



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

**Succession Cause 172 of 1995**

**IN THE MATTER OF THE ESTATE OF NKANATA MBWIRIA.....DECEASED**

**DAVID MBAE NKANATA.....APPLICANT**

**V e r s u s**

**M'ITHINJI MWAMBA.....RESPONDENT**

**R U L I N G**

1. The Succession Cause herein was filed on 7.6.1995 and the Petitioner, David Mbae Nkanata obtained a grant of letters of administration which was subsequently confirmed on 30.10.1997 and the only title comprised in the estate i.e. Land Parcel Number Igoji/Kianjogu 527 ordered to be distributed as follows.

(i) David Mbae Nkanata – 4.62 acres

(ii) M'Ithinji M'Mwamba – 5.00 acres

2. By an Application dated and filed on 3.4.1998, David Mbae Nkanata sought orders that the caution placed on the suit land by Japheth K. Mbae as licensee be ordered to be removed and vacated. Orders in that regard were issued.

3. By an application-dated 21.7.2000, the Petitioner applied to have a caution placed on the suit land by one Jerusha Njura David removed and this was done on 4.9.2000.

4. On 11.5.2004, Jerusha Njura David sought revocation of the grant issued for reasons that it was allegedly obtained secretly and she as a daughter-in-law of the deceased and was never consulted before it was filed. It is unclear who her husband was and in any event I do not see that her application was ever determined.

5. Interestingly on 16.12.2004, the Petitioner, David Mbae Nkanata also sought to have the grant revoked for reasons that he did not make the Application to confirm the grant nor did he sign the Affidavit in support. That the Application may have been made by M'Ithinji M'Mwamba, who was his employer and who had purchased part of the suit land. An agreement dated 4.7.1994 is annexed to the supporting Affidavit and it is clear from it that the Applicant was selling 5 acres out of the title No. Igoji/Kianjogu/527 to the said M'Ithinji. The manner of payment of the purchase price is clearly indicated at clause 1 thereof.

6. At paragraph 12 of the supporting Affidavit, the Applicant states that he signed some documents and later he came to know that they were for sub-division of the land and he was surprised to be told later that the grant had been issued on 30.10.1997. He also complains that the purchase price had not been fully paid and that the said M'Ithinji committed acts of fraud.

7. In the Replying Affidavit sworn on 8.9.2005, M'Ithinji M'Mwamba denies any wrong doing and depones that he was a bonafide purchase of 5 acres out of the Land comprised in the estate and that the Application has no merit.

8. In submissions before me, only one other issue arose; that the Application to confirm the grant dated 16.10.1997 is not properly on record as it is not stamped with the court stamp neither is there a receipt showing payment of filing fees.

9. I deem it fit to address the last point first and in doing so, I have seen the summons dated 16.10.1997 and it does not bear a court stamp neither do I see any receipt showing that any filing fee was paid. In an affidavit sworn on 6.6.2007 Ashford Riungu, Advocate, then acting for the Applicant depones that he in fact paid for the Application on 22.10.1997 and he annexed a receipt issued by this court in respect of this matter and specifically the Application dated 16.10.1997. I also note that Mr. Riungu is recorded as having appeared before Wamwayi D.R. on 30.10.1997 when the grant was confirmed. The Applicant is also recorded as being present. This being the case, the non stamping of the Application is a mere irregularity and cannot be the basis for revoking a grant under s.76 of the Law of Succession Act and I would quickly dismiss the last point above.

10. Secondly and turning back to the instant Application, the only serious issue raised in this Application is the argument that the Applicant did not file the Application to confirm the grant issued to him. I have anxiously considered that argument and especially the submission that the signature on the Affidavit in support of the summons for confirmation does not belong to him. I cannot find that Affidavit on record and therefore I cannot even with the naked eye compare the signature with others on record. The disappearance of the file receipt in payment and that Affidavit cannot be explained but Mr. Riungu Advocate in his Affidavit aforesaid depones that the signature was the Applicant's. I cannot make a determination one way or the other but it is the Applicant who should have conclusively brought evidence to back up his claim and without it I cannot make any finding in his favour.

11. Having so said, I have also considered all angles of the present Application and it occurs to me that the main complaint the Applicant is making is that although he sold 5 acres of land to the Respondent and has no intention of denying the Respondent those 5 acres, the Respondent tricked him into signing documents by which the land was sub-divided and the 5 acres transferred to the Respondent. Aside from the fact that no evidence of such a trickery has been properly placed before me, I do not think that an Application under s. 76 of the Law of Succession Act is the proper mechanism to resolve the dispute whether the Respondent before paying the whole purchase price in fact tricked the Applicant into signing away 5 acres of the land for a pittance. A Succession or Probate Court is not the court where debts are settled; that is the work of a Civil Court and Succession proceedings would otherwise be abused.

12. In the end and without belabouring the point, the Application dated 11.5.2004 is completely devoid of merit and the Applicant should recover the purchase price by different proceedings.

13. To minimize further friction, I will dismiss the Application and make no order as to costs.

14. Orders accordingly.

Dated, signed and delivered in open court at Meru this 23<sup>rd</sup> Day of October 2007

ISAAC LENAOLA

J U D G E

In presence of

Ms Mwangi Advocate for the Applicant.

Mr. Ondari Advocate for the Respondent.

**ISAAC LENAOLA**

**J U D G E**