



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Succession Cause 238 of 1998**

**IN THE MATTER OF THE ESTATE OF MUKURU MAIGUA ..... DCD**

**AND**

**1. MUGAI MUKURU )**

**2. MAIGUA MUKURU ) .....PETITIONERS**

**JUDGMENT**

When the deceased in this estate died he left surviving him two sons namely Mugai Mukuru and Maigua Mukuru. Mugai petitioned for letters of administration intestate in this matter. The only asset of that estate was the property Muhito/Ruthanji/255. In that petition he cited Maigua. Maigua cross petitioned. By consent the dispute was on 4<sup>th</sup> December 1990 referred to the D.O. Mukurweini for arbitration. The award of the elders was to the effect that Mugai was to get 1.25 acres and Maigua was to also get 1.25 acres of the property. Mugai sought by a chamber summons dated 17<sup>th</sup> January 1998 to have the arbitration award set aside. On 14<sup>th</sup> July 2003 the court appointed both Mugai and Maigua as joint administrators. The grant was confirmed on 12<sup>th</sup> May 2005 to the effect that Mugai was to get 1.5 acres and Maigua was to get 1 acre. Maigua has now filed a summons for revocation of grant. The grounds upon which he sought revocation are;-

1. *That the proceedings leading to confirmation were defective since Maigua did not sign a consent as per form 37 of the probate and administration rules consenting to the mode of distribution.*
2. *That confirmation was obtained fraudulently.*
3. *That confirmation was obtained by means of untrue allegations of facts.*

In his oral evidence Maigua stated that he did not consent to distribution. He said that Mugai was his younger brother yet he got 1.5 acres. That the land should have been divided equally. The land he now occupies is larger than that occupied by Mugai. Mugai in evidence stated that the land was petitioned as per the confirmed grant after the matter was discussed with their deceased mother and the clan. The basis upon which he was getting more land was because he used to send money to his mother when he was working in Nairobi. That money purchased the extra half acre. During demarcation however the whole land was registered in their late father's name. DW 2 also confirmed that at a clan's meeting it was agreed that Mugai should get 1½ acres.

What is for determination in this judgment is the application for revocation of grant. Maigua did not in his evidence prove the grounds he relied upon in his said application. In respect of ground 1 the court proceedings of 12<sup>th</sup> May 2005 show that Mugai and Maigua were before the court when the grant was confirmed. Mugai was represented by an advocate. Maigua said to the court, "*I do not have any protest filed against the application and I do not know what I can say about it.....*". The court proceeded to confirm the grant as prayed. The issue I need to consider is whether the court was obligated to ensure Maigua who was before court consented to confirmation as provided under form 37. Rule 40(8) of the Probate and administration rules provides;

*“Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependents or other persons who may be beneficially entitled, allow the application without the attendance of any person, but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant the protestor and to such other persons as the court thinks fit.”*

As it is clear from that rule consent is required when a party is not in attendance at the time of confirmation of grant. In our case Maigua was present and at that time had not filed an affidavit in protest. Maigua’s ground 1 is rejected. The other grounds in the application for revocation were not proved in evidence tendered before court and are similarly rejected. The application by Maigua Mukuru dated 5<sup>th</sup> December 2007 fails and is dismissed with costs to Mugai Mukuru. The injunction issued by this court on 21<sup>st</sup> February 2008 in HCCC Nyeri No. 6 of 2008 (OS) is hereby vacated.

*Dated and delivered at Nyeri this 9<sup>th</sup> day of October 2008.*

**MARY KASANGO**

**JUDGE**