



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISCELLANEOUS APPLICATION 87 OF 2000

IN THE MATTER OF THE ESTATE OF MUNENE GACHUBI (DSD)

AND

**IN THE MATTER OF AN APPLICATION FOR ANNULMENT OF GRANT ISSUED IN
KERUGOYA PRINCIPAL MAGISTRATE'S COURT IN SUCCESSION CASE NO. 321 OF 1994**

MICHAEL MUNENE KABURI.....1ST APPLICANT

JOHN KITHIGA MWAI.....2ND APPLICANT

VERSUS

JULIANA WANJIKU BARAGU.....RESPONDENT

RULING

The application for revocation of a grant is brought under Section 76 Succession Act Cap. 160 and Rule 44 of probate administration Rules.

The applicant seeks to revoke the grant on the ground that proceedings to obtain the same were defective in substance and that the grant was obtained fraudulently by making false statements or by concealment from the court of something material to the case by the respondent.

The application is supported by the affidavit of the applicant Michael Munene and John Kithiga Mwai who have sworn that in the ***Succession Case No. 321 of 94 filed in Kerugoya Court*** by the Respondent was filed without the applicant's knowledge and succeeded the deceased estate which is the land parcel No. Inoi/Kiaga/62. It is also sworn that the Respondent lied in court by indicating that she is the wife of the deceased while she is not. She also indicated that her sons are sons of the deceased while they are not. Also the respondent omitted other beneficiaries of the deceased estate in her petition that the deceased did not have any son. In reply the respondent has sworn an affidavit dated 22/5/2001 saying that the Succession Case 321/94 went smoothly after following the right procedures. And that on gazette, nobody lodged an objection against the issuance of the letters of administration to her. The first applicant was very much aware of the Kerugoya Succession, and therefore he should not seek

revocation of the grant. She together with other beneficiaries who are her sons live and depend on the land parcel Inoi/Kiaga/62 for their livelihood.

The first applicant have a right to claim share from the land parcel No. Inoi/Kiaga/63 and the second applicant have a right to claim share from the land parcel no. Kabare/Nyangati/348 but they are not entitled to claim anything from Inoi/Kiaga/62. She has a right to inherit that portion because she has exclusively developed the same. She says in the eyes of the first applicant. She appointed an advocate on 5/6/2001. On 5/2/2001 she swore an affidavit and said that she filed the Succession cause not as a wife of the deceased but a step mother and that her sons are step brothers to the deceased not his sons and that she did not omit other beneficiaries of the deceased as she had the blessing of the deceased's father to file the succession cause. She lived on land Inoi/Kiaga/62 soon after the deceased death up to date without anyone else claiming rights of the land.

From evidence given in this case the estate in issue comprises of land parcel no. Inoi/Kiaga./62 measuring approximately 3.8 acres. The said land was registered in name the said Munene Gachui (deceased) estate was subject matter in **Kerugoya Succ. Case No.321/94**. Munene Gachui was the son of Samuel Gachui Kahuria born of the his 1st wife (Susan Wakaria). As stated in the affidavit of Juliana Wanjiku Respondent sworn on 20/8/2001 and filed on the same day. The said Samuel Gachui Kahuria had 3 wives.

1. Susan Wakaria
2. Virginia Muthoni
3. Juliana Wanjiku

Juliana Wanjiku was originally married to Baragu who died before land demarcation. He left Juliana with 2 young sons and upon his demise and in accordance with Kikuyu customary law, Juliana was inherited by Samuel Gachui Kahuria who was Baragu's closest male relative. The existence of custom was acknowledged by applicant who is PW1 and his witness PW2 both his witnesses both agreed that Samuel Gachui was the closest living relative of Baragu and the proper person who has inherited Juliana Wanjiku (Respondent).

Samuel Gachuki was allocated land parcel No. Inoi/Kiaga/63 measuring approximately 7 acres. His son Munene Gachui was also allocated the land parcel No. Inoi/Kiaga/62 measuring 3.8 acres. From the evidence adduced Munene died even before the family moved to the allotted land. He had no wife or children. Samuel Gachuhi settled with his two wives that is Susan Wakaria and Virginia Muthoni in Inoi/Kiaga/63, and he settled the wife he inherited namely Juliana Wanjiku Baragu on his deceased sons land Parcel No. Inoi/Kiaga/62 the two lands are next to each other. It is Julian Wanjiku and her children who used the land exclusively. The Respondent evidence is corroborated by the affidavit sworn by Susan Wakaria Gachui and Virginia Muthoni Gachui on 20.8.2001.

In 1994 Samuel Gachui took JulianaWanjiku in Kerugoya Court so that they could file succession case in the estate of Munene Gachui. He did that in his capacity as the father of the deceased and in accordance the whole family agreement. He wanted Juliana Wanjiku to be registered with land parcel No. Inoi/.Kiaga/62 where he had settled her. He signed as a guarantor to her application. These people being illiterate and the documents ruled by the third party had put thumb print in that document. In that document the deceased should not have been described as husband and the petitioner should not have been described as wife. The petitioner should have been described as step mother and the sons step sons. The evidence produced in court clearly indicates that this was a honest clerical error. The parties had not realized until the application was filed. From the evidence on record the applicants were cousins of the deceased their respective fathers were Rugano Kaburia and Mwai Kahuria they were brothers to Samuel Gachui Kaburia the father of the decease Munene Kaburia. In deed neither of those persons filed an objection.

In 1998 Samuel Munene Kaburia died and his wife Virginia Munene Gachui and his daughter Sophia

Munene born by Susan Wakaria Petitioned for letters of administration to his estate in **Kerugoya SRM Succ. Cause No 293/98.** The present applicant herein objected claiming a share of land parcel No. Inoi/Kiaga/63. The court awarded them some portion of land. However on appeal in **Embu HCA Case No. 20/2000** that decision was overturned. The High Court found that present applicant was not entitled to any land of the estate of Samuel Gachubi Kaburia. The court found the applicants parents had their own land and therefore could not claim any land from their uncle. The 1st applicant father Arthur Rugano was the Registered owner of Kabare/Nyangati/779 measuring 3.97 hectares. Also Kabare/Nyangati/791 measuring 1.9 Hectares and Kabare/Nyangati/780 measuring 0.81 hectares where his wife and all children live. The 2nd applicant's father is Mwai kaburia also had his own land at Mwea where he and his family including 2nd applicant lived.

Upon considering the above it is my view that there would be no point of interfering with the proceedings in **Kerugoya Succ. Case 321/94.** I do not see that there is any evidence to prove that the grant herein was obtained fraudulently by making false statements or by concealing something material to the case by the Respondent. The procedures were complied with before the grant was issued. I also find that applicants are not entitled to any share in the plot No.Inoi/Kiaga/62 which has been inherited by the rightful beneficiaries. The applicants are not entitled to any share in that land.

I therefore do not see any merit in the application dated 14/12/2000. The same is dismissed with costs to the Respondent.

Dated this 13th day of December 2007.

J. N. KHAMINWA

JUDGE

13/12/2007

Khaminwa- Judge

Njue- Clerk

Ms Wairimu

Ruling Read in open court.

J. N. KHAMINWA

JUDGE