



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

**Misc. Appli. 138B of 1996**

**KINYUA KABABI WAMAI ..... APPLICANT**

**versus**

**NELSON NGIRIGACHA KIMANGA ..... RESPONDENT**

**JUDGMENT**

What is before court for consideration in this judgment is summons for revocation of grant dated 7<sup>th</sup> December 1996. It is filed by KINYUA KABABI WAMAI. Kinyua Kababi petitioned in the lower court for Grant of Letters of Administration intestate in respect of estate of Nduiga Wamai deceased. An objection was raised to the issue of that grant by Nelson Ngirigacha Kimanga. The lower court on 20<sup>th</sup> September 1994 ordered for the grant to be issued to the said objector. It is that grant which Kinyua now seeks to have revoked. By his affidavit in support Kinyua described himself as the son of the deceased. I have however noted that in the petition for Letters of Administration in the lower court he described himself as the nephew of the deceased. He further deponed that in April 1992 the objector approached him in his home in the presence of Joseph Njiraini Muruaga. The objector informed him that he intended to withdraw his objection since he now did not lay claim on the deceased land. Kinyua and the objector went to the objector's advocate's office where Kinyua signed an affidavit which he was advised would terminate the objection raised by the objector. The objector also assisted Kinyua to draft a letter terminating the services of his then advocate M/S H.P.G Waweru. It was not until 1995 that Kinyua realized the alleged fraud committed by the objector. He realized that a grant had been issued to the objector who had proceeded to have himself registered as the owner of the suit property. Kinyua in his affidavit stated that the grant issued to the objector was defective in substance in that the provisions of the Law of Succession Act were not followed. In support of the application Joseph Njiraini Muruaga swore an affidavit whereby he confirmed that the objector in April 1992 approached Kinyua and informed him that he did not intend to pursue his claim over the deceased land. That the objector said he was taking that step because he was merciful to the family of the deceased. Njiraini confirmed that Kinyua was agreeable to that proposal. The objector by his affidavit dated 11<sup>th</sup> March 1997 denied the allegations in those affidavits. He denied that at any time he approached Kinyua for the purpose of terminating the matter. That Kinyua was well aware of the temporary grant that was issued to him by the lower court. He accepted that he took Kinyua to his advocate but stated that the affidavit was read out to Kinyua before he signed it. The objector swore a further affidavit on 21<sup>st</sup> October 2008. He stated in that affidavit that he had purchased 3½ acres of the original parcel MUTIRA/KAGUYU/507 which comprised of 6½ acres from the deceased. He paid the deceased Kshs. 76,000 for that land. That land was subdivided by Jenasio Njogu who successful sued the estate of the deceased for three acres of the deceased land. As a consequence the only portion which was left in the name of the deceased was MUTIRA/KAGUYU/2000. This land is 3½ acres. The objector therefore stated that he is entitled to that land and hence why the applicant swore an affidavit withdrawing his petition before an advocate. The

summons for revocation was ordered to be heard by affidavit evidence. I have considered the evidence tendered before me. I have also considered the issue raised by the objector that he purchased 3 ½ acres of land from the deceased. I am however of the view that that issue can only be entertained when the court has received viva voce evidence. Kinyua did however depone that the objector in obtaining grant failed to follow the correct procedure. When the objection by Nelson Ngirigacha Kimanga to making grant was still subsisting an affidavit was filed by Kinyua indicating that the objector should get a portion of the deceased land. For more clarity it is important to reproduce that affidavit in this judgment:-

1. *That I am the deponent/petitioner herein.*
2. *That the objector herein is Nelson Ngirigacha Kimanga who is claiming three and half 3 ½ acres he had bought from my father.*
3. *THAT the original parcel Mutira/Kaguyu/507 had already been subdivided and formed Mutira/Kaguyu/2000 and Mutira/Kaguyu/2001.*
4. *THAT the Land Registrar Kirinyaga had transferred a caution to parcel Number Mutira/Kaguyu/2000, attached hereto is a Photostat copy of the Green Card marked 'K.K.W'.*
5. *THAT I have agreed to remove my caution on the said parcel to enable the objector get his portion.*
6. *THAT the objector has agreed to remove his caution.*
7. *THAT it is necessary and just that the objector NELSON KIMANGA NGIRIGACHA be issued with the temporally grant in respect of Land Parcel Mutira/Kaguyu/2000.*
8. *THAT what is deponed hereinabove is true to the best of my knowledge, information and belief.*

It does seem following the filing of that affidavit that the matter was listed in the lower court on 20<sup>th</sup> September 1994. The proceedings show as follows:-

“20/9/94

*Before J. S. Mushelle D.R.*

*Mr. Mukuya for the applicant/objector*

*Respondent/petitioner in person absent*

**ORDER**

***‘By consent land parcel No. MUTIRA/KAGUYO/2000 be registered in name of NELSON NGIRIGACHA KIMANGA. Letters of Administration to be issued to him accordingly. This is pursuant to affidavit sworn by Kinyua Kababi. No order as to cost.’***

***J. S. MUSHELLE***

**D.R. 20/9/94”**

There is no evidence that I can find in the lower court file which indicates that service was affected upon Kinyua for that date. As can be seen from the proceedings the court indicated that the order was by consent. Such a consent could not have been recorded in the absence of Kinyua. Further considering the affidavit reproduced herein before of Kinyua taken to its natural meaning it would seem that Kinyua was agreeable to objector getting a portion of the deceased property. He did not agree to the objector getting the entire land. Section 71 of the Law of Succession Act provides that a confirmed grant can be issued

after six months of the initial grant. The court may under subsection 3 confirm a grant before the expiry of 6 months when the court is satisfied that there are no dependants as defined under Section 29 and when the court is of the view that it is expedient in all the circumstances to issue confirmation within that period. In this case a grant was issued on 20<sup>th</sup> September 1994 on an application made by the objector dated 25<sup>th</sup> May 1992 for an order that the temporarily letters of administration. That is the application that seem not to have been served upon Kinyua. Lower courts record shows that on the 20<sup>th</sup> September 1994 both the grant and the confirmed grant were issued to the objector. The confirmed grant provided that Ngirigacha Kimanga was to have MUTIRA/KAGUYO/ 2000 absolutely. There is no record of an application for confirmation of grant. The procedure adopted by the objector was very irregular and not conformity with the law. On that basis alone the grant issued to the objector will be revoked. The courts judgment is in the following terms:-

- 1. The grant issued in Principal Magistrate's Court Nyeri Succession cause No. 10 of 1986 and the confirmed grant in the same cause both dated 20<sup>th</sup> September 1994 are hereby revoked and set aside.***
- 2. The court orders the land registrar to cancel the title issued to Nelson Ngirigacha Kimanga in title Mutira/Kaguyu/200 and the title do revert to the deceased name namely Nduigu Wamai. In carrying out that cancellation of title the land registrar will not require the production of title in the name of Nelson Ngirigacha Kimanga.***
- 3. The court issues a grant in the name of Kinyua Kababi which grant shall be confirmed immediately notwithstanding that the six months have not expired in view of the delay in this matter. An application for confirmation of grant shall be served upon Nelson Ngirigacha Kimanga. The said nelson Ngirigacha Kimanga will be at liberty to protest against that confirmation and in so doing will be at liberty to raise the issue of the alleged purchase of land.***
- 4. The costs of the application dated 17<sup>th</sup> December 1996 shall be in the caused.***

***Dated and delivered this 3<sup>rd</sup> Day of February 2009***

**MARY KASANGO**

**JUDGE**