



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

SUCCESSION CAUSE NO. 202 OF 2012

(FORMERLY NYERI HIGH COURT SUCCESSION CAUSE NO. 965 OF 2010)

RE ESTATE OF ISAAC MBURU ALIAS ISAAC MBURU WAINAINA (DECEASED)

PETER WAINAINA MBURU.....APPLICANT

VERSUS

JAMES KAMANDE WAINAINA.....RESPONDENT

RULING

1. The applicant has presented *summons* dated 19th May 2017. The application is expressed to be brought under Rule 73 of the Probate and Administration Rules.
2. The applicant prays that the *summons for revocation of grant* dated 26th October 2010 be *struck out* with costs. The applicant avers that the substratum of the impugned *summons* is an alleged *trust* over the property known as Loc. 17/Kamahuha/203. The applicant contends that the issue cannot be canvassed in these succession proceedings; and, that the correct forum is a civil court.
3. The applicant drew my attention to a plaint filed in the lower court in *Murang'a Civil Suit 267 of 2004*. The claimant was James Kamande Wainaina; the respondent was the deceased. The plaintiff had sought a *declaration* that the defendant held the suit property in *trust* for the plaintiff. The applicant submitted that the suit *abated* upon the death of the deceased.
4. The respondent had lodged grounds of opposition. They were filed way out of time. For considered reasons on the record, the grounds were struck out on 18th June 2018. So much so that the supporting affidavit of T. M. Njoroge sworn on 19th May 2017 is *uncontroverted*.
5. However, the court is enjoined by Article 159(2) (d) of the Constitution to do substantial justice to the disputants. See *Edward Steven Mwiti v Peter Irungu & 2 others (No. 2)* Nairobi High Court ELC 105 of 2011[2012] eKLR. The court should maintain “*equality of arms and as far as it is practicable to place the parties on equal footing*”. *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR.
6. I thus allowed learned counsel for the respondent to argue points of law. In a synopsis, he submitted that the interests of justice demand hearing of the suit on merits. He said that the respondent has since lodged a fresh suit in the Environment and Land Court; and, that striking out the original *summons for revocation of the grant* is unjust.
7. I have considered the *summons*, deposition and rival submissions.
8. I agree with the applicant that the question whether a *trust* exists in favour of the respondent cannot be conveniently tried by the succession court. Rule 40 (3) of the Probate and Administration Rules contemplates that situation. It empowers the succession court to refer such a dispute to a civil court; in this case, the Environment and Land Court.
9. I also agree that the respondent has *procrastinated* in the matter. The original suit for declaration of a trust was filed in the year 2004. The deceased died on 19th April 2009. The *summons for revocation* was filed way back on 26th October 2010. That is nearly *eight years* ago. There is no explanation proffered why a fresh suit was only lodged in the year 2017.
10. But I remain alive that this is a family dispute over inheritance. There is an underlying matter of title to land. If the *summons for annulment of the grant* is struck out, the respondent will be left holding the short end of the stick. It will defeat the *overriding objective* of the

court. The fate of any pending suit in the Environment and Land Court will be sealed. See Harit Sheth T/a Harit Sheth Advocate v Shamas Charania [supra].

11. Purely in the interests of justice, I will *disallow* the summons dated 19th May 2017. I am however minded to grant the applicant (Peter Wainaina Mburu) *thrown away* costs. That will perhaps assuage him; and, keep the respondent wide awake.

12. The respondent (James Kamande Wainaina) shall pay the applicant (Peter Wainaina Mburu) *thrown away* costs of Kshs 5,000 within the next *sixty* days. James Kamande Wainaina *shall* also ensure that the pending suit *ELC 495 of 2017* is heard and determined as soon as is practicable and *not later* than *360 days* of today's date. In default, the *summons for revocation of grant* dated 26th October 2010 shall be *struck out*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 26th day of June 2018.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Njoroge for the applicant instructed by T. M. Njoroge Advocate.

Mr. Gachomo holding brief for Mr. Kimwere for the respondent instructed by Kimwere Josphat & Company Advocates.

Ms. Dorcas and Mr. Kiberenge, Court Clerks.