



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**SUCCESSION CAUSE 561 OF 1992**  
**IN THE MATTER OF THE ESTATE OF NDUNGU KAHURA – (DECEASED)**

**SAMUEL KAHURA NDUNGU ..... APPLICANT**

**VERSUS**

**MBATIA MURUGAMI ..... RESPONDENT**

**JUDGEMENT**

The grant of representation intestate was issued to one Mbatia Murugami on 24<sup>th</sup> August, 1993 and was confirmed on 24<sup>th</sup> August, 1995.

The property of the estate namely Ndeiya/Makutano/264 was divided amongst 11 beneficiaries as is shown on the certificate of confirmation of the grant of 24<sup>th</sup> August, 1998.

But I do see it as per the record that Samuel Kahura Ndungu had filed a summons for revocation dated 23<sup>rd</sup> August, 1994 and filed on 24<sup>th</sup> August, 1994.

The ground of opposition filed on 9<sup>th</sup> September, 1994 as well as replying affidavit sworn by the Administrator on 16<sup>th</sup> September, 1994 were filed and the grant and certificate of confirmation were revoked by a ruling delivered on 24<sup>th</sup> June, 1996 with the direction that the Applicant/Objector to file Answer and Cross-petition.

The Answer and Cross-petition was thereupon filed on 11<sup>th</sup> July, 1996. I am not very sure why and how but a summons dated 23<sup>rd</sup> August, 1996 was filed by Samuel Kahura Ndungu the cross-petitioner to extend time to file the application for confirmation. He filed also an affidavit on 12<sup>th</sup> September, 1996 but sworn on 30<sup>th</sup> August, 1996.

Affidavit in Protest was filed by the Petitioner Mbatia Murugami sworn on 26<sup>th</sup> September, 1996.

Thereafter an amended summons for confirmation was filed on 17<sup>th</sup> July, 2001.

Later, Simon Kamau Kiraitu swore as affidavit on 3<sup>rd</sup> July, 2006 wherein it is shown that the issue of division of the estate was determined by Succession Cause No.45/1977 before District Magistrate Court at Limuru on 28<sup>th</sup> March, 1979.

Thereafter several affidavits were filed. Samuel Kahura Ndungu has filed supplementary affidavit and further affidavit sworn on 21<sup>st</sup> July, 2006 and 20<sup>th</sup> January, 2009, and Simon Kamau Kiratu has filed such affidavit sworn on 27<sup>th</sup> September, 2006.

Some other persons also filed affidavit namely by Samuel Ngigi Gitau sworn on 16<sup>th</sup> November, 2006, and by Njenga Ndungu Kahura sworn on 10<sup>th</sup> May, 2009.

With these chequered background, the counsel agreed that the issue of division be heard and determined by submissions on the basis of the affidavits on record which I have enumerated.

I have considered the affidavits on record and the submissions made Mr. Kiai, the learned counsel for Mbatia Murugami the protestor and other purchases and he only stated that the matter is *Res judicata* as having been heard by a competent court.

I have two matters which are heard and determined in respect of the properties of the estate.

The first is Succession Cause No.45 of 1977 at the District Magistrate's court at Limuru. On 28<sup>th</sup> March, 1979 consent was entered in presence of the beneficiaries and I further note that Mbatia Murugami was before the court but in the position of a witness, as is shown on page 3 of the certified copy of the proceedings (see Annexure S.K.K.I of the affidavit of Simon Kamau Kiraitu sworn on 3<sup>rd</sup> July, 2006). Thus the contention of the Applicant that he was not mentioned as one of the beneficiaries of the deceased and was not given any shares does not arise. Moreover, it is also on record and agreed that Mbatia Murugami the Original Applicant was a son-in-law of the deceased. He himself has averred to that fact.

The second proceedings is P.M.C.C No.2009/96 at Kiambu.

The suit was filed on 12<sup>th</sup> November, 1996 by the said Mbatia Murugami against Samuel Kahura Ndungu the Applicant for summons for confirmation herein. The said case was dismissed with costs by an order dated 26<sup>th</sup> June, 2001. It is also on record and not denied that the other similar cases namely P.M.C.C. No.2010/96 filed by Peter Patrick Gitau and Simon Kamau Kibatu (who have filed an affidavit herein) were ordered to be heard together, the first being a test case. I do agree that such order was given because all the three were based on similar facts. I also concede to the order that the claimed sale agreements cannot be entered as per law because the proposed beneficiaries lacked the capacity to sell the estate properties.

I shall thus agree that the distribution of this estate was already completed as per the law prevalent at the time of the death of the deceased. I also note that this succession cause is thus incompetent and must be struck out *ex debito justitiae*.

I do find so.

I shall not make any order on costs.

**Dated, Signed and Delivered** at Nairobi this 14<sup>th</sup> day of July, 2009.

**K.H. RAWAL**

**JUDGE**

