



REPUBLIC OF KENYA

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

**Succession cause 54 of 1998**

**IN THE MATTER OF JHAZI KINGORI MITHIGI ..... DECEASED**

**WILFRED NYOKABI ..... APPLICANT**

**Versus**

**SAMUEL MITHIGI KINGORI**

**BERNARD MITHIGI KINGORI**

**PETERSON MWANGI KINGORI ..... RESPONDENTS**

**JUDGMENT**

The ideal in respect of succession matters is that they would be concluded expeditiously to enable parties to enjoy their inheritance. That has not been so in respect of this succession. The deceased JHAZI KINGORI MITHIGI died on 8<sup>th</sup> December 1989. The court in proceedings that began on 7<sup>th</sup> February 2005 heard an objection relating to the mode of distribution of this estate. In that respect the court delivered its judgment on 11<sup>th</sup> May 2005.

The deceased left surviving him two wives. The first wife was called Grace Wangechi. She was left by the deceased occupying property AGUTHI/ATHAITHI/1. The second wife was called Hellen Wanjiku. She was left by the deceased occupying LR. NO. NYERI/WATUKA/933. The evidence that parties tendered before this court was that the deceased before his death subdivided the Watuka farm into 6 acre plots one of them being Nyeri/Watuka/936. This is the plot which is the subject of the present dispute. The court by its judgment dated 11<sup>th</sup> May 2005 gave that plot to Bernard Mithigi. The court made a finding as follows:-

***“It is apparent that the deceased on his own accord sub-divided the Watuka land into 8 portions. It is more than sheer coincidence that one portion should be much larger than the rest. Particularly when that portion is about 9.32 Hectares, slightly more acreage of the Aguthi/Gathaithi/1 land. I find that the clear intention of the deceased was not that his widow Hellen should exclusively retain the Watuka land with her children but that she should retain the larger portion i.e Nyeri/Watuka/933, whilst leaving the other 7 portions free for distribution. This would be consistent with the deceased’s wish that each widow remains in the land where they were. Moreover it is no coincidence that the remaining 7 portions were all equal and that the deceased’s sons and 1 unmarried daughter entitled to inherit him were 7. Evidently the deceased intended each child to have 1 portion. I believe the evidence of Bernard Mithigi that he not only showed him his portion, but also gave him the title to the sub-division with a power of attorney.”***

The court is now faced with an application dated 18<sup>th</sup> September 2006. That application is a summons for revocation or annulment of grant. It is brought by Winfred Nyokabi. She is a daughter of the second house. Her mother who is now deceased was called Hellena Wanjiku. By that application she seeks revocation on the basis that the proceedings of obtaining the grant were defective and that they were fraudulent and had false statements or concealment from the court something material to this case. Finally she stated that the grant was obtained by means of untrue allegations of facts. Hearing was ordered to be by way of viva voce evidence. The applicant stated that her father during his life time had given her Watuka Plot No. 936. She stated that whilst the deceased her father was alive she was unmarried. On being given that plot she began to cultivate it until she received a letter from Bernard giving her notice to vacate that plot. She produced the letter dated 15<sup>th</sup> August 2005. That letter was obviously written after the judgment of this court quoted herein before and dated 11<sup>th</sup> May 2005. As stated before the court in that judgment awarded Plot No. 936 to Bernard. According to the applicant it was on receiving the letter of notice to vacate that she got to know of the existence of this succession. She further stated in evidence that she was excluded from the list of beneficiaries to this estate. That her name was not listed under the form P&A 5. She stated that her consent was not sought when the petition was filed. She said that she was a beneficiary of the deceased and that by the time the succession cause was filed she was not married. She got married in 1994. For these reasons she sought that the grant be revoked. Bernard Mithigi in evidence denied that the applicant was cultivating Plot No. 936. He said that the said plot was given to him by his deceased father who also gave him a power of attorney to develop that plot. He concluded by saying that it was his deceased father who gave him permission to use that land. It should be noted that Bernard is a son of the first wife. In evidence he said that there was a time Peterson Mwangi of the second house who is also a real brother to the applicant, chased him away from that plot using a 'panga'. Following that incident the applicant sympathized with him for having been chased by Peterson. He began according to him to use Plot No. 936 after the judgment of this court dated 11<sup>th</sup> May 2005. He denied that at the time of petitioning in this succession that there was concealment. At that time he said that the applicant was married. That she was married even in the life time of the deceased. Bernard said that it ought to be noted that the petitioners included Peterson the brother of the applicant. That it was agreed amongst them not to include the applicant because she was a married daughter of the deceased. Peterson at this hearing did not give evidence but adopted the evidence that was recorded at the hearing on the mode of distribution. In that evidence among other things Peterson said that their father did not subdivide the Watuka farm during his lifetime. He further stated in that evidence that his greatest objection was that ***"the children of Grace (first wife) were inheriting the Watuka land."*** Bernard who in his evidence said that the deceased gave him Plot No. 936 Watuka farm is from the first house.

I have considered the evidence tendered before court at the hearing of summons for revocation dated 18<sup>th</sup> September 2006. I have also considered the evidence that was tendered at the hearing relating to the mode of distribution. I have also borne in mind the submissions filed by the parties. I see the issues that I need to determine as follows:

- 1. Does failure to cite or to obtain consent from a prospective beneficiary necessarily make a grant issued of no effect?***
- 2. Did the deceased give in his lifetime Nyeri Watuka Farm 936 to the applicant to use?***
- 3. If the answer to no. 2 above is in affirmative is the applicant in law entitled to inherit that land?***

The answer to the first issue is that each case needs to be decided on its own facts. The applicant in my view cannot say that she did not have knowledge of the present succession cause. In her evidence she stated that she confided in Peterson Mwangi her real brother. Peterson was one of the administrators of this estate. It would therefore follow that it cannot be correct as stated by the applicant that she only got to know of this succession on getting the letter sent by Bernard dated 16<sup>th</sup> August 2005. If indeed she got to know of the succession at receipt of that letter the question that arises is, why did she wait for one year before moving the court? It is clear that Peterson was loathed to have the family of the first house where Bernard comes from inherit land at Watuka Farm. It must have therefore angered him even further to

have had the court in its judgment of 11<sup>th</sup> May 2005 award Bernard Plot No. 936. It is clear in a pending application in this matter that Peterson has refused to sign the transfer forms in order to effect the judgment of this court of 11<sup>th</sup> May 2005. His reason for not signing those forms is that he has filed an appeal against the judgment of 11<sup>th</sup> May 2005. It should however be noted that there is no stay of that judgment being appealed against. The query that arises is whether the applicant is acting as a proxy for Peterson. On the whole however I am of the view that the applicant knew of the existence of this succession. Failure to cite her or to obtain her consent will not lead this court to find that the grant was obtained by means of fraud. On the second issue I find that the applicant's claim that she was given plot no. 936 by the deceased to use is not supported by evidence. Even the evidence of Peterson does not support her claim. Further her mother's objection to making grant in this matter filed on 28<sup>th</sup> May 1998 she listed the surviving beneficiaries of this estate. The applicant who was her daughter was not included in that list. I believe that the failure to include her name was not a coincidence. It can only mean that the applicant was not using the property as she alleges. I wholly support the finding of Honourable Lady Justice Okwengu when she found that the deceased in his life time gave Plot No. 936 to Bernard to use. He also donated a power of attorney to Bernard the purpose of that power of attorney dated 16<sup>th</sup> August 1998 was ***"to charge the above mentioned land with M/A Agricultural Finance Company for purpose of acquiring a loan to develop the said land."***

The deceased would not have donated that power of attorney in such specific terms unless he had already given that land to Bernard. The finding of the court is that the applicant's application for revocation of grant dated 18<sup>th</sup> September 2006 fails and the same is hereby dismissed with costs being awarded to BERNARD MITHIGI. As stated at the beginning of this judgment it is necessary for matter such as this one to be concluded as soon as possible. To that end the notice of motion dated 14<sup>th</sup> September 2005 shall be fixed for hearing at the reading of this judgment. That application is seeking the authority of this court for the Deputy Registrar to sign form LR 7 and LR 19. This is because it is alleged that Peterson Mwangi has refused to sign those forms as a co-administrator.

***Dated and delivered this 18<sup>th</sup> day of December 2008***

**MARY KASANGO**

**JUDGE**