

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 494 of 2003

IN THE MATTER OF THE ESTATE OF MICHAEL MWANGI GITHINJI –
DECEASED

RUTH NYAWIRA MWANGI PETITIONER

Versus

STEPHEN NGUMI MWANGI 1ST PETITIONER

RICHARD MAINA MWANGI 1ST APPLICANT

DAVID WAIGANJO MWANGI 2ND APPLICANT

JUDGMENT

A grant in this matter was issued on 2nd August 2005 to Ruth Nyawira Mwangi. She filed for confirmation of that grant by summons dated 13th March 2006. Annexed to the application was a consent signed by Stephen Ngunyi Mwangi, Richard Maina Mwangi and David Waiganjo Mwangi amongst others. The summons for confirmation was in court on 28th February 2007. Present before court was the petitioner Richard Maina and others. On that date the court directed that the daughters of this estate be served for the next hearing of that summons. On 9th May 2007 before court were Ruth Nyawira Mwangi, Stephen Mwangi and Richard Maina amongst others. As the court considered that summons no objection was made and the ruling of the court was to the effect that the grant be confirmed as prayed. After the ruling was read, Stephen Ngumi Mwangi stated to the court:-

“I come from the eldest family. I tell the court we have never agreed.”

The court directed that he should move the court as appropriate. There after a summons for revocation was filed by Stephen Ngumi Mwangi, Richard Maina Mwangi and David Waiganjo Mwangi. All the three swore affidavits in support of that application. In their affidavits they all denied signing the consent in support of the summons for confirmation of grant. In the case of Richard in his affidavit he intimated that he was attaching his national identity card to show that his signature on that card was different to the signature of the consent. I have perused the affidavit and I am unable to find that national identity card attached to the affidavit. The case was heard by way of viva voce evidence and all the applicants repeated their denial of signing the consent. Although Stephen Ngumi had said that the consent was brought to him by Nyawira at a bus stage he denied that he appeared before an advocate and signed the same. Contrary to what he had stated in his affidavit he accepted in evidence that Nyawira gave him an affidavit together with the consent. That can perhaps only be the affidavit that was in support of the summons for confirmation. That affidavit setout the distribution of the estate. Stephen can therefore not be heard to say that he had no knowledge of how the petitioner proposed to distribute the estate. Richard Maina stated that he got to know about the petition in this matter when Stephen was given the document by the petitioner. He however denied being given such documents himself. The petitioner’s case was supported firstly by the evidence of Peter Kariuki Machau. He is the son of the petitioner. It ought to be clarified at this stage that the deceased had two wives and the first wife was also deceased. The first wife was the mother of Stephen Ngumi, Richard Maina and David Waiganjo. Peter Kariuki Machau stated that the consent was signed by all the persons appearing thereon in the presence of an advocate. He stated

that before signing they were involved in a two hours discussion. It pained him that an allegation was being made of fraud. He termed those allegations as malicious. That evidence was supported by the petitioner his mother.

The applicant alleged that the signatures appearing in the consent were forgery. Having made that allegation they then bore the burden to prove that the signature was forgery. **Section 107** of the Evidence Act provides that the burden to prove lies on the party whose case would fail if such evidence was not proved. The applicants did not satisfy that burden. Having failed to so do on a balance of probability their allegation of fraud fails. An allegation of fraud is a serious allegation. It needs very clear evidence for the court to find that there was fraud. The applicant failed to present such evidence. For that reason the application for revocation is dismissed with costs being awarded to the petitioner.

MARY KASANGO

JUDGE

Dated and delivered this 14th day of May 2009

M. S. A. MAKHANDIA

JUDGE