The application was on 22nd October, 2007 then placed before **Kasango J.**, for directions. Directions were issued in terms that the application be served on the Respondents and that the hearing of the same be

by way of *viva voce* evidence. The application was duly served as directed. However, only the 1st Respondent reacted by filing a replying Affidavit. In that affidavit, the 1st Respondent deponed that he did not conceal any facts in relation to the cause and that the Applicant was a stranger to the estate of the deceased. That when the deceased passed on he had not known the Applicant and only came to know him in 1995 (when he lodged an application for leave to file objection out of time). The Applicant was not thus known to the estate of the deceased and could not therefore be considered a beneficiary. With regard to the Applicant's occupation of the suit premises, he deponed that the Applicant used Provincial Administration to grab a portion thereof, which to date he continues to occupy albeit forcefully and illegally.

When the hearing of the application commenced before me on 15th October, 2008 the Applicant testified as follows:

That the deceased was his paternal grandmother and the 1st Respondent was his stepbrother whereas the 2nd Respondent was his paternal uncle. The deceased in his lifetime had the suit premises namely **MAGUTU/GATHEHU/251** that is occupied by the Applicant and the 2nd Respondent. It measures 2.20 acres. Whereas the Applicant utilizes 1.7 acres of the same, the rest is utilized by the 2nd Respondent. There is no other person(s) in occupation of the suit premises apart from the aforesaid two. He had occupied his portion since 1980. He further testified that the 1st Respondent resided on **MAGUTU/GATHEHU/241** measuring 3.7 acres together with his brothers, **GATERE, KABATHA** and **CHARLES KIARA**. That **IRIAINI/CHEHE/66** was initially owned by **JAMES NGARAGARI** and was never part of the deceased estate. He however, had no claim or interest in **MAGUTU/GATHEHU/241** and **IRIAINI/CHEHE/66**. That when the Respondents applied for confirmation of the grant they proposed that the suit premises be shared between them to his exclusion. However, they knew that a portion of the suit premises had been bequeathed to him by his late father. When the proposed subdivision was made the Respondents knew that he was in occupation. He was not a stranger to the estate of the deceased as claimed by the 1st Respondent. That he had never been evicted and or requested to vacate the suit premises since he occupied the same. Indeed he had substantially developed the same by planting trees, bananas and had put up a house thereon. Otherwise he had no dispute with the 2nd Respondent's claim over the suit premises.

Cross-examined by **Mr. Kamwenji**, learned Counsel for the 1st Respondent, he responded that he occupied the suit premises in 1990. Previously he had been staying with his late father in Ragati forest. He had brothers and sisters namely **WAMBUI, WAMUNYU** and **NGUNYI**. **NGUNYI** stays with the 1st Respondent, **WAMBUI** stays in Nanyuki whereas **WAMUNYU** is unmarried and stays at Mutara on a piece of land owned by **NGUNYI**. He further stated that his father having realized that his portion of land was small and since he had another portion of land from his mother, he decided to settle the Applicant there. Much as he came to the suit premises after the death of his grandmother, that is how his father intended.

Cross-examined by **Mr. Macharia**, learned Counsel for the 2nd Respondent, the Applicant confirmed that he had no quarrel with the 2nd Respondent and he is entitled to what he has been offered in the application for confirmation of grant. This marked the close of the Applicant's case.

For the 1st Respondent, he testified in these terms; that the deceased was her paternal grandmother. The suit premises were part of her estate. It is occupied by the 2nd Respondent and the Applicant. The Applicant forced himself into the suit premises in 1990. This was the first time he saw the Applicant. That his father had another wife besides his mother. The other wife had children namely **NGUNYI, KIHARA** and two (2) daughters. That he had heard that the Applicant was a brother of **Ngunyi**. He did not know where the Applicant had been residing prior to 1990. He maintained that the Applicant was not his brother, step or otherwise and thus he was not entitled to a share of the estate of the deceased.

Cross-examined by **Mr. Karingithi**, learned Counsel for the Applicant, he stated that he had never taken any action to evict the Applicant from the suit premises. That during the burial of their father, the

Applicant was present and in fact they took a photograph alongside the coffin together. The photograph was in respect all the sons of the deceased. He conceded that the portion he allocated himself in the confirmed grant was actually occupied by the Applicant and that when he excluded him in the grant, he knew that the Applicant was in occupation. The hearing of the cause was then adjourned. At the resumed hearing, **Mr. Kamwenji Esq.**, failed to turn up and the 1st Respondent elected to prosecute his cause the absence of his Counsel aforesaid notwithstanding.

When cross-examined by Mr. Macharia, his response was as follows; that the Applicant was unknown to him. He is not supposed to inherit anything as his father had never talked to him about him. With that the 1st Respondent closed his case.

It was then the turn of the 2nd Respondent to state his case. It was in these terms; He knew the Applicant. He was the son of the second wife of his elder paternal uncle. He was thus his Cousin just as the 1st Respondent. As far as he was concerned the suit premises should be shared between the Applicant and himself in the following ratio: 2nd Respondent 1.13 acres and the Applicant 1.07 acres.

Cross-examined by **Mr. Karingithi**, he maintained that 1.07 acres from the suit premises should go to the Applicant since he is already in occupation thereof and the balance thereof of 1.13 acres should go to him. That the Respondent lied when he said that he did not know the Applicant. He maintained that the two were his cousins and was even aware that they went to the same class in primary school.

When cross-examined by the 1st Respondent, he responded that their father when alive had shown the Applicant where to build. He denied having brought the Applicant to the suit premises. Indeed he had seen the Applicant on the suit premises from childbirth. That the suit premises had been distributed by their respective parents in their presence and that each person was residing in their respective portions.

At this juncture the 2nd Respondent closed his case. Thereafter parties agreed to file written submissions in support of their respective positions. Those submissions were subsequently filed and exchanged. I have had occasion to carefully read and consider them.

As I understand it, the Applicant's case is that he was a beneficiary of the estate of the deceased and that he was in actual occupation of a portion of **MAGUTU/GATHEHU/251** jointly with the 2nd Respondent. During the hearing, the 2nd Respondent actually corroborated the evidence of the Applicant with regard to paternity, brotherhood and actual occupation of the suit premises on the ground. It also emerged during the hearing that the 1st Respondent does not even occupy nor utilize the suit premises. He actually occupies and utilizes **MAGUTU/GATHEHU/241**. It is the Applicant's case that by the Respondents failing to disclose and consider the fact that the Applicant was in actual possession of a portion of the suit premises in their application for confirmation of grant, the Respondents concealed from Court something material to the case. The 1st Respondent claims that the Applicant was a stranger to the estate of the deceased. This cannot be possibly true. The Applicant is a stepbrother to the 1st Respondent. How can he then be termed a stranger to the estate of the deceased. The unchallenged and uncontroverted evidence of the 2nd Respondent is that both the Applicant and the 1st Respondent attended even the same class in the same school. During the burial of their father, a photograph of all the sons of the deceased was taken. Among them was the Applicant. How then can the 1st Respondent claim that the Applicant was a stranger to the estate of the deceased and that he never knew him. How could he have been allowed to take a photograph alongside all the sons of the deceased if at all he was not one of them? I keenly observed the 1st Respondent as he testified and he struck me as a person who is economical with the truth. He was a person of doubtful integrity whose evidence I have treated with circumspection and abundant caution. And as correctly submitted by Mr. Karingithi, the 1st Respondent was clearly out to say the least, an untruthful witness who would deny his brother the Applicant even when shown a photograph they had taken together during their father's burial.

The 2nd Respondent has no quarrel with the Applicant getting 1.07 acres out of the suit premises

whereas he gets 1.13 acres. It is common ground that the Applicant has been utilizing the said 1.07 acres while the 2nd Respondent utilizes the rest. It is also common ground that the 1st Respondent does not occupy or utilize any portion of the suit premises. It is also common ground that the Applicant had sought leave of Court to file objection to the grant of Letters of Administration intestate out of time. So that by the time the Respondents applied for the confirmation of grant they were already aware of the Applicant's occupation and interest in the estate of the deceased. They never sought the eviction of the Applicant from the suit premises although they claimed that his entry and occupation of the suit premises was forceful and without their consent. To have totally ignored his said interest in the estate in their application for confirmation of grant smacks of concealment from Court of something material to the case therefore.

The totality of the foregoing is that the grounds upon which the revocation has been sought have been proved to the required standard. Accordingly I would allow the application and direct that the issue of the distribution of the estate of the deceased particularly with regard to the suit premises i.e. MAGUTU/GATHEHU/251 shall be heard afresh. Since the protagonists are close relatives I make no order as to costs.

Dated and delivered at Nyeri this 29th day of January 2009.

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M. S. A. MAKHANDIA

JUDGE