



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

AT NYERI

Succession Cause 693 OF 2001.

IN THE MATTER OF THE ESTATE OF ISAAC MWANGI KAMAU(DECEASED)

BONIFACE NJAGA MWANGI.....APPLICANT

Versus

ZELIPHER NYAKINYUA MWANGI.....1ST RESPONDENT

DEBORAH NJERI KURIA.....2ND RESPONDENT

JUDGMENT

On the death of Isaac Mwangi Kamau on 23rd August 1998, his wife **ZELIPHER NYAKINYUA MWANGI** petitioned for the Grant. In that petition she indicated the persons who survived her late husband as being herself, John Kamau Mwangi (son), Boniface Njaga Mwangi (son), and Emma Wambui Mungai, married daughter. An objection was filed by **DEBORA NJERI KURIA**, a sister to the deceased. Her objection was on the basis that the property **THEGENGE/KARIA/116**, which is the only asset of the deceased, was family land and that the deceased during his lifetime had decided to give her half an acre thereof. She therefore sought that the court will allow her to inherit half an acre of that land. That objection was heard by this court by way of *viva voce* evidence and a judgment was delivered on 7th July 2004. The Court upheld the objection and proceeded to issue a grant in the name of the wife the petitioner, and in the name of Debora the sister. The court in that judgment stated in conclusion that the grant be confirmed and that the land parcel **THEGENGE/KARIA/116** be sub-divided and 0.5 acres be registered in the name of Debora Njeri Kuria and the remaining portion be registered in the name of Zelipher Nyakinyua Mwangi and her two sons John Kamau Mwangi and Boniface Njaga Mwangi jointly. The court proceeded to order that a confirmed grant be issued in terms of that judgment.

The court is now moved by an application by way of Summons filed by Boniface Njaga Mwangi which was filed in this court on 11th July 2005. That application is brought under *Section 76* of The Law of Succession Act. In the supporting affidavit of the Applicant the deponent stated that there were documents that were produced in court at the hearing of the objection by Debora which documents were a forgery. Further the deponent stated that some of the exhibits by Debora were not registered in the public office so as to authenticate the same. The deponent also drew the attention of the court that some of the documents also produced at the hearing of the objection were dated on a date after the death of his father whose estate is the subject of this matter. In support of that application Zelipher Nyakinyua Mwangi also swore an affidavit and stated that the deceased did not sign any mutation forms in favour of Debora before his death and that further he was incapacitated from 1984 up to his death by disease and would not have executed documents without informing her or the children. That application was also supported by affidavits of John Kamau Mwangi and Emmah Wambu Mungai. The two confirmed that there was no

hearing before elders whereby their deceased father agreed to give his sister half acre of land.

In response to that application the Respondent **DEBORA NJERI KURIA** swore a replying affidavit and grounds of opposition. Her opposition was in the following terms:

(a) THAT the orders sought are not known to law

and are incapable of being granted by court.

(b) THAT the applicant herein, who is a son to the

1st Respondent is attempting to constitute this honourable court as an appellate court unto its own judgment as he had all been aware of the proceedings before the Honourable Court.

(c) THAT the Honourable court need not be invited

to waste time and resources in re-hearing the same matter under the guise of revocation proceedings.

(d) THAT the summons for revocation are contrary

to law and should be dismissed forthwith.

Section 76 of the Succession Act in part provides as follows:

“A grant of representation, whether or not confirmed may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion_

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;”

From the Applicant’s application, it is clear that he relies on *Section 76 (b) and (c)*. Considering those sub sections, I am of the view that the same does not envisage revocation of grant where the subject of the objection has been entertained by the court by a full hearing by way of oral evidence but rather those paragraphs relate to where an application is made by way of affidavit evidence and later there are allegations that there were concealment of material or that the grant was obtained by means of untrue allegations. In considering the application I find that I am in agreement with the Respondent that this court is being invited to conduct a re-hearing of the objection. This cannot be the correct procedure for if indeed the parties are aggrieved the correct thing to do would be to file an appeal against this court’s finding of the judgment dated 7th July 2004.

I therefore find that the application is misconceived and accordingly the judgment of this court is that the same is dismissed. In view of the fact that the matter involves relatives I will not order costs to be paid by any party but rather each party shall bear its own costs.

Dated and delivered at Nyeri this 6th day of July 2007.

MARY KASANGO

JUDGE

