**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE 26 OF 2007**

**IN THE MATTER OF THE ESTATE OF**

**RUMINJO KAGOYA GITHUKA (DECEASED)**

**LENSON MAINA RUMINJO…….APPLICANT**

***VERSUS***

**MARY WANJA GACHOMO…….RESPONDENT**

**R U L I N G**

Ruminjo Kagoya Githuka, hereinafter referred to as the deceased died on 2nd August, 2006. He was survived by Lenson Maina Ruminjo, a son hereinafter referred to as "*the applicant"* and Mary Wanja Gachomo, married daughter hereinafter referred to as "*the respondent."* On 1st march, 2007, the applicant petitioned this court for the grant of letters of administration intestate with regard to the deceased estate. Unknown to the applicant however, the respondent too had in the same cause on 9th February, 2007 petitioned for the grant of letters of administration intestate for the same estate.

On 4th October, 2007, the two petitions were placed before **Justice Kasango** who ordered that the grant be issued jointly in the names of the applicant and the respondent. On 24th April, 2008 the respondent applied for the confirmation of grant. The said application came up for interpartes hearing on 3rd June, 2008 before me. However, the applicant was absent. Being satisfied that the applicant had been duly served with the application and was aware of the hearing date but chose to be absent, I allowed **Mr. Waweru Macharia,** learned counsel for the respondent to prosecute the application the absence of the applicant notwithstanding. As no affidavit of protest had been filed in response to the application for confirmation of grant by the applicant, I proceeded to allow the application and had the grant confirmed as prayed.

On 16th July, 2008, the respondent filed an application dated 15th July, 2008 in which she sought that the Deputy Registrar or any other suitable officer of this court be authorized to sign papers on behalf of the applicant to effectuate the confirmed grant. The application was again served on the applicant. Again on the hearing date of the said application interpartes, the applicant was absent. Being satisfied once more that the applicant had been served and their being no explanation for his absence, I allowed counsel for the respondent to argue the application. Persuaded on the merits of the application, I did allow it.

The applicant then on 13th October, 2008 filed the instant application under certificate of urgency seeking that I stay my order of 9th October, 2008 aforesaid as well as set aside the same and re-admit the respondent's application dated 15th July, 2008 for hearing afresh. In support of the application, the applicant swore that he was aware that he was supposed to attend court on 9th October 2008 in respect of the respondent's application dated 15th July, 2008. That on the said date however he boarded a motor vehicle on his way to this court but the said motor vehicle developed a mechanical problem on the way. He was constrained to hop into another motor vehicle and by the time he arrived in court, the application had been called out, heard and allowed. That had he arrived in court on time, he could have raised his

objection against the granting of the application until the hearing and determination of his application for the revocation of the grant. That his failure to attend court on time was occasioned by circumstances beyond his control and he was therefore beseeching this court to give him a chance to be heard in this matter which touches on land that he considers sensitive. In his oral submissions in support of the application, the applicant merely reiterated what he had deponed to in the affidavit in support of the application.

The application as expected was opposed. The respondent in her replying affidavit deponed in pertinent paragraphs that there was no evidence attached to the applicant's affidavit to support his bare allegation that he came to court on the material day, that the applicant was bent on delaying the finalization of this cause, that the law does not discriminate against her for being a married woman, that both of them were beneficiaries of separate parcels of land given to them by their deceased father in his lifetime. Finally she deponed that the applicant was not getting on well with the deceased and only got interested in his estate after the deceased passed on. In his oral submissions in opposition to the application, **Mr. Macharia**, learned counsel reiterated and expounded on what the respondent had deponed to in her replying affidavit. He however, added that the applicant was a joint administrator of the estate of the deceased. He had however consistently refused to co-operate with the respondent on the erroneous notion that she is not supposed to inherit from the deceased's estate as she was a married daughter. In any event the applicant had not filed an affidavit of protest though he had been served with the application for confirmation of grant.

I have now had the opportunity to consider carefully the application, the supporting and replying affidavits, the annextures thereto, respective oral submissions and the law. The applicant has made a bare statement that he was impeded in making his way to court in good time because the motor vehicle he was travelling in suddenly developed a mechanical problem. There is no evidence at all attached to the applicant's affidavit, documentary or otherwise to support the applicant's said bare allegation. How does the applicant expect this court to act on such bare statement? That being the case I would agree with the submissions of learned counsel for the respondent that there is no material, sufficient or otherwise laid before me as would assist me to exercise my discretion in the applicant's favour. Indeed it is not lost on me that the applicant is deliberately being ambiguous on certain aspects of the application. For instance what time did he arrive in court after getting another vehicle to ferry him to Nyeri following the break down of the first one. He is also silent as to where exactly the first motor vehicle that he had boarded actually broke down. This court takes judicial notice of the fact that Othaya is not very far from this court. It is hardly 25KM away. Hardly can it take an hour or so to cover the said distance either by public or private means. Assuming that the first vehicle that the applicant had boarded broke down somewhere between Othaya and Nyeri, I would imagine that the applicant would have been able to make it to court before 10 o'clock. Afterall the applicant himself has deponed that he boarded the second vehicle at 9am.

I have however called for and examined the cause list for 9th October, 2008. I have noted that on the day I dealt with matters for both court 1 and my own court as court 1 was not sitting on that day. For court 1 whose matters I dealt with first, there was a total of eighteen matters listed on the cause list. Four of them were judgments which I had to deliver, followed by a plea, thereafter mentions, directions, applications and hearing of protests and revocation of grants. On that cause list, the only matters which I did not handle were protests and applications for revocation of grant. Thereafter I proceeded to handle my own cause list. The applicant's application was at least number 26 on my cause list. Before it were eleven judgments and six rulings that I delivered. That was followed by a part heard case which was scheduled for hearing at 9.15am. The evidence of two witnesses was taken before the applicant's application could be reached.

I have said all the foregoing to show that the earliest time that the application dated 15th July, 2008 could have been reached could not have been earlier than 11 o'clock. Accordingly, if the applicant had boarded a second vehicle at 9am as he wants this court to believe then there is no way that he could not have made it to court before the application had been called out, heard and allowed in his absence. The bottom line is that the applicant is not being honest and or candid with the court. A litigant who expects this court to exercise its wide and unfettered discretion in his favour must be truthful, honest and candid in whatever

he says in support of such an application. From what I have so far, the applicant has failed the litmus test and therefore has denied himself this court's hand in discretion.

In any event of what use will be to reinstate the application dated 15th July, 2008 for hearing afresh. It was a formal application meant to effectuate the terms of the confirmed grant. The confirmed grant has neither been revoked and or annulled. It thus remains a valid confirmed grant whose terms must be respected and complied with.

The end result is that I do not see any merit in this application. Accordingly it is dismissed with no order as to costs since the combatants are a sister and brother.

***Dated and delivered at Nyeri this 20th day of November, 2008.***

**M.S.A. MAKHANDIA**

**JUDGE**