



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**

**SUCCESSION CAUSE NO. 95 OF 2014**

*IN THE MATTER OF THE ESTATE OF PETER GITHINJI (DECEASED)*

**JESSE KARAYA GATIMU.....APPLICANT**

**VERSUS**

**MARY WANJIKU GITHINJI.....RESPONDENT**

**JUDGMENT**

On 10<sup>th</sup> February, 2014, the applicant filed a summons under **rule 73** of the **Probate and Administration Rules** which took this form:

*“LET ALL PARTIES CONCERNED attend the Honourable Judge in Chambers on the .....day of .....2014 at.....o'clock in the forenoon or soon thereafter for the hearing of an application by counsel for the applicants for an ORDER that the grant of letters of administration to the estate of PETER GITHINJI NJOROGE be revoked/annulled on the grounds that:-*

1. *THAT this matter be certified as urgent and service be dispensed with at first instance.*
2. *THAT a prohibitory order do issue against land reference number LOC1/KIRIAINI/320.*
3. *THAT the respondent and/or their agents be restrained from alienating, disposing and/ or interfering with the applicant's quiet enjoyment of land parcel number LOC1/KIRIAINI/320 or its subdivisions.*
4. *THAT costs of this application be met by the respondent.*

*WHICH APPLICATION is further grounded on the affidavit of JESSE KARAYA GATIMU and on other GROUNDS to be adduced hereof.*

*DATED at THIKA this 6<sup>th</sup> day of February, 2014*

*KARANJA KANG'IRI & CO.,*

*ADVOCATES FOR THE OBJECTOR”*

The verbatim reproduction of the applicant's summons as drawn is meant to demonstrate, at the outset,

that the grounds on the face of the summons upon which the applicant seeks to have the grant of letters of administration revoked or annulled are not the grounds set out in **section 76** of the Law of Succession Act under which the application ought to have been made. It is apparent that the purported grounds are clearly prayers for other reliefs which have supplanted what would have been the duly recognised statutory ground or grounds for nullification or revocation of grant letters of administration.

Be that as it may, the summons was supported by the affidavit sworn by the applicant on the same date the summons was drawn.

In that affidavit, the applicant swore that his late father one Danson Mwangi Thiongo bought 1 ¼ acres of land from Peter Githinji Njoroge (hereinafter called “the deceased”) way back in 1966; in support of this contention, he attached what he claimed to be the a sale agreement presumably between the deceased and the applicant’s deceased father. The agreement was written in Kikuyu language but was translated to English under the certification of the applicant’s counsel.

The applicant further deposed that the parcel of land he purchased was to be excised from the deceased’s land which is referred to as **Loc1/Kiriaini/320** and that together with his siblings, one Seliva Wanjiru Ng’ang’a and one Hezekiah Waweru Wanjiku whom he described as his nephew, they have been in possession of the land since 1966.

The applicant’s claim against the respondent is that she filed a succession cause, being **Thika Chief Magistrates Court Succession Cause No. 603 of 2011** and obtained a grant of letters of administration of the deceased’s estate without informing the applicant or disclosing his interest in that estate.

The respondent filed a replying affidavit responding to the applicant’s allegations; the affidavit was sworn on 13<sup>th</sup> March, 2014 and filed in court on the same date.

In her affidavit the respondent, who is the deceased’s widow, denied that the person referred to by the applicant as Danson Mwangi Thiongo was the applicant’s father; in any event, so the respondent contended, the said Danson Mwangi Thiongo never purchased any land from the deceased and the purported sale agreement does not have anything to suggest that such a transaction ever took place in 1966 or at all.

As for the claim of having been in possession of the land, the respondent deposed that the applicant could easily have laid a claim on the land based on the concept of adverse possession and at any rate there is no explanation given as to why the applicant or his deceased father never sought for the transfer of the land to themselves or either of them since 1966 when they are alleged to have started living on the land.

The applicant responded to the respondent’s replying affidavit by filing a further affidavit in which he now described himself as Danson Mwangi Thiongo’s nephew and not his son. He added that Njoroge Migogo who is described in the sale agreement as the seller is the same person Charles Kahiga who is indicated in the same agreement as the person who sold the land to Danson Mwangi Thiongo.

Those are the facts that this court was confronted with and which this court has to interrogate and decided whether a case has been made for nullification or revocation of the grant of letters of administration made to the respondent herein.

I have considered the respective parties’ pleadings and their affidavits; I have also given due regard to their respective counsel’s submissions.

Although the applicant did not cite **section 76** of the **Law of Succession Act** in his summons, it assumed that the summons was made under this section for there is no other provision in the Act under which a party may apply for nullification or revocation of grant. That section provides as follows:-

***76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an 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 untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*

*(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-*

*(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or*

*(ii) to proceed diligently with the administration of the estate; or*

*(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs(e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*

*(e) the grant has become useless and inoperative through subsequent circumstances.*

The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of these grounds, whatever the case may be.

The applicant's summons did not, on its face, specify which of the grounds stated in section 76 was applicable to his application; indeed no ground at all was stated in the summons. The applicant's statement in the summons that "further grounds" were to be adduced was inconsistent with the reality of his application because there were no grounds, known in law, in the application. In any case, being statutory in nature, it is doubtful that such grounds would be stated in an affidavit which would ordinarily be restricted to evidentiary aspects of the application.

In my humble view, this irregularity in the applicant's summons is not just one of form but goes to the substance of the summons and hence failure to state which of the grounds stated in section 76 of the Act is invoked would render a summons such as the one filed by the applicant incompetent. The reliefs which the applicant appeared to be seeking in his summons cannot certainly pass off as the grounds for revocation or nullification of a grant as the applicant seemed to suggest in his application.

Even if the applicant's summons was competent, there are still several other hurdles that the applicant did not satisfy me as having surmounted. To begin with, it is obvious that under **section 76** of the Act a party seeking revocation or nullification of grant of letters of grant must be an interested party; I take it that an interested party in this sense is a party who has an interest in the estate.

I gather from the applicant's case that his interest, as far as the deceased's estate is concerned, is pegged on a sale agreement allegedly executed between the deceased and one Danson Mwangi Thiongo in 1966. In his affidavit in support of his application, the applicant described Danson Mwangi Thiongo as his father. When the respondent disputed this fact, the applicant varied his relationship with Danson Mwangi Thiongo and described him as his uncle in a further affidavit filed in response to the replying affidavit.

Regardless of the descriptions the applicant ascribed to Danson Mwangi Thiongo, it is apparent from the application that he was never authorised in law to pursue Thiongo's interest under the purported sale agreement in respect of the deceased's estate or part thereof. There is no evidence presented in the applicant's summons to demonstrate that the applicant had been duly appointed as the administrator of the estate of Danson Mwangi Thiongo or his personal representative. Without such an appointment, the

applicant could not initiate any legal proceedings for the benefit of Thiongo's estate in which he claims to have an interest. The legal basis for the need for such an appointment is found in **section 2 (1)** of the **Law Reform Act**; it states:

***2. (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of, his estate;***

***Provided that, this sub-section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claim damages for adultery.***

According to this provision, the applicant ought to have applied, as a condition precedent to his application, for appointment as representative of Danson Mwangi Thiongo or an administrator of his estate albeit limited to taking proceedings in enforcement his rights under the contract he is claimed to have executed in 1966. This provision is consistent with **section 82(a)** of the Law of Succession Act which stipulates powers of personal representatives. It states:

***82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-***

- a. ***to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arise out of his death for his estate;***

Any cause of action which may have vested in Danson Mwangi Thiongo based on the alleged contract between him and the deceased survived him under **section 2(1)** of the **Law Reform Act** but could only be pursued for the benefit of his estate by his duly appointed personal representative in exercise of the powers conferred upon him by **section 82 (a)** of the **Law of Succession Act**.

The appointment of a personal representative is beyond peradventure; according to **section 3** of the **Law of succession Act**, a personal representative is someone who has been granted letters of administration to the estate of the deceased intestate pursuant to an application under **section 51** of that **Act**. There is no evidence that the applicant took out these letters before he initiated these proceedings.

This question was addressed extensively in the **Hintz versus Mwalimu (1984) KLR 294**; Kneller JA as he then was put it this way:

***“It may well be that, in many instances, the sole heir or one of the heirs of a child, is his or her father, but without a grant, general or limited, of letters of administration to the estate, the heir cannot represent the estate and bring an action on its behalf because, until the grant is obtained by someone, the estate (and the legal chose in action) is vested in court. The form of grant bears this out. When the grant is obtained the estate and the legal chose in action pass automatically to the administrator.” (See page 309).***

Although this was a dissenting opinion in the split decision by the court of appeal, the same court, sitting as a bench of five judges (F.K. Apaloo, R.O. Kwach, A.M. Cockar, R.S.C. Omolo and P.K Tunoi J.J.A.) in **Trouistik Union International & Ingrid Ursula Heinz versus Jane Mbeyu and Alice Mbeyu, Civil Appeal No. 269 of 1997** overturned the decision of the majority in **Hintz versus Mwalimu** case (supra) and upheld the dissenting judgment of Kneller JA (as he then was) as the correct position of the law. The learned judges said of Justice Kneller's opinion:

***“Indeed, the presiding judge of the Court (Kneller, J.A.) expressed his open disagreement with it (that is, the majority decision). And as we have tried to show, his lone voice was the correct one. In our opinion, the true view is that that appeal (that is, appeal in Hintz versus Mwalimu) was simply wrongly decided.”***

While reiterating that it is only an administrator who can sue on behalf of a deceased person under the Law of Succession Act, the judges of appeal said at page 3 of their decision:

***“The Act came into force on the 1<sup>st</sup> July, 1981. The person whose death and succession gave rise to this suit, namely, John Katembe, died on the 10<sup>th</sup> April, 1984. To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82(a) of the Law of Succession Act. That section confers that power on personal representatives within the contemplation of the Act. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3 the interpretive section, provides an all-inclusive answer; it says “personal representative means executor or administrator of a deceased person”. It is common ground that the deceased in this case died intestate. Therefore the only person who can answer the description of a personal representative is the administrator of the deceased. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? Section 3 says “administrator means a person to whom a grant of letters of administration has been made under this Act.”*”**

The long and short of it all is that the applicant in the summons herein did not have the requisite capacity to lodge these proceedings in the guise of Danson Mwangi Thiongo’s shadow. Neither could he initiate any proceedings against the deceased’s estate or claim any benefit thereof in his own right because there is no evidence that he was a survivor of the deceased, a dependant or a beneficiary of his estate; there is simply no place, as far as I can see, upon which the applicant can stand and lay any claim on the deceased’s estate.

Before I conclude, it is necessary that I mention something about the sale agreement which, for all intents and purposes, is the basis of the applicant’s claim against the respondent. A casual scrutiny of the so called agreement would reveal that Danson Mwangi Thiongo under whom the applicant is claiming would himself have had problems in enforcing it against the deceased or his estate. In the first place, two different people are stated in the agreement to be sellers of the land and none of these people appears to be the deceased. Although the applicant stated in his affidavit that the two different names referred to one and the same person no explanation has been proffered as to why an individual would prefer to be called a particular name in one part of the agreement and adopt a totally different identity in other part of the same agreement. It is also not clear how any of these people are related to the deceased. Again the agreement speaks only of land; apart from the varied acreages mentioned, there does not appear to be any link between the subject matter of the agreement and the deceased’s estate which is clearly identified as **Loc. 1/ Kiriaini/320**. In a nutshell, the purported agreement is uncertain.

The inevitable conclusion that I have come to is that from whichever angle one considers the applicant’s summons, it is bound to fail; it is not only incompetent but it is also not merited. I therefore dismiss it with costs to the respondent.

**Dated, signed and delivered in open court this 6<sup>th</sup> June, 2014**

Ngaah Jairus

**JUDGE**

