



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE 89 OF 1998**

**IN THE MATTER OF THE ESTATE OF KARIUKI KIRUTHU ..... DCD**

**AND**

**PATRICK KARIUKI KIRUTHU ..... PETITIONER**

**VERSUS**

**JOHN BAPTISTA IKUA KARIUKI ..... APPLICANT**

**J U D G M E N T**

By a petition for letters of administration filed on 16<sup>th</sup> June 1998, Patrick Kariuki Kiruthu (hereinafter referred to as the Petitioner) applied for letters of administration intestate in respect of the estate of his grandfather the late Kariuki Kiruthu. Following the publication of an appropriate notice in the Kenya gazette on the 22<sup>nd</sup> September 1998 Hon. Juma J issued letters of administration in favour of the Petitioner.

On 26<sup>th</sup> January 1999 John Baptista Ikua Kariuki (hereinafter referred to as the Applicant) brought a notice of motion under section 76 of the law of succession Act seeking revocation of the grant of letters of administration issued to the Petitioner on the grounds that the proceedings relating to the obtaining of the grant were defective and that it was just and equitable to grant the orders sought. In a supporting affidavit the applicant deponed that he was a son of the deceased and that the grant issued to the Petitioner was obtained without his knowledge and without any notice having been served on him.

In his replying affidavit the Petitioner responded that appropriate procedures were followed before the grant was issued to him. He deponed that an appropriate citation was served on the applicant and that the applicant entered appearance to the citation on 16<sup>th</sup> July 1998 and cannot therefore feign ignorance of the proceedings. He maintained that the applicant though a son of the deceased never concerned himself with the affairs or welfare of the deceased prior to the deceased's death and was not therefore fit to administer his estate.

On the 9<sup>th</sup> March 2000, the court gave directions amongst other things for the matter to be disposed off by way of *viva voce* evidence.

At the hearing the applicant together with his sister Anna Wanjira Kariuki (P.W.2) and brother Stephen Ngare Kariuki (P.W.3) testified. They reiterated the position that they were not made aware of the petition nor was their consent obtained. They also denied having been served with any citation and

maintained that P.W.3 though a son of the deceased was excluded in the Petition. They maintained they ranked higher than the petitioner in priority to apply for letters of administration. They therefore urged the court to revoke the grant issued to the Petitioner.

The Petitioner, his mother Rachel Gathoni Kiruthu (P.W.2) and 3 others witnesses who claimed to have known the deceased well during his life time, as well as Mary Wangechi Maimba (P.W.6) who claimed to have been employed by the deceased at his popular Bar all testified. They maintained that the deceased and his first wife had 3 children being the Petitioner's father the late Michael Kiruthu, the applicant and Anna Wanjira Kariuki (P.W.2). The deceased and his first wife separated in the 1950s and finally divorced traditionally. The deceased subsequently married one Wambura who died in 1980s having not had any children.

The Petitioner and his witnesses maintained that following the separation of the deceased and his first wife, the applicant and his sister Anna never bothered about the deceased or took care of his welfare and that it was the Petitioner's father who prior to his death took care of the deceased and that the Petitioner and his mother (D.W.2) took over that responsibility until the deceased died. It was maintained that the applicant only surfaced a few days before the deceased died and that he took no active part in the funeral arrangements or payment of the hospital bills but appeared to be only concerned about the deceased's properties. The Petitioner explained that he had excluded Stephen Ngare from the Petition because he was not the biological son of the deceased. The Petitioner explained that the deceased was very bitter with his children as they never bothered about him and that it is the petitioner who knew about the affairs of the deceased. After the death of the deceased, the Petitioner discussed with the applicant and P.W.2 and it was agreed that a succession cause be filed and that Stephen Ngare be excluded. The Petitioner availed copies of documents relating to the deceased's properties to the applicant. The applicant however disappeared and the Petitioner filed the succession cause only to later learn that the applicant had filed another succession cause in Nairobi. The Petitioner maintained that he served both the applicant and P.W.2 with citations, to which appearances were entered by their advocate. The Petitioner therefore urged the court to dismiss the application for revocation of the grant.

In his written submissions, Mr. Mukunya who appeared for the applicant submitted that the Petitioner had intermeddled with the estate of the deceased contrary to section 55 of the Law of Succession Act as he had started expending the deceased's assets using the temporary grant.

It was further submitted that the Petitioner being a grandson of the deceased derived his right to the estate of the deceased through his late father and should therefore have first obtained Letters of Administration intestate in respect of his father's estate. He submitted that under section 38 of the Law of Succession Act the estate of the deceased devolves upon his surviving children. He therefore urged the court to revoke the grant issued to the Petitioner as it was based on a fraudulent allegation that the deceased had no other children apart from the applicant and the Respondent.

Ms Mukuha who appeared for the Petitioner/Respondent submitted that the grant was obtained procedurally and in accordance with section 66 of the Law of Succession Act, which gives the court the final discretion as to who to issue a grant. She maintained that the Petition only omitted Stephen Ngari because of the issue of his paternity, which was in dispute. She submitted that appropriate citations were served on the applicant and his sister (P.W.2) and that an appropriate notice was published before the grant was issued. She submitted that the applicant was bound by his pleadings and therefore not having pleaded the issue of intermeddling or having adduced any evidence in proof of the same, the issue could not be canvassed during submissions. She therefore urged the court to dismiss the application for revocation as the same was not proved.

Having considered the application and the evidence adduced I find that the application is grounded on the allegation that the proceedings to obtain the letters of administration were defective. Although the applicant claimed he had no knowledge of the petition, it is evident that he was served with a citation to which his advocate did duly enter appearance. Surprisingly there are no copies of the appearance in this court file but the same are evident in H.C. Succession Case No. 2005 of 1998 which was filed at the High Court in Nairobi by the applicant but which was subsequently consolidated with this case.

It is also evident from the Petition that the applicant and his sister (P.W.2) were both included as heirs and persons upon whom by law the estate of the deceased devolved. The citation required the applicant to show cause as to why letters should not issue to the Petitioner. The applicant did not however lodge any objection or cross application for grant. He instead chose to ignore the citation served upon him and the notice published in the Kenya gazette even though he had already filed another succession cause in the Nairobi High Court Registry and ought therefore to have lodged an objection to the Nyeri Succession Cause.

The applicants contention that the letters of administration were obtained without his knowledge or that he was excluded from the petition were therefore false.

I find that all proper procedures were followed and appropriate notices issued before the grant was issued.

In his evidence the applicant raised the issue of the exclusion of his brother Stephen Ngari. This was however not one of the grounds upon which his application was hinged moreover although Stephen Ngari testified, he has not himself challenged the grant. Further the

Petitioner did explain why Stephen Ngari was excluded from the Petition. The exclusion of Stephen Ngari from the petition does not in any way vitiate the grant as the same has not been confirmed and the issue of who are the lawful Beneficiaries and their shares can still be canvassed during the distribution.

I note that the Petitioner was a grandson of the deceased. He was however closer to the deceased than the deceased's own children and was more conversant with the deceased's affairs. It is therefore appropriate and just that the Petitioner should hold the letters of administration. This is in accordance with section 66 of the Law of Succession Act which gives the court the discretion to appoint any person it may deem appropriate as an administrator. The Petitioner should however note that until the letters of administration are confirmed his mandate as the administrator of the estate is limited to gathering the assets of the deceased and where need be paying the debts of the estate. He has no mandate to appropriate the assets to himself and is liable to account for all the deceased's property.

Last but not least, the applicant came to this court by way of notice of motion. This was contrary to the express provisions of rule 44 of the Probate and Administration Rules, which provides that an application for revocation of a grant under Section 76 of the Law of Succession Act shall be by Summons in Form 107. The applicant's application for revocation was therefore defective.

The upshot of the above is that the notice of motion dated 26<sup>th</sup> January 1999 is dismissed for the reasons aforesated. I make no orders as to costs.

***Dated signed and delivered this 22<sup>nd</sup> day of September 2005***

**H. M. OKWENGU**

**JUDGE**