



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT EMBU**

**Succession Case 58 of 2005**

**In the matter of the estate of Geoffrey Nyotu Chibiri....Deceased**

**JOHN MURAGE P. MBOGO.....APPLICANT**

**VERSUS**

**GICHOBI NYOTU.....RESPONDENT**

**RULING**

Summons for annulment of grant under Section 76 Succession Act. Both parties agreed to proceed on affidavits only. The grounds upon which orders are sought are that the grant of letters of administration granted to the Respondent were obtained in proceedings that were defective in substance, fraudulently by making of a false statement or by concealment from the court of something material to the case. In support the affidavit sworn by first applicant shows that the applicants are sons of deceased whereas the Respondent is not in any way related to deceased. And that Respondent made application for grant secretly and got it confirmed without informing the applicant. The respondent awarded himself one acre of estates land.

In reply the Respondent says that it was agreed by the family for him to take a grant since the applicants and their mother failed to do so. And that he had purchased a portion belonging to Mwai Nyotu and that proceedings were taken openly in court and not secretly. He denies being guilty of fraud. The respondent is also supported by affidavit of Mwai Nyotu one of the brothers of applicants.

I have perused the record in the Succession Case No. 61 of 1997. On 8/7/1998 applicants were in court when the Respondent was granted Letters of Administration there being no objection from any of the parties who were present including the applicants herein described himself as “son” of deceased. No objection was taken by the parties present. The procedure followed by the parties is not irregular a creditor can be issued with a grant under Section 66 (d) Succession Act. However this was not disclosed before court. It was a material fact. I therefore find that the grant was obtained by means of an untrue allegation of a fact essential in the point of law to justify the grant notwithstanding that the allegation was made out of ignorance or inadvertently. It is clear all parties participated in the deceit. However the powers of court are discretionary not mandatory. I have noted that the distribution is not objected to being equal among the sons and the son who sold his share is not to take anything extra.

It is my view that the matter should not be disturbed as it is clear the Applicants will not be prejudiced. I therefore dismiss the application with no order as to costs.

Dated this 11<sup>th</sup> February, 2008.

**J. N. KHAMINWA**

**JUDGE**

**11/2/2008**

**Khaminwa – Judge**

**Njue – Clerk**

**Mr. Utuku HB for Mr Kagio**

**Njeru Nyaga**

**Read in open court.**

**J. N. KHAMINWA**

**JUDGE**