



**REPUBLIC OF KENYA**

**High Court at Meru**

**Succession Cause 171 of 1992**

**IN THE MATTER OF THE ESTATE OF KANAMPIU MPUNGI(DECEASED)**

**M'NDIBU KANAMPIU.....PETITIONER/RESPONDENT**

**VERSUS**

**M'KARIA KANAMPIU.....INTERESTED PARTY/APPLICANT**

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

The interested party M'Karia Kanampiu filed summons for revocation or annulment of grant of letters of administration issues on 8<sup>th</sup> September, 1993 to M'Ndubi Kanampiu, the petitioner/respondent to be revoked and the same to be re-issued jointly to the applicant and the said M'Ndubi Kanampiu. On 27<sup>th</sup> November, 2009 court directed that the summons dated 29<sup>th</sup> July, 2009 be heard by way of viva voce evidence.

That when the summons was set down for hearing the petitioner and his Counsel though served and accepted service did not attend. The interested party therefore proceeded to adduce evidence in support of his claim in the summons dated 29<sup>th</sup> July, 2009. The interested party/applicant filed submissions on 19<sup>th</sup> July, 2012.

The interested party/applicant case as per his evidence is as follows:- That the deceased Kanampiu Mpungi, died on 6<sup>th</sup> April, 1981. That the deceased was married to one wife, called Thigaa, who has also passed on. That the deceased was father to the applicant and had three sons and one daughter, namely:

- 1. M'Ndubi Kanampiu, the respondent/petitioner**
- 2. M'Raini Kanampiu(deceased)**
- 3. M'Karia Kanampiu, the interested party/applicant**
- 4. Kirumi, a daughter of the deceased who is now married.**

That when the petitioner petitioned for grant of letters of administration he failed to inform the applicant or seek his consent. The applicant did not sign any papers authorizing the petitioner to seek grant of letters of administration intestate of the deceased estate. The applicant came to know of the petition when

the petitioner/respondent informed the applicant he had the title and wanted the applicant to vacate from the deceased properties. The applicant was further threatened that he won't be buried on the deceased land. The deceased had two parcels of land namely, Mwimbi/Kiraro/661 and Mwimbi/Kiraro/146. That on confirmation of grant land parcel No.146 was given to John Muthomi, a son of the petitioner, whereas Plot No.661 was given to Dickson Kiborio Kaaria son to the interested party.

That according to official search, produced by interested party as exhibit No.1 the same was registered on 13<sup>th</sup> June, 1994 in the name of John Muthomi M'Ndubi. That Mwimbi/Kiraro/661 transferred to Dickson Kiborio Kaaria was subdivided and 1 ¼ acre registered as Mwimbi/Kiraro/1711 sold to a third party. The interested party produced official search in respect of Mwimbi/Kiraro/1711 in the name of Dickson Kiborio Kaaria as exhibit No.2.

The issue for determination in this case is whether the interested party has made a case to justify the revocation of the grant of letters of administration and confirmed grant issues in favour of the petitioner .

In the instant case the petitioner/respondent did not controvert the evidence adduced by the interested party notwithstanding that the petitioner/respondent was served and was aware the application had been directed to be heard and determined by way of viva voce evidence. The petitioner/respondent filed written submissions which with all respect are not supported by any evidence.

He did not offer any evidence nor did he come forward to challenge the interested party's evidence. The court was left out with unchallenged evidence of the interested party.

The interested party averred that he is brother to the petitioner and the petitioner applied for letters of administration without involving the interested party. That the petitioner further failed to disclose that the deceased had other dependants who included the interested party and the wife of the deceased brother of the petitioner/and interested party. That John Muthomi Ndubi is not son of the deceased and was not dependant of the deceased.

The petitioner in form P&A 80 under paragraph 3 stated that every person having equal or prior right to grant of representation had consented or renounced such right or had been issued with citation to renounce such right and apply for a grant of representation and has not done so. That consent to the making of a grant of administration intestate was given by Dickson Kaborio Kaaria, who was not entitled to apply for letters of administration to the estate of the said Kanampiu Mpungi in equality with the petitioner.

Further to the above in the petitioner's affidavit dated 17<sup>th</sup> February, 1992 under paragraph 4 the petitioner referred to the said Dickson Kiborio Kaaria as son of the deceased when that was not the case and concealed to mention the applicant who is son to deceased.

Similarly in an application for confirmation of grant dated 14<sup>th</sup> February, 1994 the petitioner failed to disclose that the applicant was dependant and entitled to deceased estate. He failed to seek and obtain applicant's consent to distribute of the deceased estate. He failed to obtain applicant's consent to confirmation of grant.

The petitioner failed to controvert matters raised by the applicant in his application and in his evidence. The petitioner obtained grant of letters of administration and had the same confirmed fraudulently by making of false and untrue statements and/or allegation of fact essential in law. The petitioner fraudulently with intention to deprive the applicant of his lawful share failed to disclose to this court that the applicant was his brother and dependant of the deceased estate. The petitioner had schemed with others to take the applicant's share but I must say they miserably failed in their evil scheme.

The law of Succession Act(Cap.160) Laws of Kenya provides under Section 63 the preference to be given to certain persons to administer the deceased estate where he died intestate. Section 66(a) and (b) provides:-

**“66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference -**

**(a) surviving spouse or spouses, with or without association of other beneficiaries;**

**(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;.....”**

Section 38 of the Law of Succession Act(Cap.160) which deals with a situation where intestate has left a surviving child or children but being there no spouse provides:-

**“38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”**

Further to the above grant of letters of administration are required to be granted to the applicant after notice to every other person entitled in the same degree as or in priority to the applicant.

Rule 26(1) (2) of probate and Administration Rules provides:-

**“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.**

**(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”**

In addition to the above in an application for confirmation of grant consent in writing of all dependants or other person who may be beneficiaries is necessary.

Rule 40 (8) of the Probate and Administration Rules provides:-

**“(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.”**

In view of the above, I am satisfied that the grant of letters of administration issued to the petitioner on 8<sup>th</sup> September, 1993 and confirmed on 8<sup>th</sup> April, 1994 should be revoked and all consequential transaction that were effected with the said grant.

As the matter had been pending for several years and in the interest of clearing the overwhelming backlog in the court's I order that a fresh grant be issued forthwith jointly to M'Ndubi Kanampiu and M'Karia Kanampiu as joint administrators who should forthwith file an application for confirmation of grant within the next 30 days from today suggesting the agreed mode of distribution of the deceased estate over the parcel of lands. In default of agreement any of the administration can file an application for confirmation serve the other who should file (if need) be his scheme of distribution for consideration of both.

Having revoked the grant issued to the petitioner/respondent I order cancellation of the title deeds for land

parcel Mwimbi/Kiraro/146 and Mwimbi/Kiraro/1771 issued to John Muthomi M’Ndubi and Dickson Kiborio Kaaria respectively and order that the same do revert to the names of the deceased estate for distribution to the lawful/rightful beneficiaries of the estate of the deceased Kanampiu Mpungi. The inhibition order issued on 27<sup>th</sup> November, 2009 against land Parcel No.Mwimbi/Kiraro/146 be and is hereby lifted and the Land Registrar do dispense with production of the original title deeds for the land parcels No.Mwimbi/Kiraro/146 and Mwimbi/Kiraro/1771 in effecting the said orders of this court.

The interested party/applicant is awarded costs of the application against the petitioner/respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2012.

**J. A. MAKAU**  
**JUDGE**

***Delivered in open court in presence of:***

1. Mr. J. G.Gitonga for applicant/interested party
2. Mr. I. C. Murango for the petitioner/respondent(absent)

**J. A. MAKAU**  
**JUDGE**