



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**SUCCESSION CAUSE 2970 OF 2001**

**IN THE MATTER OF THE ESTATE OF MWAURA KIMANI – DECEASED**

**JUDGMENT**

**INTRODUCTION**

The objector George Thuku in the present cause had filed a succession cause No.369/1993 in the Kiambu Law Courts. I asked for production of the said file and after perusal it is apparent that Tabitha Wairimu Mwaura, the Petitioner in this cause has named as a widow of the deceased, but her consent was not been acquired and she never appeared before that court. The Objector herein was a co-petitioner with one Kimani Mwaura. Other three beneficiaries are also named.

It is pertinent to note that the Objector had sought special prayer for grant of letters of representation despite the fact that he had specifically mentioned in his petition that the present Petitioner was unwilling to give her consent. Even at the time of confirmation no consent from all the named beneficiaries, was obtained though their names differ with those mentioned before me (by the Objector). It is very sad to see that an affidavit alleging service on Tabitha is a piece of document which is worth nothing. The consents by other beneficiaries are not dated and no certificate of interpretation has been attached against thumb marks in respect of Joyce Kabura Mwaura and Karanja Mwaura. More interesting is the fact that the affidavit of guarantee to be sworn by the proposed Administrators viz; the Objector and Kimani Mwaura have been signed by one Joseph Kiratu and Solomon Thugo.

Affidavit of justification of proposed Administrators is signed by only one person.

The petition was filed without Death Certificate, Burial permit or the letter of introduction by Chief or any other Administrative authority.

These glaring defects in the procedure have also been shown to and agreed by the Objector in his deposition, before this court.

The certificate of confirmation of the grant thereafter was issued on 5<sup>th</sup> January, 1996. The land parcel Limuru/Bibirioni/315 was directed to be shared as under:

**(i) Tabitha Kanuthu Mwaura - 1.40 Ha**

**(ii) George Thuku Mwaura - 1.10 Ha**

It is evident from the facts before the court that the said property is not sub-divided and title deeds are not issued, till to-date.

The Succession Cause on hand was filed by Tabitha Kanuthu Mwaura, the widow on 30<sup>th</sup> November, 2001. No mention of the earlier Succession Cause is made by her. It is also evident that the name of George Thuku the Objector was mentioned as grandson but was then crossed out. The remaining two beneficiaries are Tabitha the widow and Jane Wachuka Njeri mentioned as a granddaughter. The grant of representation was issued on 9<sup>th</sup> April, 2002. The summons for confirmation dated 18<sup>th</sup> December, 2002 was filed, proposing equal distribution between the aforesaid two beneficiaries of the sole property of the estate namely, Limuru/Bibirioni/315. Accordingly the certificate of confirmation was issued on 30<sup>th</sup> June, 2003. This certificate of confirmation was executed and the property was sub-divided in three portions – namely, Limuru/Bibirioni/3123, 3124, and 3337. The two beneficiaries are registered as absolute owners of 0.50 Ha and one Hosea Njuguna Kimani is registered as owner of Parcel No.3337 admeasuring 0.10 Ha. Tabitha has also annexed a certified copy of green card of original plot which was transferred in her names from those of the deceased, on 13<sup>th</sup> September, 2004. (Annexure GTM 2). That title was closed on sub-division in two portions. I am not told except from the evidence of Jane Wachuka (DW.1), when she testified that one portion was sold by Tabitha on 25<sup>th</sup> September, 2006.

These facts are deponed by the Objector George Thuku Mwaura in his affidavit of support of the application dated 20<sup>th</sup> November, 2006 for revocation of grant. In his application and evidence the Objector has claimed that the deceased had two wives and had seven children with the first wife as against the five mentioned in his petition filed before Kiambu court. Josephine who is mentioned in his petition is not named in his affidavit in support of revocation. However, it is not disputed that Tabitha the surviving widow had no children. His deposition before the court that Tabitha participated and agreed on distribution flies on the face of his petition where he has asked for issuance of the grant to himself and his brother despite the fact that Tabitha has refused to give her consent.

The discrepancies and irregularities in presenting the petition and prosecuting the same have been already specified in earlier part of this judgment.

Moreover, he has also agreed that he and his siblings till 1996 were living with their maternal grandfather. He claimed that he cultivates a portion of the land in question and said that he has leased his portion to a lady but did not give her names or details. He also agreed tacitly that no other siblings of his is on the land. Moreover, he has failed to show the ages of his siblings. Moreover, it is clearly accepted by him that his mother was buried at Ngangaria – her parents' land. It is also agreed by him that he was not a biological son of the deceased and other siblings also were born after him. The decision of elders, on which he claims his right was made in the year 1979. He also agreed that goat directed by the elders was only given in the year 1996.

I may pause here that although he is claiming the elders award, the same is not produced before the court. He also contradicted himself by saying that himself and Tabitha applied for grant in Kiambu Court when it is evident that Tabitha did not even give her consent.

I may further point out that Objector was born in 1970 and he could not have known how the elders met and decided in 1979 when he was only 9 years of age.

As against this evidence Jane disclosed that she was the maternal grandchild of Tabitha who looked after her since she was a child. While she was in school, she has heard from Tabitha that elders had been visiting her but she decided not to accept the Objector as a son of the deceased because he was born after the death of the deceased which fact in any event the Objector has accepted. She also denied having ever seen the Objector on the property of the deceased.

From the evidence before the court, it is clearly emerging that the Objector has failed to prove that as per the directions of elders, when he was only nine years of age, Tabitha was asked to accept him as a son of the deceased. I am also not sure what the elders decided in 1979 and how. The Objector has not shown any link with the deceased through his mother.

Thus it shall not be prudent and safe to rely on the evidence as to the decision of the elders.

I may only consider the fact that the Objector had obtained a grant in the sub-ordinate court which was prior in time to the one obtained by Tabitha. Only because of that factor, will the court find in favour of the Objector?

Under Section 76 of the Law of Succession Act, the court has a jurisdiction to revoke a grant suo moto which is obtained under the circumstances stipulated therein.

Section 76 stipulates:

“76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion –

- a) that the proceedings to obtain the grant were defective in substance;
- b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
  - (i) *to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or*
  - (ii) *to proceed diligently with the administration of the estate; or*
  - (iii) *to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions or paragraphs (e) and (g) of section 83 or has produced any such inventory o*
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

Was the grant by the Objector in Succession Cause No.369/93 before the Kiambu Law Courts, obtained after following proper procedure?

I have detailed the procedure followed by the Objector in presenting the petition before Kiambu court. The process was full of irregularities. The most glaring is the absence of consent from Tabitha. Only because, she was given a share in the estate does not make the grant proper and lawful.

The Objector not being a biological son of the deceased and also having been born after the death of the deceased had no link or connection with the deceased. The circumstances alleged by him to don him with any right of heritance are absolutely not shown and/or proved.

In view of the aforesaid observation, I shall have no option to find, which I hereby do, that the grant of representation dated 21<sup>st</sup> March, 1994 and certificate of confirmation issued on 5<sup>th</sup> January, 1996 are liable to be revoked and I hereby revoke them suo moto.

Having found as such, the Objector has no substratum to stand on and thus I also dismiss his summons for revocation dated 20<sup>th</sup> November, 2006.

As Tabitha has accepted about the visitation of elders, I shall not make an order on costs.

**Dated, Signed and Delivered** at Nairobi this 28<sup>th</sup> of July, 2009

**K.H. RAWAL**

**JUDGE**

**28.7.09**