



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

**SUCCESSION CAUSE NO.137 OF 2004**

**IN THE MATTER OF THE ESTATE OF:**

**NDIRANGU NGATIA alias**

**NDIRANGU NGATIA MUCHUNU.....DECEASED**

**AND**

**WILLIAM NGATIA NDIRANGU.....PETITIONER**

**AND**

**MWANGI NGATIA.....OBJECTOR**

**VERSUS**

**JOHN NDUMIA MWANGI.....APPLICANT**

**RULING**

By an application dated 18th November 2013 under **Section 47 and 76 Cap 160** and **Rules 44, 59 and 73** of the **P&A Rules** the applicant JOHN NDUMIA MWANGI under certificate of urgency moved the court for the following orders:-

- 1. That the application be certified urgent and it be heard ex parte in the first instance.*
- 2. That JOHN NDUMIA MWANGI be substituted in the matter herein as an objector/co-administrator in place of MWANGI NGATIA who is since deceased.*
- 3. That pending inter parties hearing of this application, an order be issued, restraining/stopping/preventing the petitioner/respondent, his family members, representatives, assigns, employees, servants, agents, and anyone else acting for, through, or on his behalf from entering into, delineating and taking possession of any portion/part of, and/or whatsoever interfering with the applicant and his family's peaceful, quiet, exclusive, uninterrupted and undisturbed actual possession, cultivation, user and enjoyment of LR NO. LAIKIPIA/*
- 4. NDINDIKA/440.*
- 5. That pending the hearing and determination of this application, an order be issued,*

*restraining/stopping/preventing the petitioner/respondent, his family members, representatives, assigns, employees, servants, agents, and anyone else acting for, through, or on his behalf from entering into, delineating and taking possession of any portion/part of, and/or whatsoever interfering with the applicant and his family's peaceful, quiet, exclusive, uninterrupted and undisturbed actual possession, cultivation, user and enjoyment of LR NO. LAIKIPIA/NDINDIKA/440.*

*6. That the certificate of confirmation of grant dated 15th June 2012 and issued to WILLIAM NGATIA NDIRANGU be revoked and a fresh one be issued to include the said JOHN NDUMIA MWANGI as co-administrator and the deceased's estate be distributed equally to all beneficiaries.*

*7. That cost of the application be provided for.*

The application was supported by the affidavit of the applicant in which he deponed that the objector co-administrator Mwangi Ngatia who was his father died on 2nd January 2012 which the cause was still pending and that it was agreed that he substituted the same.

It was deponed that after the death of his father, the petitioner/respondent took advantage and applied for confirmation of grant as the sole beneficiaries which grant was confirmed on 15th June 2013 through concealment of material fact that the deceased was summoned by a brother the late Mwangi Ngatia and that the petitioner is a nephew of the deceased and under degree of consanguinity far removed from the deceased.

It was deponed that the petitioner through letter dated 30th October 2013 issued to the applicant a notice to vacate LR. LAIKIPIA/NDINDIKA/440 wherein the applicant and his two brother have been in occupation since 1984.

The application was certified urgent and prayers numbers 1, 2 and 3 granted. In response to the said application, the respondent filed a replying affidavit on 2nd December 2013 in which it was deponed that he had already become the registered owner of the land and therefore the applicant's claim does not fall within the probate court which became functus officio.

It was deponed that the advocate for the objector was served with the application for confirmation of grant and neither the applicant nor his advocate attended court so the grant was confirmed. It was further stated that after confirmation of grant, the respondent discharged the Settlement Fund Trustees Loan and there was no objection.

It was deponed that the application had been necessitated by the fact that he had issued notice to the applicant and others to vacate his land which was left to him by the deceased.

#### Applicant's submissions

It was submitted that though the property has been registered in the petitioner/respondent's name, the court has jurisdiction to revoke the same and order a fair, just and equitable distribution of the estate of the deceased. It was submitted that Lady Justice M. Kasango had found that since the petitioner was a nephew rather a son of the deceased in these proceedings he ought not to have misrepresented himself as a son and therefore appointed the objector and the petitioner as co-administrator.

It was submitted that the petitioner had the grant confirmed *exparte* while the objector was ailing. It was submitted that the petitioner was guilty of misrepresentation by stating that he was solely entitled and that the deceased Ndirangu Ngatia was only survived by him as his child. It was submitted that the co-administrator who was a brother of the deceased ranked higher in priority and that the law provides for revocation whether or the grant has been confirmed.

It was submitted that the rights of the original objector ought to be considered and in the meantime the objector's family be allowed to stay on the land until the final determination of the cause. In support of

the application the applicant's advocate submitted two authorities being **Nairobi High Court Succession Cause No.2097 of 2004 in the matter of the Estate of Witheraro Kamau deceased reported in [2007] e KLR** and **Nyeri Court of Appeal No.179 of 2002 Joseph Waitiki Ndegwa & another -vs- Duncan Nderitu Ndegwa & another** but which she did not make any reference to in her submissions.

Respondent

On behalf of the respondent it was submitted that the deceased raised the respondent as a son and therefore he reported himself as such at the time of filing petitioner. It was submitted that the objector did not pursue his summons for revocation of grant dated 18th March 2002 for the years forcing the petitioner to file his application to have the summons dismissed which the court declined to allow.

The respondent filed summons for confirmation of grant which was allowed in the absence of the objector. It was submitted that the issues the applicant is bringing in this succession had been dealt with when the grant was revoked. It was further submitted that **Section 20(b)** of the **Law of Succession Act** defines Dependant as:

**“Such of the deceased parents, step parents, grand parents, grand children, ..... children, children whom the deceased had taken in his family as his own, brothers and sisters and half brothers and sisters.”**

It was submitted that the respondent was taken by the deceased as his child. It was submitted further that the honourable court became fuctus officio the moment it finalized the succession proceedings and in support thereof the case of **In the matter of Estate of Chege Kebion (deceased) High Court of Kenya at Nairobi Succession Cause No.685 of 1991** was submitted.

The following facts are not disputed in this matter:-

- a. The grant initially issued to the petitioner was revoked and both the petitioner and the father of the applicant appointed joint administrators.*
- b. On 27th January 2002 the petitioner/respondent filed an application for confirmation of grant which was served upon the offices of the applicant's advocates on 23rd February 2012.*
- c. Neither the applicant's father nor his advocates then on record attended hearing thereof and the grant was duly confirmed ex parte.*
- d. The objector died on 2nd January 2012 and therefore by the time when the grant was being confirmed he was long dead.*
- e. That the respondent did not disclose to the court at the time of confirming grant that the objector was dead.*

The conditions upon which the court can revoke whether confirmed or not are provided for under **Section 76** as follows:-

- a. That 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 fact essential in point of law to justify the grant notwithstanding that the allegations were made in ignorance or inadvertently.*

In the matter before the court at the time when summons for confirmation of grant was filed and served, the objector co-administrator was already dead and this is a matter which must have been in the

knowledge of the respondent and in applying for confirmation of grant the respondent failed to name the objector who was a brother of the deceased as part of the survivors.

It is also clear that the applicant lives on the suit land and therefore their right to the said land has never been adjudicated upon. It is therefore clear from the material presented that the grant was confirmed based upon concealment of material facts to the court being that the objector co-administrator was dead and would therefore not respond to the petitioner's proposed mode of distribution.

It is clear to my mind that had this information been placed before the court, the grant could not have been confirmed. It is also clear to my mind that the proceedings to obtain the confirmed grant were defective in nature as the co-administrator herein was dead at the time of the said confirmation and therefore any transmission of the suit property to the respondent without the signature or consent of his co-administrator was unlawful.

I have looked at the supplementary affidavit filed by JOAN NDORONGO Advocate though not commissioned wherein she deponed that her law firm was not served with hearing notice for the applicant's confirmation of grant and the same having proceeded ex parte by virtue of powers conferred upon the court under **Rule 73 of P&A Rules** in the interest of justice and taking into account as stated herein that the applicant and his family lives on the suit land, I allow the application herein and revoke the certificate of confirmed grant issued to the respondent on 15th June 2012.

In view of the age of this cause the applicant is hereby granted 14 days within which to file and serve an affidavit of protest to the proposed mode of distribution which protest shall be heard by way of oral evidence within the next 30 days from the date of service of the affidavit of protest.

This being a family dispute I make no order as to cost.

**Signed and dated this                      day of                      2014**

**J. WAKIAGA**

**JUDGE.**

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November, 2014

**J. NGAAH**

**JUDGE.**

In the presence of:

----- for Protestor

----- for Petitioner

----- for Applicant