

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 208 of 1994

IN THE MATTER OF THE ESTATE OF GIKIBUTU MUYA..... DECEASED

AND

JAMES GIKIBUTU MUYA PETITIONER

JUDGMENT

The deceased died in 1972. In his life time he had two wives namely Wahito Gikibutu and Waruguru Gikibutu. The application for confirmation of grant was filed by John Gichuiri Gikibutu. That application was dated 18th December 2006. The grant was confirmed on 3rd December 2007. James Muya Gikibutu has filed summons for revocation of that grant dated 11th December 2007. The deceased had only one property namely Aguthi/Ithekahuno/182. The grant was confirmed to the effect that the estate property being 4.85 acres was to go to James Muya and 1.15 acres was to go to John Gichuiri. Muya in his affidavit stated that he was from the second house while John was from the first house. He stated that during the deceased's life time and at the time of demarcation the deceased registered the property Aguthi/Ithekahuno/23 in the name of Charles Maina Kiromo. Charles is from the first house. According to Muya the deceased intended for the first house to get that parcel No. 23 and for the second house to get the property which is the subject of this estate. John does confirm in his affidavit that the deceased did give parcel No. 23 to the first house but it was registered in the name of Charles. But he stated that parcel No. 23 is 4.2 acres whilst parcel No. 182 is 5.8 acres. That makes a total acreage of the two properties to be 10 acres. He stated that he only was seeking from parcel No. 182 0.8 acres. Having considered the application and the affidavits on the record I find that what is for consideration is the mode of distribution. That does not necessitate the grant to be revoked. See the case of *In Re Estate of Gitau (deceased)* [2002] 2 KLR where the court held,

“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.”

The deceased died before the operation of the law of succession came into being. His estate therefore has to be distributed according to the written law and the deceased's custom. The deceased according to the parties in this case made a customary will. In his life time he gave the first house parcel No. 23. It is stated that his intention was that parcel No. 182 was to go to the second house. That was his Customary will and the court will do no better than to enforce it. The judgment of this court is in the following terms:-

1. *The court does hereby set aside the confirmation of grant of 3rd December 2007 and the court does hereby order that a fresh confirmed grant be issued to the effect that Aguthi/Ithekahuno/182 do go to John Muya Gikibutu absolutely.*
2. *There shall be no orders as to costs.*

Dated and delivered at Nyeri this 18th day of December 2008.

MARY KASANGO

JUDGE