



**REPUBLIC OF KENYA**

**HIGH COURT OF AT NYERI**

**Misc Civil Appli 320 of 2002**

**JANE MUTHONI KIBUNJA ..... APPLICANT**

**VERSUS**

**MURIMI MBITI ..... RESPONDENT**

**R U L I N G**

The applicant, Jane Muthoni Kibunja has filed the instant application seeking that the grant of letters of Administration to one, Murimi Mbiti, the Respondent in Kerugoya Succession Cause number 356 of 1994 on 24<sup>th</sup> January 1995 be revoked and or annulled on the ground that:

- (a) The respondent filed and conducted **the succession cause secretly and never informed the applicant, the only daughter of the deceased and who had greater or equal priority to the respondent in applying for the grant.**
- (b) **The respondent colluded with impostors to have the grant made and confirmed.**
- (c) **The respondent failed to cite the applicant**
- (d) **The respondent used fraud and trickery to obtain the letters of Administration in a bid to disinherit the applicant.**

The application is supported by the affidavit of the applicant sworn on the 19<sup>th</sup> December, 2002. In the main, the applicant depones that she is the only surviving daughter of **Kibunja Mbiti Ndonga**, the registered owner of land parcel number **Mwerua/Kithumbi/642**. That the respondent herein is a brother of the deceased and therefore an uncle to the applicant. That the respondent secretly commenced succession proceedings in Kerugoya court, wherein he indicated a person by the name of **Wanjiku Kibunja** purporting it to be the applicant. The applicant depones further that those are not her names as her real names are **Jane Muthoni Kibunja**. That she never gave her consent to the respondent to pursue the succession cause nor was she cited. That on 24<sup>th</sup> April 1995 when the matter came up in court, a person who went by the name **Mary Wanjiku** appeared purporting to be the daughter of the deceased. To the applicant the deceased never had a daughter by the said names and in any event she was the only daughter of the deceased. That person again could not have been the applicant as she is not known by those names. That again when the matter came up for the confirmation of the grant, the respondent deliberately lied to court that all the beneficiaries to the estate of the deceased had agreed on the mode of distribution of the deceased's estate. That the persons named in the papers filed in the Kerugoya court are complete strangers to the estate of the deceased and impostors. Finally the applicant depones that the grant issued should not be allowed to stand as the same was obtained fraudulently and through

concealment of material facts privy to the respondent herein.

In his oral submissions in support of the application, **Mr. Karweru**, learned counsel stated that the Kerugoya court dealt with a purported will executed by the deceased. The petition filed was however not for grant of probate but for letters of administration intestate. The grant was therefore ipso facto a nullity. By law and being the only daughter of the deceased, the applicant ought to have been cited and or consent to file the petition procured from her before the filing of the same. Counsel further submitted that on 20<sup>th</sup> December 1994, the Respondent appeared before the learned magistrate at Kerugoya and an order was issued that the grant of letters Administration will not issue because the daughter of the deceased was not in court. However on 24<sup>th</sup> January 1995, a person by the name of **Mary Wanjiku** and said to be a daughter of the deceased unmarried with two children entered the proceedings. The court then ordered that since there was no objection, letters of Administration would issue to the petitioner. To counsel and the applicant, this **Mary Wanjiku** is but an impostor, who is unknown to the Estate of the deceased. Counsel concluded his submissions by stating that the proceedings in Kerugoya court were conducted fraudulently by getting an imposters to masquerade in court as the applicant. The grant should therefore be revoked and a fresh one issued to the applicant who is the daughter of the deceased and who ranks in priority to all the others.

The application was served on the Respondent, and one, **Allan Migwi** in terms of the directions issued by **Justice Juma** on 7<sup>th</sup> April, 2003. Though served in good and ample time the two did not file any documents in opposition to the application. On the day of the hearing of the application, however, the respondent through **Mr. Mwangi Esq.** learned counsel made a meek attempt to have the proceedings stalled by making an application to have the matter adjourned to enable him prepare and file a replying affidavit to the application. That application was of course opposed by counsel for the applicant. Eventually the court turned down the request for adjournment whereupon **Mr. Mwangi** intimated to court that he had no further instructions in the matter. The court then ruled that the application shall be heard the absence of the replying affidavit by the respondent notwithstanding.

On the undisputed and uncontroverted evidence laid before me by the supporting affidavit by the applicant as well as submissions of learned counsel, I am satisfied and do find that the applicant has made out a case to warrant the granting of the application. It is apparent that the succession proceedings in the principal magistrate's court at Kerugoya being succession cause No. 356 of 1994 were premised on an alleged will executed by the deceased just before he passed on. From a copy of the same filed in court on 6<sup>th</sup> October, 1994, it would appear that the deceased devised and bequeathed to the Respondent, his brother the whole parcel of land known as **Mwerua/Kithumbu/642**. Though there was the alleged will, the respondent surprisingly however elected to petition for letters of administration intestate. To my mind therefore and as correctly submitted by learned counsel for the applicant the petition filed was ipso facto defective. It should never have been entertained by way of petition of letters of administration intestate. Rather the respondent if he genuinely believed that the will was genuine and valid he should have petitioned the court for the Grant of Probate of written will. That being my take on the matter it would appear therefore that ipso facto the grant made herein pursuant to the petition of letters of administration intestate was a nullity and liable to revocation and I so hold.

Even assuming for purposes of argument that the petition for letters of administration intestate was properly filed in court, a couple of unanswered questions arise. The initial petition does not show that the deceased apart from the respondents had any other children liable to inherit his estate. The only persons named as surviving the deceased are the respondents. However in the application for confirmation of the grant a lady by the name **Wanjiku Kibunja** suddenly pops up as a prospective beneficiary of the estate. She is described therein as married daughter of the deceased. I may hasten to state that by law and being the daughter of the deceased this lady if at all she was a biological daughter of the deceased and presumably the instant applicant ought to have been cited and or her consent to filing of the petition procured by the respondents before the filing of the petition. Indeed the applicant herein being the daughter of the deceased ranks in priority to the respondents who were on the documents before me one was a brother to the deceased, and the second was a purchaser of a portion of the deceased's land respectively.

I also note that on 20<sup>th</sup> December 1994 when the respondents appeared before the learned magistrate for the grant of letters of Administration, the magistrate made a specific order to the effect that “..... **Letters of administration will not be granted when the daughter of the deceased is not in court**”. However on 24<sup>th</sup> January 1995 a person now by the name of **Mary Wanjiku** and said to be a daughter of the deceased unmarried with 2 children suddenly enters the proceedings. The court then orders that since there is no objection, letters of administration granted to the petitioner shall be confirmed after 3 months. I must at this juncture express my dismay and reservations as to the manner in which the proceedings were conducted. There was no attempt by the learned magistrate to establish whether **Wanjiku Kibunja** was the same person as **Mary Wanjiku**. The applicant states that the said **Mary Wanjiku** and or **Wanjiku Kibunja** who appeared in court passing off as the daughter of the deceased and therefore the applicant were imposters. Invariably what the applicant is saying is that she was nowhere near the court on 24<sup>th</sup> January 1995 and whoever appeared purporting to be her must of necessity have been an imposter. On the material before me, I have no doubt at all that whatever the applicant is saying could be true. If that be the case (and I have no doubt at all that that was indeed the case) then the proceedings and indeed the grant was obtained fraudulently on the basis of concealment of material facts or misrepresentation of the same. For that reason alone again the grant is liable to revocation.

There was no application before the magistrate to shorten the time within which the grant should be confirmed. Yet on her own motion and without being urged on by the Respondent, the learned magistrate proceeded to order thus:

**“..... Since there is no objection letters of administration granted to the petitioner to be confirmed after 3 months .....**”

In the absence of a specific application on the part of the respondent setting out reasons why the confirmation of the grant should be hurried and or brought forward, this order was gratuitous but nonetheless irregular.

For all the foregoing reasons then it is only mete and just that the grant of letters of administration intestate confirmed on 7<sup>th</sup> November 1995 be and are hereby revoked. It is clear to me that in obtaining the grant the Respondents perpetrated a fraud in concealing the proceedings from the applicant yet she ranked in priority to the respondents, failed to cite her or obtain her consent, the Respondents used impostors to masquerade as the applicant and finally the respondents deliberately misled the court as to the rightful heirs to the estate. Accordingly the grant is revoked with costs to the applicant. A fresh grant in the name of **Jane Muthoni Kibunja** shall issue forthwith to be confirmed in the normal manner.

Orders accordingly.

*Dated and delivered at Nyeri this 16<sup>th</sup> day of July 2007.*

**M. S. A. MAKHANDIA**

**JUDGE**