



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 559 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE MURURU RIMBITU (DECEASED)

MARTHA REGERIA MAINGI..... 1ST APPLICANT

ESTHER NTIRINGA MUTWIRI.....2ND APPLICANT

PETER MWENDA 3RD APPLICANT

VERSUS

IBRAHIM GITONGA JACOB.....1ST RESPONDENT

ZACHARY KIMATHI MAINGI..... 2ND RESPONDENT

ANASTASIA GACHIUKI..... 3RD RESPONDENT

JACKSON KINYUA NTEERE..... 4TH RESPONDENT

RULING

1. Before me is a summons dated 16/12/2019 seeking to set aside the orders made on 17/7/2015. That order dismissed the application dated 1/2/2012. The application is expressed to be brought under **section 47 of the Law of Succession Act, Cap 160 Laws of Kenya (“the Act”) and Rule 73 of the Probate and Administration Rules.**

2. The summons is based on the grounds on the face of it and on the supporting affidavit of **Esther Ntiringa Mutwiri**. She stated that she had lodged the **Succession Cause No. 538 OF 2008** over her late father’s estate and a grant was issued to her on 24/2/2009. However, unknown to her, her aunt and cousin who are the 3rd and 4th respondent’s subsequently lodged this Cause claiming to be the daughter and son of the deceased. A grant was confirmed in this cause and the rightful heirs of the deceased were disinherited as a result.

3. The applicant averred that she had instructed the law firm of MS J.M ISABOKE & CO. ADVOCATE to apply for revocation of the grant herein but before the application was heard, the sole proprietor of the said firm, **Japhet Isaboke**, was appointed a State Counsel and the law firm was wound up. That she had no knowledge of that development. This therefore led to the dismissal of the application dated 1/2/2012 by the court on 17/7/2015.

4. The application was opposed by the respondents through the grounds of opposition dated 30/1/2020. They contended that the application was vexatious, an abuse of due process, brought with inordinate delay and the matter has become *functus officio*.

5. I have carefully considered the affidavits on record and the rival contention by the respondents. The court had ordered that the application be argued by way of written submissions. However, none of the parties had filed their submissions. as at the time of writing this ruling.

6. I have considered the entire record and the issue for determination is whether to set aside the orders made on 17/7/2015 and reinstate the application dated 1/2/2012.

7. **Section 47 of the Act** provides”, *inter alia*, that:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

...”.

8. This is an application to set aside an order that dismissed the applicants' application that sought to challenge the grant that had been issued to the 3rd and 4th respondent. In an application for reinstatement of a dismissed matter, the Court has to consider; the length of the delay, the reason for the delay, the reason for non-attendance which led to the dismissal and the prejudice if any that may be suffered by the opposite party.

9. The order sought to be challenged was made on 17/7/2015. That is approximately 4 years before the present application was lodged. To this Court's mind, there was in-ordinate delay in making the present application. That required an explanation.

10. The reason advanced for the delay was that the applicants were at the time being represented by the firm of **J. M. Isaboke & Company Advocates**. That the sole proprietor of the said firm, Japheth Isaboke, was appointed a State Counsel thereby leading to the winding up of that law firm. That the applicants were not aware of the said fact.

11. This Court is aware of the responsibility bestowed upon litigants to be vigilant in the prosecution of their matters. However, in situations such as the present one where a law firm is wound up abruptly and the process is not well structured, the affected litigants may have challenges in first, knowing the fact of the winding up and secondly, being able to retrieve their files from the wound up law firm.

12. The applicants did not disclose when the law firm was wound up or when they discovered the winding up. They did not also disclose in their affidavit when they discovered that fact. This Court however, is inclined to believe that that must have been a failure on the part of the Counsel who drafted the affidavit and will excuse that failure. The Court will invoke the discretion granted under **Article 159 of the Constitution and Rule 73 of the Probate and Administration Rules** with a view to do justice.

13. What is the justice of this matter? The order that resulted in the dismissal of the subject application was made in the absence of the applicants as well as their aforesaid advocate. I have carefully examined the record. There is an undated Notice to Show Cause on record which reads as follows: -

“NOTICE TO SHOW CAUSE UNDER SECTION 73 OF THE LAWS (sic) OF SUCCESSION ACT CAP 160 LAWS OF KENYA

TAKE NOTICE that the above suit will be mentioned on 17th day of July, 2015 at 9.00am.

You are hereby requested to show cause Why the suit should not be dismissed for want of prosecution”.

14. The Notice was addressed to the law firm of **L. Kimathi Kiara & Co, Advocates** who were on record for the petitioners. The same was served upon that law firm and not the law firm of **J. Isaboke & Co** for the applicants.

15. As expected, on the date of mention, neither the applicants nor their advocates showed up. Instead of the Cause (suit) being mentioned for the petitioners to state why the Cause had taken long to be prosecuted, the advocate for the petitioner applied that the applicant's application dated 1/12/2012 be dismissed.

16. The record shows that the mention was under **section 73 of the Act** for the revocation of the grant. The Court struck out that part of the record that was meant to revoke the grant and acceded to the application for the dismissal of the applicants' application. It is clear that the attention of the Court was not drawn to the fact that the applicants had not been served with that notice. They were unaware of the proceedings of that day.

17. To that extent, the applicants were condemned unheard contrary to the rules of natural justice. They were not given an opportunity, either directly or through their erstwhile advocates, to show cause why their application should not be dismissed.

18. The other issue of concern is that, in the dismissed application, the applicants raised very serious issue regarding the grant. They contended that as lawful heirs, they had been disinherited by the respondents. That the 3rd and 4th respondent had lied to Court that they were daughter and son, respectively of the deceased which fact they knew was untrue. That is a very serious issue that should be determined in the said application.

19. It is worthy to note that the Cause was taken with pre-determined decision to sell the property to the 1st respondent. He appeared in the proceedings as a purchaser and the grant was confirmed as such. In this regard, it is worthwhile that the parties in this cause should be given an opportunity to defend their positions by having the dismissed application heard on merit.

20. As regards prejudice to be suffered by the respondents I see none. This is a succession matter which touches on land a very emotive issue in this country and moreso, in this part of the country,

21. For the foregoing reasons, I find the application dated 16/12/2019 to be meritorious and I allow the same.

22. Since there is a likelihood of 3rd parties being involved if the estate property or portions thereof are disposed or portions thereof are disposed off, it calls for the status quo to be maintained pending the hearing and determination of the matter. That will reduce costs and litigation. Accordingly, under **Section 47** of the Act and **Article 159** of the Constitution and to avoid any disposal and further interference with the estate property. I issue an order of inhibition against **Nyaki/Mulathankari/2767** until the application for revocation is heard and

determined.

23. Each party is to bear own costs.

DATED and DELIVERED at Meru this 12th day of August, 2020.

A. MABEYA

JUDGE