



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MURANG'A

SUCCESSION CAUSE NO. 5 OF 2017

[FORMERLY NAIROBI HIGH COURT P&A CAUSE NO. 543 OF 2006]

RE ESTATE OF GITHAIGA THUKU *alias* THUKU GITHAIGA *alias* LIVINGSTONE THUKU (DECEASED)

HELLEN WANGARI THUKU.....APPLICANT

VERSUS

RICHARD MWANIKI THUKU.....RESPONDENT

RULING NO. 2

1. This matter has a long history. It originated as *Nairobi High Court Succession Cause Number 543 of 2006*.
2. The deceased died testate on 25th July 2005. The executor of his will, Richard Mwaniki Thuku, brought summons for Grant of Probate of Written Will at the High Court at Nairobi. He thereafter sought confirmation of the grant through a Summons dated 26th September 2007.
3. A protest was lodged by Stanley Maina Thuku on the grounds that the will left out some heirs. After hearing the parties, the Court (*Musyoka J*) found that the deceased left a valid will dated 25th February 2004. The protest was dismissed.
4. In the last paragraph of the judgment dated 20th December 2016, the learned judge directed that since majority of the assets were located in Thika and Murang'a, "the cause herein be transferred to the High Court of Kenya at Murang'a for disposal".
5. There are now two competing applications before the court. They are at cross-purposes.
6. One is by Hellen Wangari Thuku [hereafter *the applicant*], who is a daughter of the deceased. She seeks *review* of the decree or to *re-open* the case on the grounds that she and 7 other dependents were left out of the will. Her Notice of motion is dated 20th January 2020 and anchored primarily upon Order 45 of the *Civil Procedure Rules*.
7. She claims that she only became aware of the proceedings on 20th December 2019 through one David Ndekere, a director of Fulilia Company Limited. Her case is that the grant was obtained through misrepresentation or non-disclosure of material facts.
8. The Notice of Motion is contested by the respondent.
9. On the other hand, there is a Summons dated 23rd September 2019 by Richard Mwaniki Thuku [hereafter *the respondent*]. He is the executor of the will. He prays that the directors of Fulilia Company Limited and 7 other named respondents be compelled to transfer 1 share in LR No. Thika Municipality Block No. 10/230 (New Fulilia Hotel Thika) jointly to him and Mary Njeri Thuku in equal shares as per the confirmed grant dated 27th May 2019. There is a similar prayer for transfer of 1 share in LR No. Thika Municipality Block No. 9/133 (Fulilia Hotel Thika).
10. The latter Summons by the respondent is equally opposed by the applicant.
11. I directed the parties to file skeleton submissions. The set of submissions by the applicant relating to the two applications were presented on 29th October 2020. The corresponding set by the respondent was also presented on even date.
12. On 29th October 2020, I heard brief arguments from learned counsel for both parties.

13. I will commence with the applicant's Notice of Motion dated 20th January 2020. It fails for *four* main reasons. Firstly, the issue whether some heirs were left out of the will was determined in the judgment of 20th December 2016 at Nairobi. That is nearly *four years* ago. That delay has been casually wished away by claiming that the applicant, a daughter, was unaware of the proceedings at Nairobi until 2019 when Mr. Ndekere asked her to execute a transfer of the disputed shares.

14. Considering the history of the litigation between close family members, I found it hard to believe and a clear afterthought. There is thus undue laches. When there is long and ill-explained delay, it is deemed to be inexcusable. See *Ivita v Kyumbu* [1984] KLR 441.

15. Secondly, there is nothing truly novel in the Notice of Motion. As I have stated, the High Court at Nairobi precisely dealt with the claims by her brother, Stanley Maina Thuku, that the impugned will had omitted some heirs. That protest was dismissed.

16. Thirdly, the motion does not rise to the threshold for *review*. It instead points more in the direction of an *appeal*. Paraphrased, if it is the applicant's case that the High Court at Nairobi *erred* by upholding the will, the remedy lies in an appeal.

17. Fourthly, the motion is also an *abuse* of court process. Not long ago, to be precise on 6th May 2019, this court ruled on a similar motion for review or setting aside of the decree. This time it was, brought by her brother, Stanley Maina Thuku, the original objector in the High Court at Nairobi and whose protestations were dismissed. His fresh Summons was dated 9th February 2017.

18. I held that there were no grounds for review and dismissed the Summons. So much so that the current Notice of Motion by yet another sibling seeking analogous reliefs on the same grounds falls into the wide genre of *res judicata* at worst or a clever stratagem to *abuse the court* process at its best.

19. For all those reasons, the Notice of Motion is devoid of merit and is dismissed with no order as to costs.

20. I will now turn to the respondent's Summons dated 23rd September 2019. Having found that there are no grounds for review of the decree issued at Nairobi on 16th December 2016, it must follow as a corollary that the resultant grant remains valid.

21. The respondent's prayers for transfer of 1 share in each of the two pieces of land on which are erected the two hotels conforms with the impugned judgment, the proved will and the confirmed grant. The objections by the applicant merely rehearse the old arguments that some heirs were left out of the will which I now find prosaic.

22. The upshot is that the Summons dated 23rd September 2019 is allowed.

23. My final orders are as follows:

a) That the applicant's (*Hellen Wangari Thuku's*) Notice of Motion dated 20th January 2020 is hereby *dismissed* with no order on costs.

b) That the respondent's (*Richard Mwaniki Thuku's*) Summons dated 23rd September 2019 is hereby *allowed* in terms of prayers 2 and 3 thereof with no order on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 19th day of November 2020.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Ms. Kilonzo holding brief for Mr. Murango for the applicant instructed by Murimi Murango & Associates Advocates.

Mr. Muriithi for the respondent instructed by Wambugu Muriithi & Company Advocates.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.