



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**Prob & Admin Cause 109 OF 1994**

**IN THE MATTER OF THE ESTATE OF KIMANI KINUTHIA – DECEASED**

**BETWEEN**

**BENSON NJENGA KIMANI**

**HANNAH WANJIRU MUHUHU**

**KARUGA KIMANI..... PETITIONERS**

**AND**

**SIMON KINUTHIA KARIUKI**

**STEPHEN KIMANI MUNGAI**

**BENARD GITHUMBI KARIUKI**

**JOHN SILAS NDUNGU..... OBJECTORS**

**J U D G M E N T**

The deceased the late Kimani Kinuthia died in Kamukunji Estate, Eldoret on 16<sup>th</sup> August, 1969. The Petitioners applied for Letters of Administration to the Estate on 20<sup>th</sup> July, 1994.

The Petitioners averred that the beneficiaries to the Estate of the deceased at the time were as follows;-

1. Benson Njenga Kimani – son (1<sup>st</sup> Petitioner)
2. Alice Njeri Kangee – daughter in-law (i.e widow of deceased son)
3. Hannah Wanjiru Muhuhu – daughter in law (i.e widow of another of deceased's sons) – (2<sup>nd</sup> petitioner)
4. Leah W. Ng'ang'a – daughter in-law i.e widow of another of deceased's sons
5. Karuga Kimani – son – (3<sup>rd</sup> Petitioner)
6. Daniel Ndirangu Kimani – son

According to the Petition the assets of the deceased left were;

1. 2.9 acres land at Githiga in Kiambu
2. 10 acres of land – Plateau in Uasin Gishu District

3. 2.5 acres land, Kamukunji in Uasin Gishu District
4. 0.25 acre plot at Kamukunji in Eldoret

The 2.9 acres of land in fact comprised of two properties namely;-

1. Title Githunguri/Githiga/653
2. Title No. Githunguri/Githiga/T 518

The letters of administration were granted to the Petitioners on 2<sup>nd</sup> June, 1995 and confirmed on 23<sup>rd</sup> June, 1995.

The Objectors have taken out an application under the provisions of sections 76 of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration rules for revocation of the aforesaid grant of letters of administration. The grounds raised for the application are;-

- (a) That the grant was obtained fraudulently by the making of a false statement by the concealment from the court of facts material to the Administration Cause.
- (b) That the grant was obtained by means of untrue allegations of facts essential in points of law to justify the grant aforesaid.
- (c) That the Deputy Registrar of this court had no jurisdiction to entertain this matter of issuance of the Grant to the Petitioners herein which jurisdiction is the reserve of the High Court as stipulated by the Rules
- (d) That the objectors are also beneficiaries of the Estate of the late Kimani Kinuthia who died in 1966 on ground that he held plot No. Githunguri/Githiga/653 and plot Githunguri/Githiga/T 518 in trust for himself and their late father Timothy Mungai Kinuthia.
- (e) That the properties are still intact and in the name of the deceased Kimani Kinuthia.
- (f) That the objectors have no dispute over the other properties of the deceased In their supporting affidavit the objectors state inter alia that;
  - their father the late Timothy Mungai Kinuthia who passed away on 7<sup>th</sup> October, 1967 was younger brother of the deceased.
  - That their grandmother handed over the two parcels of land to the deceased as the elder son to keep in trust for himself and their father in equal shares.
  - that this was done in accordance with Kikuyu customary law that the elder son do take care of the property of the deceased for distribution to the other beneficiaries at a later stage.
  - that the deceased therefore held the two parcels of land in trust for himself and his younger brother the late Timothy Mungai Kinuthia whose estate they have now obtained a grant of letters of administration for.

The Application is opposed by the Petitioners after a full hearing of the dispute before me, both counsels filed written submissions for purposes of consideration and delivery of judgment.

In their written submissions the Petitioners raised questions of jurisdiction. It is trite law that once a question of jurisdiction is raised, it must be the first question to be considered and determined before going into any other issue or question. Jurisdiction is what gives this court the mandate and authority to hear, entertain and determine any matter before it. Without appropriate jurisdiction duly conferred by law, this court has no business in delving into any matter before it. Jurisdictional is conferred by law. As a result, it is my duty to look into the jurisdiction issues raised at the outset: These are;-

1. That what the objectors wish to achieve in the rectification of the registers to the suit properties and that this can only be effected by section 143 of the Registered Land Act.
2. That the objectors are not entitled to be granted letters of administration to the Estate of the deceased as they were

not his dependants or beneficiaries.

3. That their claim (a trust) can only be vindicated vide a separate suit I have considered the points of law raised. I do not agree that section 143 of the Registered land Act precludes this court from hearing this dispute. To the contrary, the said provision enhances and confers jurisdiction to this court in revoking a title and rectifying of the register if the registration was obtained by fraud or mistake.

In any case, I do not think that it is the objectors' case that the deceased was registered as proprietor due to fraud. What they pleaded is that it is the petitioners who obtained letters of administration by fraud. Their claim is based on a TRUST which right is protected inter alia by section 28 of the Registered Land Act.

I have also considered the second question which really is of locus standi or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position in law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors' father.

In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed.

The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.

Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary or dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.

In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/rights. They are lucky that the claim of trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate.

I therefore do hereby hold that this court has no jurisdiction to determine the claim of trust or to give any relief in respect thereof. It is unfortunate that the question of jurisdiction was raised at the end of the hearing. It is always appropriate and reasonable for jurisdictional issues to be raised at the beginning of hearings or trials. Preferably, they should be raised in the pleadings at the outset.

Be that as it may, the fact that it is raised at the end does not change anything. If a court has no jurisdiction, then it has none. The conclusion of hearing does not confer any jurisdiction to the court. This will only go to the question of costs.

I therefore do hereby dismiss the application for revocation with no order as to costs.

In the interests of justice and considering that the Petitioners raised the issue after loss of precious judicial time and did not put the objectors on notice, I do hereby order stay of the distribution of the Estate of Kimani Kinuthia, the deceased herein for a period of 4 months to enable the objectors decide whether to institute separate proceedings, and if so to institute the same and have adequate time to present appropriate orders to preserve the suit properties.

In default of the filing of such suit/action and obtaining of interim orders within the given period, the Petitioners shall be at liberty to apply for distribution of the assets of the Estate. Orders accordingly.

Dated and delivered at Eldoret on this 22<sup>nd</sup> day of January, 2008.

**M.K. IBRAHIM**

**JUDGE**

