



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

**AT NYERI**

**Succession Cause 395 of 2003**

***IN THE MATTER OF THE ESTATE OF SAMUEL GITHUMBI THUA – DECEASED***

**AND**

**MICHAEL WANG’ONDU GITHUMBI ..... 1<sup>ST</sup> APPLICANT**

**PETER KARICHO GITHUMBI ..... 2<sup>ND</sup> APPLICANT**

**WANGUI KARIUKI ..... 3<sup>RD</sup> APPLICANT**

**CYRUS MAMICHA GITHUMBI ..... 4<sup>TH</sup> APPLICANT**

**WANJIRU GITHUMBI ..... 5<sup>TH</sup> APPLICANT**

**WANGUI GITHUMBI ..... 6<sup>TH</sup> APPLICANT**

**WANG’ARU WAITHAKA ..... 7<sup>TH</sup> APPLICANT**

**WAICHERE GITHUMBI ..... 8<sup>TH</sup> APPLICANT**

**NYAMBURA GITHUMBI ..... 9<sup>TH</sup> APPLICANT**

**WANGECHI GITHUMBI ..... 10<sup>TH</sup> APPLICANT**

**VERSUS**

**FRANCIS KAMAU GITHUMBI ..... RESPONDENT**

**RULING**

This is an application filed by Michael Wang’ondu Githumbi, Peter Karicho Githumbi, Wangui Kariuki, Cyrus Namicha Githumbi, Wanjira Githumbi, Wangui Githumbi, Wang’aru Waithaka, Waichere Githumbi, Nyambura Githumbi and Wangechi Githumbi hereinafter referred to as “*the applicants*” against Francis Githumbi hereinafter referred to as “*the respondent.*” In the application expressed to be brought under section 47 and 76 of the Law of Succession Act and rules 44(1), 49, 73 and 76 of the probate and Administration Rules, the applicants seek that:-

- “1. This application be certified as urgent and heard on priority basis and service be dispensed with in the first instance.
2. Pending the hearing and determination of this application there be a stay of execution of all the consequential orders arising from the certificate of confirmation of grant issued on 23<sup>rd</sup> October 2006.
3. The grant of letters of Administration issued to the respondent and the 1<sup>st</sup> applicant herein on 23<sup>rd</sup> October 2006 be revoked and or grounded.
4. The costs of this application be provided for.”

The application is made on the grounds that the proceedings to obtain the grant were defective in substance as no affidavit in support of the mode of distribution of the estate of the deceased was filed in court to warrant confirmation of grant as required by law. Further no consent from the beneficiaries was obtained and or filed in court, that the grant was obtained fraudulently, surreptitiously by making of a false statement and by concealment from the court of material facts. That the respondent is wantonly intermeddling or wasting the estate of the deceased. The grant has become useless and inoperative through the respondent's clandestine conduct. That the respondent has now filed a bill of costs on the basis of the certificate of grant obtained unprocedurally and finally that the respondent may tax the said bill anytime now an event that will render the summons nugatory.

The application was further supported by an affidavit sworn by Michael Wang'ondu Githumbi and Peter Karicho Githumbi on behalf of all the other applicants. In the main they depone that they are sons and daughters of the deceased, Samuel Githumbi. That though the grant of letters of Administration intestate was issued jointly to the 1<sup>st</sup> applicant and the respondent, the respondent subsequently filed summons dated 3<sup>rd</sup> May 2006 to confirm the said grant which grant was confirmed on the 23<sup>rd</sup> October 2006. The same was done without the consent of the family and therefore was prejudicial as no affidavit in support of the mode of distribution of the Estate accompanied the application. That the respondent has now gone ahead to apportion himself the assets of the estate favourable to himself and distributed the less favourable to the applicants. That it follows therefore that the proceedings to obtain the said confirmation of grant were defective in substance and procedure. The respondent is wantonly intermeddling and or wasting the Estate. That they were all beneficiaries of the Estate of the deceased and therefore entitled to a fair share of the estate. Finally they deponed that if the confirmed grant is not revoked and or annulled they stand to suffer irreparable loss and the deceased's estate will be wasted without salvage.

The application was opposed. By a replying affidavit dated 8<sup>th</sup> July 2008, the respondent in opposing the application deponed that apart from the 1<sup>st</sup> applicant, the rest of the applicants were strangers to the estate of the deceased as the estate was distributed to him and the 1<sup>st</sup> applicant by the clan elders. That there was an affidavit in support of the application for confirmation of grant. That the bill of costs was as taxed on 25<sup>th</sup> May 2007. That the only remedy available to the applicants is to appeal. That the application was not filed timeously.

In his oral submissions before me in support of the application, Mr. Ikua, learned counsel for the applicants reiterated and expounded on the grounds in support of the application and what was deponed to in the affidavit in support of the application. Suffice to add that the main parcel of land on which the applicants reside has been taken over by the respondent following the distribution and he is in the process of evicting them.

On his part the respondent submitted that the applicants were all aware of the application for the confirmation of grant as they were served. That the clan had intervened in the matter and decided on how the estate of the deceased should be distributed. He acted in accordance with the decision of the clan when he applied for the confirmation of the grant. That the applicants were given their inheritance by the deceased in his lifetime. Finally, he submitted that the delay in bringing the instant application is

inordinate.

I have carefully considered the application, the supporting as well as replying affidavits, the rival oral submissions and the law. Looking at the prayers on the face of the application, clearly prayer 1 is spent. What is therefore left of the application in the main is prayers 2 & 3. Prayer 3 seeks revocation of the grant that was confirmed on 23<sup>rd</sup> October 2006. Under the Law of Succession Act and the rules made thereunder there is a clear procedure laid down as to how proceedings leading to the revocation and annulment of a confirmed grant should be undertaken. First, once the application for the revocation and or annulment of a grant is filed, initial directions have to be obtained from the judge as to who should be served with the application and the mode of such service. Once service has been effected on those ordered to be served and they have responded in whichever manner to the application, the application is again set down for further directions before the judge as to the mode of hearing and disposal of the application. It may be by way of viva voce evidence or by affidavits. It is only after these final directions have been given that the application for the revocation or annulment of the grant can be set down for hearing and determination.

The instant application has not gone through those motions. It has therefore come up for hearing rather prematurely. Accordingly prayer 3 in the application is not available to the applicants at this stage.

That leaves me with prayer 2 of the application. The prayer as already stated seeks stay of execution of all the consequential orders arising from the confirmed grant. The issues and allegations raised in the application are not flimsy. They are serious questions of law and fact. The applicants face imminent eviction on the basis of the confirmed grant that is now being challenged. If this comes to pass, the applicants would definitely suffer irreparable loss as they are likely to be evicted from their residences. This application too may be rendered nugatory. I have looked at the replying affidavit sworn by the respondent and have not come across any paragraph in which he deposes that he will suffer any prejudice if any further proceedings pursuant to the confirmed grant are stayed. I therefore take it that no prejudice will be occasioned to him if the application is allowed.

That being my view of the matter, I will allow the application limited however only to prayer 2 of the application. Costs shall abide the outcome of the summons for the revocation or annulment of the grant. I further direct the applicants do set down the application for initial directions within the next twenty one (21) days from the date of this ruling failing which the order of stay granted herein as aforesaid shall automatically lapse. The respondent shall however have the costs of this application assessed at Kshs.6000/= to be paid also within the next twenty one (21) days from the date hereof. The order for costs against the applicants has been necessitated by the fact that they have not been timeous in the prosecution of the application.

*Dated and delivered at Nyeri this 9<sup>th</sup> day of October 2008*

**M. S. A. MAKHANDIA**

**JUDGE**