



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 493 OF 2006**

**IN THE MATTER OF THE ESTATE OF HANNAH NJERI KIRITU (DECEASED)**

**JANE WANJIKU KIRITU..... APPLICANT**

**VERSUS**

**DANIEL NJUGUNA KIRITU.....RESPONDENT**

**RULING**

1. The deceased Hannah Njeri Kiritu died on 26<sup>th</sup> January 2002. She was survived by the following children:-

- (a) Jane Wanjiku Kiritu (the applicant);
- (b) Lucy Wanjiru Ng'ang'a;
- (c) Joseph Ngochi Kiritu ((deceased); and
- (d) Daniel Njuguna Kiritu (the respondent).

She left a written Will whose executor was the applicant.

2. The applicant petitioned this court for grant of probate of written Will. The grant was issued on 29<sup>th</sup> May 2006, and confirmed on 3<sup>rd</sup> July 2007. The estate was distributed in accordance with the Will.

3. On 12<sup>th</sup> March 2009 the respondent petitioned the court for the revocation of the grant. The basis of the application was that his father (the deceased's late husband) Kiritu Ngochi alias Kiritu Ngochi Muhia died following which the deceased petitioned Githunguri SRM Court in **Succession Cause No. 11 of 2000**, got grant which was confirmed and she succeeded the estate. The respondent claimed that the deceased was supposed to get only a life interest in the estate but instead shared it and gave herself prime property, including Githunguri/Riuki/504 comprising 1.581 Hectares. He complained of unfair distribution of his father's estate, and stated that it was wrong for her to be registered as proprietor of the properties which she willed away which had led to the present petition. He further claimed that the SPM court at Githunguri did not have jurisdiction to handle his father's estate which was in excess of the two hundred thousand shillings stated in the petition on the subordinate court.

4. On the basis that the application had been served and there was no response, on 29<sup>th</sup> October 2018 the court revoked the grant and ordered for accounts from the applicant. The application for revocation had prayer for a full and accurate statement of accounts by the applicant. The court directed that a fresh joint grant of letters of administration/grant of probate be issued to the respondent and Lucy Wanjiru Ng'ang'a.

5. On 20<sup>th</sup> March 2019 the applicant, under **section 47** of the **Law of Succession Act (Cap 160)** and **rule 73** of the **Probate and Administration Rules**, filed the present application seeking to set aside the *ex parte* proceedings of 20<sup>th</sup> October 2018 and the orders made herein. She sought to be allowed to respond to the application for revocation. Her case was that the application had been heard and determined without her being afforded a hearing. This was because she had not been served with the application or the hearing notice. She stated that throughout these proceedings her advocates were Kinyua Mwaniki & Wainaina Advocates, and no process relating to the application had been served on them. Lucy Wanjiru Ng'ang'a swore an affidavit to support the application. She stated that she was not

aware of the application for revocation until the respondent came to her with orders of 29<sup>th</sup> October 2018 indicating that the grant to the applicant had been revoked and that she had been appointed a co-administrator of the estate of the deceased. She said that she had not asked to be an administrator of the estate of the deceased, and neither was she interested in the administration. Her case was she was suffering from high blood pressure and could not administer the estate.

6. The respondent filed a replying affidavit to state that the application for revocation had been served on the applicant on 3<sup>rd</sup> August 2018 but that she had failed to respond to the same which had led to the orders. The matter was then mentioned on 28<sup>th</sup> November 2018 after he had served the revocation and accounts orders on the applicant. On this day the applicant was represented by counsel who indicated he had not been served with the summons for revocation. He was asked by the court to file an appropriate application. This, in my view, is what led to the present application. The respondent stated that their sister Lucy Wanjiru Ng'ang'a had denied having filed an affidavit to support the application.

7. The applicant filed a further affidavit on 21<sup>st</sup> May 2019 to deny that he had been served with the summons for revocation as alleged, or at all.

8. Counsel for the parties filed respective written submissions which I have considered.

9. The court has discretion, where *ex parte* judgment or order had been entered by the court, at the request of the applicant, to set it aside or vary it on such terms as may be just (**Pithon Waweru Maina –v- Thuka Mugiria [1983] eKLR**). The court has no jurisdiction where it appears that the judgment or order followed a situation where the application had not been served, or properly served (**Shah –v- Mbogo [1967] EA 116**). Where there was service, and he applicant seeks for setting aside to be allowed to defend the application, the court has a wide discretion to determine the matter in a manner that best serves the interest of justice. The discretion is intended to avoid injustice on hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. The applicant should show why the application to set aside should be granted, and the court will, among other things, consider whether his defence or response has merits, why it was not filed, and whether costs should adequately compensate the respondent. It should always be remembered that justice is best served when a matter has been heard and determined on merits, and not when a party has been locked out from the seat of judgment (**KenyaSafari Lodges Hotels Ltd-vs- Tembo Tours & Safaris Ltd [1975] eKLR**).

10. There is no dispute that the applicant was in this proceedings represented by advocates. The application for revocation was not served on them. The respondent, instead, decided to serve the applicant personally. He referred to the affidavit of service dated 3<sup>rd</sup> August 2018 as evidence of service. I have looked at the affidavit sworn by process server Joshua Ndiritu Muturi. He stated that he was accompanied by the respondent to Mairo-Inya Town in Nyahururu where he traced the applicant at her daughter's residence. He served her but she refused to acknowledge. The applicant swore that her residence was at Madaraka Ward in Ol Jororock sub-county in Nyandarua; that she does not live with her daughter at Mairo-Inya, or at all. She denied that she was served.

11. There was no further affidavit, either by the respondent or the process server. I have indicated that there was no reason why the respondent decided to bypass the applicant's counsel and to go and serve on her personally. I have considered the alleged evidence of service on the applicant. I do not believe she was served as alleged, or at all. It follows that the revocation and order for accounts were irregularly entered as there was no service. The same have to be set aside *ex debito justitiae*.

12. Even assuming that the applicant was regularly served, I consider that she was an executor of the written Will of the deceased. On basis of that Will she petitioned the court which issued her a grant which she got confirmed. She shared the estate on basis of the Will. If she wants to defend this position, I find there would be merit in allowing her an opportunity to file a response to the application for revocation.

13. In conclusion, I allow the application and set aside the proceedings and orders of this court that were conducted and issued on 29<sup>th</sup> October 2018. The joint grant issued to the respondent and Lucy Wanjiru Ng'ang'a is revoked.

14. The application for revocation dated 26<sup>th</sup> July 2018 and filed on the same date is reinstated. The applicant is allowed 14 days to file and serve response. The respondent shall respond to it within 14 days of service. The matter shall be mentioned on 30<sup>th</sup> October 2019 for directions on hearing.

15. The costs of the application shall be borne by the respondent.

**DATED and DELIVERED at NAIROBI this 23<sup>RD</sup> day of SEPTEMBER, 2019.**

**A.O. MUCHELULE**

**JUDGE**