



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**Succession Cause 803 of 2002**

**IN THE MATTER OF THE ESTATE OF ISAIAH MWARANJIRU**

**NYAGA KANGARI.....DECEASED**

**AND**

**ALICE KAVIA NYAGA.....1<sup>ST</sup> PETITIONER**

**VERSUS**

**ABIUD NJUE.....2<sup>ND</sup> RESPONDENT**

**RULING**

This case emanated from ***Senior Principal Magistrate Embu Court as Succession Cause No. 126 of 1998***. It was later transferred to this court as given a new number ***HC SUCC.Case No. 803 of 2002***. One Abiud Njue Moses Objected to the Grant of letters of administration being issue to the petitioner who is the widow of the deceased herein. After hearing the objection, Hon. Justice Khamoni dismissed the same saying;

*“ The claim of the objector Abiud Njue Moses should not prevent her from obtaining a grant of letters of Administration to the Estate of her husband. She should Get it and distribute the estate to the beneficiaries listed in form P& A5. If after that distribution the objector will feel that he has a valid claim against any of the beneficiaries, it is then that he may follow that beneficiary.”*

I have painstakingly gone through this file. I have not seen any grant of the letters of administration issued to the petitioner following the dismissal of the objector’s objection. What appears to have happened subsequently is that the objector came to court and filed a citation. This as stated by **Justice Khaminwa** is her disputed ruling was the wrong procedure. Apparently, however **Judge Khaminwa** proceeded to take evidence of the parties and ordered that

*“The surviving administrator to proceed to sub-divide the*

*land for purpose of distribution and allocate the protestor*

*one acre out of Mathew's share."*

The Honourable Judge appears to have proceeded on the assumption that there was already an administration to the estate of the deceased. This unfortunately is not the position as the grant of letters of administration has never been issue.

The honourable Judge therefore gave orders for confirmation of a grant that was non-existent. There was also no application for confirmation of the same. Being aggrieved by the said ruling, the petitioner filed the application dated 9<sup>th</sup> September 2008 seeking orders of review of Judge Khaminwa's ruling dated 14/1/2008. Apparently even counsel now on record for the petitioner did not realize the above explained discrepancy. The main ground for the application is that there was already in existence of Judgment of Judge Khamoni dated 7/10/2003 and that the same would not be overruled by Judge Khaminwa's Ruling. Mr. Githinji for the objector filed grounds of opposition saying inter alia that there is no error or any new and important matter or evidence that has been indicated. According to the applicant "*Judge Khaminwa's ruling was made without her knowledge that the issue between the petitioner and objector had already been determined.*"

I have very carefully considered the contents of the Judge Khamoni's Judgment and the ruling by Judge Khaminwa. I actually do not see any material contradictions in them. What Judge Khamoni's "*Judgment*" did was to dismiss the objector's objection. He did not say that the objector could not pursue his claim against the administrator/ beneficiaries later after the estate had been distributed. The problem however is that Judge Khaminwa confirmed a grant which was non-existence. This in my well considered view is an error the face of the record. It is an error that stares at you in the face. This was not the wrong exposition of the law as counsel for the respondent seemed to suggest. As clearly in the case of **Nyamogo and Nyamogo Advocate – V- Kogo – EALR (2001) EA 170**,

*"There is a real distinction between a mere erroneous decision and an error apparent on the face of the record where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out....."*

There are no two explanations here as to whether there existed a grant capable of being confirmed nor not. It is simply not there and the applicant would therefore have no capacity to sub-divide and distribute the land in question within 45 days as ordered or within any other period of time. For those reasons, the application by the petitioner must succeed. I allow the same and hereby set aside the ruling by Judge Khaminwa dated 14/1/2008 and all consequential orders/decrees arising therefrom. The petitioner to move the court to be issued with the said grant of letters of administration after which she will proceed to file the application for confirmation. The objector herein be at liberty to file his affidavit of protest and the issue of distribution be heard afresh.

Each party will bear its own costs of this application.

**W. KARANJA**

**JUDGE**

Delivered, dated & signed at Embu this 18<sup>TH</sup> day of June 2009.

**In presence of Mr. Mutahi for the applicant and Mr. Githinji for 2<sup>nd</sup> Respondent. 2<sup>nd</sup> Respondent also present**

**W. KARANJA**

**JUDGE**

