



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

**AT NYERI**

**Succession Cause 10 of 1986**

**In the Matter of the Estate of Douglas Kamau Wagama**

**JOEL MBOGO KAMAU.....PETITIONER/RESPONDENT**

**VERSUS**

**NAFTALI WARUTA KAMAU.....OBJECTOR/APPLICANT**

**AND**

**GIBSON MWANGI KAMAU....INTERESTED PARTY/APPLICANT**

**RULING**

Before me is an application dated 27<sup>th</sup> May, 2008 and filed in Court on 28<sup>th</sup> May, 2008. It is brought jointly by one NAFTALY WARUTA KAMAU and GIBSON MWANGI KAMAU hereinafter referred to as “the Applicants.” It is expressed to be brought under *Rule 73* of the Probate and Administration Rules. In the main the application seeks that this Court do issue a prohibitory order against land parcel Numbers LAIKIPIA/01-ARABEL/811, 812, 813 and 814 all registered in the name of JOEL MBOGO KAMAU, hereinafter referred to as “the Respondent” being the resultant of subdivision of Title Number LAIKIPIA/01-ARABEL/213 that formed the estate of DOUGLAS KAMAU WAGEMA deceased pending the hearing and determination of the application for revocation of grant filed in this cause.

The application was brought on the grounds that the Applicants were interested parties to the estate of the deceased by virtue of being his sons and therefore by right entitled to a share of the estate. That the Respondent had irregularly acquired the grant and transferred the whole estate comprised in title No. LAIKIPIA/01-ARABEL/213 to himself and thereafter caused its subdivision in total disregard of the Applicants’ interests. That the Respondent had failed to proceed diligently with the administration of the estate by failing to provide for all the Respondents especially the Applicants. That the confirmed grant was obtained irregularly and was defective as it was obtained by willful concealment of material particulars. That if the prohibitory orders are not issued, the Respondent will dispose off the said parcels of land, and as a consequence will destroy the substratum of the application for revocation of grant filed in this cause and occasion the Applicants substantial loss and damage. That if the aforesaid parcels of land are sold and registered in the name of third Parties, it will defeat the cause of justice and finally that no prejudice will be occasioned to the Respondent if the orders sought are granted.

The application was further supported by the affidavit of the 1<sup>st</sup> Applicant. In summary he deponed that the deceased was his father as well as co-applicant and the Respondent. He passed on, on 19<sup>th</sup> December,

1985. His estate consisted of LAIKIPIA/01-ARABEL/213. The Respondent then petitioned for Letters of Administration of the estate of the deceased and misrepresented to court that he was the sole survivor of the deceased. The 1<sup>st</sup> Applicant objected to the grant and cross-petitioned for the grant of Letters of Administration intestate. Thereafter the matter was referred to arbitration whose award has to date not been filed. On 5<sup>th</sup> May, 2008, the 1<sup>st</sup> Applicant got to know that the Applicant was bent on selling the suit premises. On conducting a search on 6<sup>th</sup> May, 2008 at Nanyuki Land Registry he noted that the suit premises had been transferred and registered in the name of the Respondent way back in 1997 who then proceeded to subdivide the same into four (4) portions which had since become LAIKIPIA/01-AABEL/811, 812, 813 and 814 yet there had been no application for confirmation of grant, nor had his objection and cross-petition heard and determined. That the consent letter in this file dated 15<sup>th</sup> April, 1993 purportedly between the 1<sup>st</sup> Applicant and Respondent was a forgery. That upon inquiring at Nyahururu Land Control Board, he established that the issue of the suit premises was not an agenda then on 28<sup>th</sup> June, 2007 when it is purported to have issued a consent to the subdivision. That in any event the suit premises were situated at Ngama and the Respondent ordinarily ought to have made the application to Nyahururu Land Control Board, which was not the case here. Thus, the said consent was irregularly acquired. Finally he deponed that in the interest of justice, it is only fair that a prohibitory order do issue.

The application met with stiff resistance from the Respondent. In a Replying Affidavit dated 24<sup>th</sup> June, 2008, he deponed in pertinent paragraphs that he was the youngest son of the deceased. That this matter was finalized on 20<sup>th</sup> January, 1998 when the grant was confirmed. That prior to the confirmation of the grant the 1<sup>st</sup> Applicant and the Respondent had signed a consent dated 15<sup>th</sup> April, 1993 and his advocate confirmed the same by his letter dated 9<sup>th</sup> November, 1999. That he had subdivided the suit premises and developed the same since 1970. That the suit premises were owned by Ol Arabel Scheme whereof his family members had agreed that it be registered in his name as he purchased it from the management of the Scheme. In 1971 the deceased executed power of Attorney in his favour and at no time did the Applicants' claim, use or occupy the suit premises save when the 1<sup>st</sup> Applicant filed an objection which he later withdrew.

On 21<sup>st</sup> June, 2008 the 2<sup>nd</sup> Applicant swore an affidavit in which he distanced himself from what the 1<sup>st</sup> Applicant had deponed and in the same breath confirmed as true what essentially the Respondent had deponed to. Indeed he wished that his name which had been dragged into this matter by the 1<sup>st</sup> Applicant be expunged from the record as he had no interest in pursuing the suit premises which the deceased had surrendered to the respondent on condition that he pays for the same to the management of the Scheme and have it thereafter registered in his name. In response to the respondent's Replying Affidavit, the Applicant swore a Supplementary Affidavit which in the main he disputed what the Respondent had deponed.

In her oral address to me in support of the application, MS KABETHI, learned Counsel for the Applicant submitted that prohibitory order ought to issue as the respondent was bent on selling the resultant parcels of land that were obtained fraudulently. That the Respondent will not be prejudiced by the order of prohibition.

In response, Mr. Mugo, learned Counsel for the Respondent submitted that a consent was signed by the parties and was not therefore a forgery.

I have now carefully considered and pondered over the application, the affidavits and the rival submissions. On the material placed before me, I am not satisfied that the Applicant has made out case to warrant the prayers sought in the application. The Applicant appears to me to be economical with the truth. He is not candid at all in what he states in the application. First he claims to have filed the application jointly with the 2<sup>nd</sup> Applicant and that he had his authority to swear the affidavit in support of the application, on his own behalf and on behalf of the 2<sup>nd</sup> Applicant. It turns out that, however, that that was not the case. If the Applicant can lie so blatantly and unreservedly on the issue of the application being brought jointly with the 2<sup>nd</sup> Applicant, what else in the application has he not lied to! The affidavit

of the 2<sup>nd</sup> Applicant in which he disowns all that the 1<sup>st</sup> Applicant had deposed to in the supporting affidavit has not been challenged nor controverted by the 1<sup>st</sup> Applicant. It is important to note that the said affidavit was filed in Court on 25<sup>th</sup> June, 2008 long before the 1<sup>st</sup> Applicant filed his supplementary affidavit on 2<sup>nd</sup> September, 2008. Had the 1<sup>st</sup> Applicant felt the urge to challenge the affidavit by the 2<sup>nd</sup> Applicant, he could have done so in the supplementary affidavit. Having not done so, it must be taken that what the 2<sup>nd</sup> Applicant deposed to must be true. I do not think that the 2<sup>nd</sup> Applicant had any reason to depone falsely against his own two brothers – the 1<sup>st</sup> Applicant and the Respondent. He had nothing to gain from such an undertaking.

The record shows that the grant issued herein was confirmed on 20<sup>th</sup> January, 1998. Although on perusal of the file, I did not come across a formal application for confirmation of grant, it does appear to me that the grant was confirmed pursuant to the consent dated 15<sup>th</sup> April, 1993 entered into between the 1<sup>st</sup> Applicant and the Respondent. Of course the authenticity of the said consent letter is being challenged by the 1<sup>st</sup> Applicant. However, I have nothing on record to show that the said letter was anything else but genuine. It is imperative to note that the said letter was copied to the Applicant's then lawyers on record – GHADIALY & CO. Much as the consent letter appears to have been crafted by the Applicant and Respondent in person though they had lawyers on record, that in itself does not make the consent letter a forgery. In any event how come the 1<sup>st</sup> Applicant has not taken penal steps against the Respondent on the said letter if he indeed felt seriously that it was a forgery. It is also not lost on me that by a letter dated 9<sup>th</sup> November, 1994 addressed to this Court by the Applicant's then lawyers, they confirmed that the parties had settled the matter outside Court. In terms of the consent letter aforesaid there was no need for the application for confirmation of grant. There was also no need for the Applicant to prosecute further his objection and cross-petition as they were withdrawn in terms of the consent letter. Having perused the consent letter, I am satisfied much as it appears to have been drawn in person, there is no doubt that a legal mind was lingering in the background for in the way it is crafted, it covered every aspect of the suit.

The 1<sup>st</sup> Applicant claims that as far as he is concerned the case is still alive in Court pending the filing of the arbitration award. Again the Applicant is not being candid with this assertion. There are several correspondences on the file indicating that he had been summoned severally by the District Officer, Nanyuki for purposes of hearing the dispute. However, he was un-cooperative. Indeed in one such letter dated 23<sup>rd</sup> April, 1992, the District Officer expressed his exasperation with the Applicant in these terms.

*“..... It is now clear that he has no interest in this case and there is no way I can force him and yet he is the Complainant. In view of the above and to avoid further delayment, it is the strong feeling of this office that the land in dispute “be awarded” (registered) to Joel Mbogo Kamau as agreed by the rest of the family members.....”*

For the Applicant to turn around and claim that arbitral proceedings have not been finalized and when he is the sole cause of the alleged delay is a calculated ploy to allow him to benefit from his own mischief. In any event, even assuming that the consent letter was a forgery, what steps has the

Applicant taken to have it expunged from the record. As long as the same remains on record, it is binding to the parties.

For all the foregoing reasons I am satisfied that the Applicant has not made out a case to warrant the orders prayed in the application. The application is accordingly dismissed with costs to the Respondent.

*Dated and delivered at Nyeri this 29<sup>th</sup> day of January 2009.*

**M. S. A. MAKHANDIA**

**JUDGE**