



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 412 of 2004

IN THE MATTER OF THE ESTATE OF DIFATHA KARIUKI MBUYATA DCD

AND

- 1. JOSEPH MAINA KARIUKI)**
2. DAVID MWANGI DIFATHA) APPLICANTS

VERSUS

GERALD MUGO KARIUKI RESPONDENT

JUDGMENT

The petitioner Gerald Mugo Kariuki petitioned for grant in respect of this estate on 24th April 1982. The deceased died on 9th November 1980. An objection to that petitioner was filed by the wife of the deceased. Before that objection could be heard she died. The objection was taken over by her unmarried daughter Eunice Wairimu Kariuki. She too died before prosecuting her objection. When the matter came up for confirmation of grant on 30th May 2002 the court record shows that the petitioner was present and also the objector's daughter by the name of Caroline Njeri Muraguri. The grant was confirmed as follows by consent.

KIINE/NGUGUINE/KIBINGOTI/325

GERALD MUGO KARIUKI 2.5 ACRES

JOSEPH MAINA KARIUKI 3 ½ ACRES

SILAS KIGOTHO KARIUKI 2.5 ACRES

DAVID MWANGI DIFATHA 3 ½ ACRES

CALORINE NJERI MURAGURI 1 ACRE

The summons dated 10th September 2004 which is the subject of this judgment was filed by Joseph Maina Kariuki. By that summons the applicant seeks the revocation of the grant issued by the Murang'a Principal Magistrate. The revocation is sought on the basis that the grant was obtained fraudulently by making false statement or concealment from the court or something material from the case. The

application is based on the following grounds;-

- (i) *That the entire estate of the deceased comprised in land parcel No. KIINE/KIBINGOTI/325 is located within Kirinyaga District and hence the Muranga Principal Magistrate lacked territorial jurisdiction.*
- (ii) *That the estate of the deceased comprising 13 acres far exceeds the pecuniary jurisdiction of the Muranga Principal Magistrate.*
- (iii) *That requisite consents for the distribution of the estate were never sought nor obtained and neither were the applicants served with Notices to renounce their rights in the estate of the deceased.*
- (iv) *That since the confirmation of the grant on 18th December 2002 one of the beneficiaries of the estate of the deceased has died leaving no surviving dependant.*

In respect of the 1st ground the applicant deponed in the supporting affidavit that the deceased resided within Kirinyaga District and that his entire estate comprising of land was also within the Kirinyaga District. In respect of that ground rule 7(3) of The Probate and Administration rules provide that a petition may be filed in the principal registry or high court registry and the case where the deceased estate does not exceed Kshs.100,000/- the same can be filed in the Resident Magistrate's registry within the area of the court which the deceased had his last known place of residence. The place that determines where a petition should be filed if it is within the pecuniary jurisdiction of the magistrate is the last place of residence of the deceased. The applicant did not show by his application the last place of residence of the deceased. There needed to be more evidence other than a statement in an affidavit that he resided in Kirinyaga District. I am however of the view that even if the deceased did not reside within the territorial jurisdiction of the Murang'a Magistrate's court that fact would not defeat the orders that were granted by that court. What the applicant ought to have done before the conclusion of the matter was apply for the transfer of the matter to the correct court. In respect of ground 2 the applicant makes a bare statement that the estate property value was beyond the pecuniary jurisdiction of the Murang'a Magistrate's Court. As we have seen 7(3) provides that *a principal magistrate has jurisdiction in succession matters where the value of the property does not exceed Kshs.100,000/-*. The applicant did not provide to the court a valuation of the property to enable the court determine whether the matter indeed was beyond the jurisdiction of the magistrate. This ground fails. In respect of ground 3 it should be noted that the deceased died in 1980. Section 2(2) of the Law of Succession Act provides,

"The estates of persons dying before commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."

That section obligates the court to proceed with a matter as far as possible in accordance with the act. The requirement of rule 41(1) of The Probate and Administration Rules is that at the hearing of confirmation of grant the court should read the affidavits before it and written protests to the party before confirmation. The petitioner in his replying affidavit stated that all parties were present before court during confirmation. That being the case and because that issue was not contradicted by the applicant and bearing in mind that the deceased died before the commencement of the law of Succession Act I find no reason to revoke the grant on this ground. The petitioner stated that he was chosen to petition because he was the oldest. He stated in his replying affidavit paragraph 8, *"That no written consent was filed but we all appeared in court on 30th May 2002 and the grant was confirmed by consent."* That was not contradicted by the applicant. Accordingly this ground also fails. On ground 4 I am of the view that the death of one beneficiary is not a basis to revoke a grant. This ground also fails. In the end the judgment of this court is that the summons dated 10th September 2004 are hereby dismissed with costs to the petitioner Gerald Mugo Kariuki.

Dated and delivered at Nyeri this 8th day of October 2008.

MARY KASANGO

JUDGE