REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISCELLANEOUS CIVIL APPLICATION 101 OF 2006

ELIUD GACHOKI MUTHIKE…….APPLICANT

VERSUS

ELIZABETH WANGOTHO GACHOKI……..RESPONDENT

JUDGMENT

A grant of letters of administration to the estate of the late Gachoki Rubarita alias Charles Gachoki were applied for and granted to Elizabeth Wangotho Gachoki and Julius Mutua Gachoki on 1/7/2005. The records before the subordinate court shows that the deceased died leaving behind a wife who was one of the petitioners and 5 sons. One of his sons namely Muthike Gachoki died before the grant could be confirmed. From the evidence of the Respondents herein, his wife Veronica Wanjiru Muthike was brought on board and was informed of all that was happening. Before the grant was issued i.e on 7/4/2004 the Applicant herein one Eliud Gachoki Muthike filed a notice to enter an appearance in that file but did nothing else. He neither filed an objection or affidavit of protest. The grant was consequently issued to the 2 petitioners herein. They applied for a confirmation of the grant and the grant was confirmed on 8/8/2006 and a certificate of confirmation issued to that effect. The land was distributed as follows:-

(a) Veronica Wanjiru Muthike (Applicant's mother)- 1.0 acre

(b) Gedion Miano Gachoki - 1 acre

(c) Julius Mutua Gachoki - 1.5 acres

(d) Bernard Ndege Gachoki - 1.5 acres

(e) Stephen Muriuki Gachoki - 1 acre

There was no protest filed. The grant was confirmed after the beneficiaries informed the court that they had no objections. After the said distribution, the applicant moved to this court and filed the application for revocation of the said grant dated 15/8/2006. In his application he has reproduced ver batim the grounds listed under Section 76 i.e (a) – (c) verbatim and added the following 3 grounds;

(a) That the applicant is a bone fide beneficiary of the deceased estate.

(b) That the grant did not make a provision for the applicant.

(c) That the grant cannot be operative due to subsequent circumstances.

It will be noted however that as at the time the grant was confirmed there was no application pending before the court for provision for dependent filed by the applicant herein.

He has not stated which subsequent circumstances would make the grant inoperative. At the viva voce hearing of the summons for revocation, the applicant testified and called one witness. The Respondent also testified and called a witness. Both counsel filed written submissions in the matter. From the entire evidence on record, what transpired is that there was actually no fraud or non-disclosure of any material information on the part of the petitioners when the grant was applied for. Indeed the applicant himself was aware of the application and he could have filed an affidavit of protest but he did not. The gist of the matter or his complaint is that he was not treated as the other sons of the deceased when the land was distributed. There is no doubt however that he was not a son to the deceased. He was his grandson. His father had, before his death been informed of the succession and had even signed his consent in Form 38. Since the applicant's parents were alive, and his father even consented to the grant of letters of administration being issued, the applicant really had no business in the matter. He was not entitled to be consulted or even to file his consent because he did not feature anywhere in the order of priority of the estate of the deceased who was his grandfather. Since his father and later his mother were included in the list of those left surviving the deceased, his name could not feature anywhere.

He nonetheless argues that his parents had separated when he was a small boy and that it was his deceased grandfather who went for him and installed him in his homestead, educated him and showed him where to build and plant coffee. He therefore wanted to be given a share in his own right. This is the issue here. The respondents argue that the applicant can only claim a share from his mother and not in his own right.

I have carefully considered the evidence and the arguments advanced in the submissions by both counsel. Firstly, my finding is that none of the grounds set out under section 76 of the Succession Act have been established to call for the revocation of the grant. The same was properly granted to the 2 petitioners after the children of the deceased signed the requisite consent. It cannot therefore be revoked.

On the issue of the distribution of the estate, my view is that the same was distributed fairly between the houses and none of the parties from either house has complained or appealed against that mode of distribution. The applicant was a grandchild of the deceased and he could only claim through his mother who was actually given a share. The applicant cannot be treated in any special way visa-vis the other grandchildren of the deceased. Indeed had the deceased wanted him to inherit the portion in question, nothing could have stopped him from bequeathing it to the applicant during his life time. He did not do so. He died intestate and the distribution of his property must be guided by rules of intestacy. The Rules do not recognize grandchildren when their parents or parent who are the children of the deceased are still living. If the deceased did educate and care for the applicant during his lifetime, then he was just luckier than his other grandchildren but he is not entitled to any special treatment, from the other grandchildren. His application must therefore fail. The same is hereby dismissed with orders that each party bears its own costs as the parties are all family members.

W. KARANJA

JUDGE.

Delivered, signed and dated at Embu this 14th day of June 2009

In presence of:-Mr. Kiama and Ms Ndorongo for parties.

W. KARANJA

JUDGE