

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 231 of 2005

IN THE MATTER OF THE ESTATE OF GITHINJI GICHOHI DCD

AND

JAMES MURIMI GITHINJI PETITIONER

RULING

The Applicants Murimi Githinji, Wambui Maina, Gichohi Gathigia and Beatrice Wanjiru have moved this court by a summons dated 7th January 2008. That summons is brought under Rules 49 and 73 of Probate and Administration Rules. The applicants seek that the order confirming the grant issued by the court on the 4th December 2007 be set aside and the confirmed grant be recalled. These applicants state that they had not consented to the mode of distribution suggested in the application for confirmation dated 5th November 2007. They however confirmed in their supporting affidavit that they were served with that application. When the same came up for hearing on 4th December 2007 they attended court. Their intention on that day was to seek for an adjournment to enable them file an affidavit of protest. They deponed that when the matter was called out only the name of the petitioner was called out by the court. Because their names were not called out they did not make their presence known. They deponed in the affidavit that they do not object to the grant being issued to the petitioner but they object to the mode of distribution. It is that mode that they seek to set aside. The distribution made when the grant was confirmed they stated was in accordance to the Kikuyu Customary Law whereas the deceased died on 11th February 1998. This was after the enactment of the Succession Act. They therefore argued that distribution should have been in accordance with that act. The application was opposed by the petitioner. In his opposition he stated that the estate property was to be divided according to the houses. That he was the only one representing his mother's house. He confirmed that the applicants did attend court on 4th December 2007 and when asked by the court they indicated that they had no objection to the confirmation of grant.

I have considered the submissions made before me and the application the subject of the present ruling. Although it was argued by the respondent to the application that the grant having been confirmed the same could not be set aside I find that I am persuaded by the decision of the Hon. Justice Khamoni in the case of *In Re Estate of Gitau (Deceased)* [2002] 2 KLR. The Hon. Judge held as follows;-

“Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant which, as in this case, has nothing wrong. While section 76 of the Law of Succession Act should therefore be relied upon to revoke or annul a grant, it is not proper to use the same section where the objector is challenging the distribution only.”

I am conscious that parties get daunted by the appearance of the court and it is possible that the applicants did attend court on 4th December 2007 but were not free to make their presence known perhaps fearing being found to be out of order by the court. I have looked at the mode of distribution confirmed on that day and I am of the view that the interest of justice demands that all parties be heard on that distribution. Accordingly the orders of this court are;-

1. That the order made herein on 4th December 2007 be and is hereby set aside and the grant issued therefore is hereby cancelled. The petitioner shall return that confirmed grant to the court within 14 days of the reading of this ruling.
2. The applicants shall file their affidavit of protest within 7 days of the reading of this ruling. This matter shall be mentioned before court 1 on 18th April 2008 for further orders.
3. There shall be no orders as to costs in respect of the summons dated 7th January 2008.

Dated and delivered at Nyeri this 9th day of April 2008.

MARY KASANGO

JUDGE