

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 244 OF 2009

IN THE MATTER OF THE ESTATE OF GATHONI GICHINGIRI GITHINJI (DECEASED)

Between

ELIZABETH WAMUYU GITHINJI.....PETITIONER

And

MICHAEL WACHIRA GAKUO.....PROTESTER

RULING

By a judgment dated 24th January, 2003 **J. N. Nyaga**, the then Senior Resident Magistrate at Karatina held that the petitioner herein was the rightful heir to the land parcel number **Konyu/Ichuga/340** hereinafter referred to as “*the suit premises*”. This holding by the learned magistrate had been provoked by objection lodged against the petitioner being appointed as the administrator of the estate of **Gathoni Gichingiri Githinji alias Gathoni W/O Gachingiri**. The petitioner sought the grant in her capacity as a daughter in law. **Paul Njonge Kariuki, Jane Njeri Wachira, James Kariuki Karangi and Michael Wachira Gakuo** were the objectors. Their objection was grounded on the fact that the petitioner was not a person surviving the deceased over the suit premises. They claimed that they were the grand children of the deceased. The learned magistrate having carefully listened and evaluated evidence tendered by the petitioner as well as the objectors, dismissed the objection lodged by the objectors and simultaneously ordered that temporary grant do issue to the petitioner.

Aggrieved by the learned Magistrate’s judgment, the objectors preferred an appeal to this court being Civil Appeal Number 13 of 2003. The appeal was subsequently heard and determined. In a judgment dated and delivered on 21st July, 2008, this court dismissed the appeal thereby paving way for the petitioner to apply for the confirmation of the grant.

Indeed, on 21st August, 2008, the petitioner filed the said application. She wanted the grant of letters of administration intestate issued to her on 24th January, 2003 confirmed. In the affidavit in support thereof, the petitioner deponed that the deceased was only survived by her as a daughter in law and no other dependent. She proposed that the suit premises should go to her absolutely. Finally she deponed that the objectors’ claim to the estate of the deceased had been heard and finally determined by the judgment of the Senior Resident Magistrate’s Court.

Unexpectedly, that application was met with resistance from **Michael Wachira Gakuo** one of the original objectors in the Senior Resident Magistrate and one of the appellants in the appeal that arose from the judgment of the learned magistrate aforesaid. His protest was still anchored on the fact that he was entitled to 1.3 acres out of the suit premises. This is the very issue that had been canvassed before the learned magistrate as well as in the appeal. He lost on both occasions.

Incidentally, the application for confirmation of grant aforesaid was filed in the succession cause in the Senior Resident Magistrate’s court at Karatina. However on 18th February, 2009, **L. Mbugua Ag**

P.M made an order in these terms;

“.....considering that subject matter is land Konyu/Ichuga/340 which this court believes is worth more than 100,000/= then I direct that, the file be taken to High Court for directions.....”

These are then the circumstances under which this cause again found its way to me. On 8th May, 2009, the application for confirmation of grant and protest were fixed for hearing before me on 12th June, 2009. On that day **Mr. Kiama**, learned counsel for the petitioner appeared on her behalf whereas the protester appeared in person. **Mr. Kiama** stated that the issues raised in the protest were the same issues raised on the appeal whose decision was rendered herein on 21st July, 2008. That brought to an conclusion the dispute. Accordingly there was no need for the cause to proceed any further. Surprisingly the protester agreed with him.

As I have already outlined above, this dispute has been the subject of a judgment by the Senior Resident Magistrate's Court, Karatina as well as this court on an appeal. The issues raised in the protest were indeed the same issues canvassed and ventilated in the two courts and decisions made thereon. The decision of the learned magistrate which in essence was to the effect that the petitioner was the right heir to the suit premises was upheld by this court on appeal. The protester's claim to the same or a portion thereof was in effect dismissed. There is no evidence that the protester appealed against the decision of the High Court to the court of appeal. Even the protester agrees that the issues he has raised in his protest were actually the subject of the proceedings in the trial magistrate's court as well as in the appeal. That being the case, the protest filed is actually an abuse of the process of the court. Accordingly it is struck out with costs to the petitioner. Otherwise the grant is confirmed as sought in the application dated 21st August, 2008 with costs again to the petitioner.

Dated and delivered at Nyeri on 22nd day of July, 2009.

M.S.A. MAKHANDIA

JUDGE