



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 73 OF 1999

(IN THE MATTER OF THE ESTATE OF KAHUTIA GICHERE)

DANIEL GICHERE KAHUTIA.....APPLICANT

VERSUS

NGUO KARUKU GICHERE.....1ST RESPONDENT

JOSEPH KAGWAMBA.....2ND RESPONDENT

JAMES KANYEKI KARUKU.....3RD RESPONDENT

KEZIA WAMBUI MUCHINA.....4TH RESPONDENT

RULING

The contestants in this cause filed two separate applications which were simultaneously heard on 17th November, 2014; in the first application dated 22nd April, 2014, the applicant herein sought for an order authorizing the Deputy Registrar to execute the necessary transmission documents in place of the respondents in respect to the distribution of the estate of the late Kahuthia Gichere. The applicant also sought for an order directing the District Land Registrar, Nyeri to register the transmission without copies of the respondents' identity cards, personal identification numbers and their passport photographs. Finally, the applicant asked for security of the surveyors who will survey the land comprising the estate in issue. The application was brought under **rules 49, 63 and 73** of the **Probate and Administration Rules** and was supported by the affidavit of the applicant himself sworn on 22nd April, 2014.

The basis of this first application was that although the shares of each of the parties herein in the distribution of the estate of Kahuthia Gichere have been ascertained and even the grant of letters of administration intestate of the estate confirmed, the respondents have either neglected, ignored or declined to cooperate with the applicant and share out the estate as scheduled in the certificate of confirmation of grant.

The second application was filed by the 1st respondent on 9th September, 2014 seeking orders for valuation of what the respondent claims to be his tea bushes on the parcel of land sought to be shared out amongst the deceased's beneficiaries; he is ultimately seeking compensation equivalent to the worth of the tea bushes. The applicant's argument is simply that he planted the tea bushes and therefore he is entitled to compensation.

The two applications were contested and as noted they were both heard concurrently.

The succession cause in which these applications were filed commenced way back in 1993 and considering how far in time the cause has come from I had to sift through the record to understand why the parties should be making the sort of applications they have made. Some of the milestones in the course of this succession cause, as far as they are relevant to the applications herein, include the grant of letters of administration intestate in respect of the deceased's estate to Daniel Gichere Kahutia, Samuel Nguo Karuku and Michael Machina Kahuhia on 11th March, 1997.

By a summons for confirmation of grant dated 11th May, 2004 and filed in court on 13th May, 2004, Daniel Gichere Kahuthia applied to have the grant confirmed. Samuel Nguo Karuku protested against the confirmation of grant and to that end, he filed an affidavit of protest sworn on 16th November, 2004.

The protest came up for hearing on 4th November, 2010; on that day, the protestor did not appear in court and for that reason the protest was dismissed and the grant confirmed as prayed in the summons for confirmation of grant dated 11th May, 2004.

By a summons for revocation or annulment of grant dated 22nd August, 2011, Daniel Gichere Kahuthia, sought to have the grant made on 11th March, 1997 revoked on the sole ground that the same had become useless and inoperative through subsequent circumstances; the subsequent circumstances referred to here were the demise of one of the administrators, Michael Machina Kahutia and the lack of cooperation from the rest of the administrators in the distribution of the estate.

On 23rd March, 2012, directions were given by the court to the effect that the summons for revocation of grant would be determined by way of affidavit evidence and written submissions. On 27th March, 2012, parties fixed the summons for mention before the judge on 13th July, 2012. Although it is not clear what the mention was all about, parties are recorded to have agreed to have the grant revoked when they appeared in court on 13th March, 2012; the court entry shows that the summons for revocation or annulment of the grant was allowed.

One would assume that since the summons for revocation of grant had been allowed and the grant revoked, the next plausible action would have been to apply for a fresh grant; however, on 18th July, 2012, counsel for the applicant in the summons for revocation of grant which, as noted, had been allowed, fixed the "matter" for mention before the judge on 2nd November, 2012. Indeed the cause was mentioned on 2nd November, 2012 as scheduled, and when they addressed the court, parties asked for time to negotiate and possibly record a settlement. Accordingly, the court granted them time and fixed the matter for mention on 16th November, 2012 for purposes of recording a settlement.

Nothing appears to have happened on 16th November, 2012 when the matter was set for mention; curiously, on 14th March, 2013 the applicants in the summons for the revocation of grant that had earlier been allowed, fixed the same summons for hearing on 11th December, 2013. On the material date, parties appeared before my learned brother, Wakiaga, J. who made the grant of letters of administration intestate of the deceased's estate to the petitioner and the protestor "to effect the grant herein".

Subsequently an "amended certificate of confirmation of grant" confirming the grant on 13th December, 2013 was issued on the same date. I may have missed it but the record does not appear to show that there were any confirmation proceedings on that particular day to warrant the issue of a certificate of confirmation of grant; however, as parties here will certainly agree, unless it is appropriately moved and whenever circumstances so demand, this cannot engage on a mission to interrogate its own orders. It is for this simple reason that it would be out of order for me to question whether or not the confirmation of grant in this cause was validly made. Suffice it to say here that if any of the parties, particularly the respondents, had any issue with the confirmation and the certificate that was subsequently issued, there is nothing that should have stopped them from taking what they deem as the appropriate step in law. To the extent that the confirmation of the grant has not been challenged, I can only proceed on the basis that the grant of letters of administration intestate has been duly made and confirmed; the identification and

distribution of the shares of the estate is as duly indicated in the schedule to the amended certificate of confirmation of grant dated 13th December, 2013.

Proceeding as I have proposed, I am not persuaded that the respondents' application dated 5th September, 2014 has any merit; once the grant was confirmed without any protest and the estate distributed as scheduled in the certificate of confirmation of grant, it is not open to the respondents to raise the issue of the valuation of the estate or any part thereof. In my view, these are matters that could and should have been raised in confirmation proceedings under **rules 41(1), (2) and (3) of the Probate and Administration Rules** which provide as follows:

(1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.

(2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.

***(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.**
*(Underlining mine).**

If the applicant had protested against the confirmation of grant under **sub rule (1)**, the court would perhaps have adjourned the hearing for further evidence on the issues that the applicant is now raising in his application under **sub rule (2)** thereof. If the value of the tea bushes, had been raised as the only issue of concern, then under **sub rule (3)** the court would have set aside that particular issue and determined separately or as provided under the provisions of law prescribed in that sub-rule.

I am compelled to conclude that there is no reason why the applicant in the application dated 5th September, 2014 did not invoke any of these provisions in the confirmation proceedings before the grant was confirmed; whatever might have been his reason or reasons, it is a bit late in the day to raise matters that could properly have been raised and should have been raised prior to the confirmation of grant. For this reason I am inclined to dismiss the applicant's application dated 5th September, 2014; parties will bear their own costs.

In the absence of any challenge to the validity of the certificate of grant dated 13th December, 2013, there is no reason why the estate should not be distributed as indicated in the schedule thereto. Save for an application under **section 76 of the Law of Succession Act** for revocation or annulment of grant, the valuation of an intestate estate or any part thereof cannot stand in the way of the sharing out of or distribution of the estate once the grant has been confirmed; counsel for the respondents did not show me and I have not found any provision in the Law of Succession Act that would support that position. In the premises, I would allow the application dated 22nd April, 2014; once again parties will bear their own costs. It is so ordered.

Signed, dated and delivered in open court this 2nd February, 2015

Ngaah Jairus

JUDGE