



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 892 OF 2009**

**AND**

**IN THE MATTER OF WAITHAKA GITHI – DECEASED**

**RULING**

1. By an application dated 20<sup>th</sup> September, 2011 and filed in court on the 29<sup>th</sup> September, 2011, and taken out under Section 47 and 76 of the Law of Succession Act, Cap. 160, and Rule No. 44 of Probate and administration Rules, the Applicant was sought an order that the grant of probate or/letters of administration to **Mary Wairima Waithaka** made on 15<sup>th</sup> June, 2010 be revoked or annulled on the ground that the grant was obtained fraudulently by the making of a false statement by concealment from the court of something material to the case. The application was supported by the annexed affidavit of **Jacob Mutheci**, the Applicant herein, sworn on even date.
2. The Petitioner/Respondent filed a Preliminary Objection on 14<sup>th</sup> June, 2013, based on the grounds that the objection is scandalous, frivolous, vexatious and an abuse of the court process, has been overtaken by events and that the objector has no locus to initiate the proceedings on behalf of his father's estate.
3. Having considered the application, the submissions of the respective counsels, and the authorities they relied on, I take the view that the issue for determination is whether the application for revocation of the said grant is scandalous, frivolous, vexatious and an abuse of the court process as raised in the Preliminary Objection.
4. In *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd. (1969) E.A. 696*, Law, J.A. said at page 700 –

**“.....So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...”**

5. It is the Petitioner/Respondent's position that the Objector/Applicant has no capacity to file the objection herein. She contends that the Objector/Applicant is not an heir to the Estate of the late Gibson Gathii whose estate is the subject matter of the objection. Further, that the Objector/Applicant has not demonstrated to this court that he is the legal representative of his late father's estate as required by law. That no word has been stated on whether or not the Objector/Applicant has obtained a grant of probate to be the legal representative of his father's

estate. Therefore, she submits that the Objector/Applicant is a stranger to the above proceedings and that the proceedings initiated by the Objector/Applicant are bad in law and a nullity from the date of filing them.

6. Does the Objector/Applicant herein lack capacity to file the objection herein as has been argued by the Petitioner/Respondent? I do not think so. I note that the said application was brought under Section 76 of the Law of Succession, which provides thus:

*‘A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—*

*(a) that the proceedings to obtain the grant were defective in substance;*

*(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*

*(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*

*(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*

*(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*

*(ii) to proceed diligently with the administration of the estate; or*

*(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*

*(e) That the grant has become useless and inoperative through subsequent circumstances.*

7. The above mentioned section is clear as it provision that a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion. My understanding is that the Objector/Applicant herein brought this application as an interested party.
8. The Petitioner’s other argument is that the objection has been overtaken by events since the Grant of Probate issued on the 15<sup>th</sup> June, 2010 to Mary Wairima Waithaka has since been confirmed. Again, the law is that a grant of representation, whether or not confirmed may at any time be revoked or annulled. I need say no more on that point.
9. I am clear in my mind that the Preliminary Objection filed on 18<sup>th</sup> June, 2013 does not measure up to the standards envisaged by **Law J.A. in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd.*** for the purpose of dismissing a suit or an application. The result is that the Petitioner’s Preliminary Objection herein is accordingly dismissed.

**DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF April, 2014.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mr. Kimathi advocate for the applicant.**

**No appearance for the respondent.**