



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO.328 OF 2015

IN THE MATTER OF THE ESTATE OF KIHAGI MBUTHIA (DECEASED)

ANNE NGIMA NGARI.....1ST APPLICANT

ESTHER WAMBUI KINYUA.....2ND APPLICANT

JOHN MUGAMBI KIHAGI.....3RD APPLICANT

-VERSUS-

MARY WANJUGU KIHAGI.....1ST RESPONDENT

JOHN NDERITU NGIBUINI.....2ND RESPONDENT

RULING

Before me was the Summons for Revocation/Amended Grant dated 10th April 2015 filed by Ann Ngima, Esther Wambui Kinyua and John Mugambi Kihagi against Mary Wanjugu Kihagi and John Nderitu Ngibuini.

The applicants' complaint was that the grant of letters of administration of estate intestate was confirmed on 2nd April 1996 in Kerugoya PM Succession Cause No.281 of 1995, the deceased's estate IRIAINI/KAIRIA/439 distributed and new title deeds issued. They now wanted the grant revoked, the titles cancelled and the Estate re-distributed according to their wishes.

On 5th September 2016, the first two applicants made applications to withdraw their application or themselves from the summons for revocation/annulment grant dated 10th April 2015 before Mativo J.

Their respective applications were granted and the 3rd applicant was allowed to proceed by himself with the summons for revocation/annulment of the grant. Directions were given for the hearing of the application by way of oral evidence.

The matter proceeded before me. The applicant's case was heard on 14th June 2017. He testified and did not call any witnesses.

The respondents were heard on 29th November 2017. They had closed their case. Parties agreed to file written submissions by 20th February 2018. The record shows that on 30th January 2018 a summon general was filed by Gacece wa Miano, counsel for the applicant. When the matter came for mention on 20th February 2018 the 1st respondent told the court that she had just been served with the submissions by Mr. Karingithi. He requested for directions from Mr. Gacece wa Miano's application.

Directions were given that since judgment had not been delivered the application be served on all the parties and the same be heard inter-partes on 9th April 2018.

The Summons General dated 24th January 2018 and filed on 30th January 2018 is supported by the affidavit of Ann Ngima Ngari. It seeks orders: -

1. That the earlier orders allowing her to withdraw from the application be set aside.

2. That she be reinstated as a co-applicant for the purposes of the application dated 10th April 2015.
3. That in the alternative she be granted leave to testify on behalf of 3rd applicant John Mugambi Kihagi.
4. That costs be in the cause.

The summons general is brought under rules 49 and 73 of the P&A rules and Section 47 of the Laws of Succession Act. Section 47 provides for the jurisdiction of the High Court **“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.....”**

Rule 49 provides for applications not otherwise provided for **“a person desiring to make an application to the court relating to the estate of a deceased to which no provision is made elsewhere in these rules shall file a summons supported if necessary by affidavit”** and Rule 73 saves the court’s inherent powers to make orders as may be necessary **“for the ends of justice or to prevent abuse of the process of court”**.

Of relevance to the summons general in the applicant’s affidavit in support are paragraphs 19 and 20 where she depones that she and Esther Wambui Kinyua were misled by the 2nd respondent to withdraw from the summon for revocation/annulment of the grant dated 10th April 2015.

The 1st respondent in a replying affidavit filed on 1st March 2018 opposed the application on the grounds that the applicant had voluntarily withdrawn from the proceedings and that the application was mischievous, vexatious and a gross abuse of the process of court.

The 2nd respondent reiterated the proceedings through which the applicant and Esther Wambui Kinyua withdrew from the summons for Revocation/annulment of the grant deponing that the only reason the application was filed was to give the applicant the opportunity to fill in gaps pointed out in the submissions filed by respondents.

His counsel Maina Karingithi also filed grounds of opposition to the application stating that the applicant had withdrawn voluntarily and there was no allegation of fraud, mistake, error or misrepresentation in doing so; that no legal basis had been set for the said application, no application to had been made to arrest the judgment, and no application made by the applicant in the summons for revocation/annulment of the grant to re-open his case.

The applicant filed a further affidavit on 12th May 2018 clarifying issues she deemed to be uncertain in her previous affidavit.

In arguing the application Mr. Gacece wa Miano submitted that the applicant was mistaken that their deceased father had bequeathed L.R Iriaini/Kairia/1040 to the 1st respondent because the same belonged to their mother Lucy Wairimu Kihagi (deceased). However, as per the applicant’s affidavit the 1st respondent had ‘given’ the said parcel of land to a total stranger to the family. This stranger had subsequently the title to obtain a loan, defaulted on the loan and caused the land to be sold public auction and that the applicant had a right as a child of deceased to be heard. He submitted further that the 1st respondent had lied on oath that she was unmarried yet they had her marriage photo as evidence to the contrary, rendering her an incredible witness.

The 1st respondent relied on her replying affidavit and submitted that the applicant was aware of all the cases relating to their father’s estate, and that even if she was married she was the child of Kihagi Mbuthia.

Mr. Karingithi for 2nd respondent submitted that the allegations against the 2nd respondent were unfounded and that the applicant in the summons for revocation/annulment of the grant had not applied to re-open his case. He pointed out that the applicant had not fulfilled the requirement in an application of this nature of demonstrating that she was bringing new evidence which was not within her knowledge at the time of her withdrawal from the Summons for revocation of the grant. He clarified that the record showed that L.R. Iriaini/ Kairia/1040 was registered in the name of Lucy Wairimu mother to applicant and it was the said Lucy Wairimu who had sold it to a 3rd party and not the 1st respondent.

From the foregoing, the only issue for determination is whether the application dated 24th January 2018 has any merit.

Neither party cited any authorities for the positions taken.

The applicant is ideally asking this court to do 2 things: -

1. Reinstate the application already withdrawn.
2. Re-open the applicants’ case in the summon for revocation/annulment of the grant to allow her to testify on his behalf.

On the 1st issue, the record speaks for itself that the applicant and her sister first withdrew their counsel and secondly withdrew their application and from the application as filed. The allegation made in the applicant’s affidavit that they were misled by the 2nd respondent is not supported by any evidence. It is merely stated in the affidavit without any explanation. Hence I find that that request is untenable.

On the 2nd request, the applicant in the summons for revocation/annulment of the grant has not made any application to re-open his case. Neither did he mention anywhere that he needed the evidence of the applicant herein in support of his case. He testified and closed his case

without calling any evidence.

In dealing with similar question as to whether the plaintiff could re-open his case ,Justice Kasango in **Samuel Kiti Lewa -vs-Housing Finance Co. of Kenya Ltd and Another (2015) eKLR** citing the Uganda case of **Simba Telecom -Vs- Karuhanga & Another (2014)UGHC 98** where the court referred to the Australian case of **Smith -vs- New South Wales (1997) HCA 36, (1992) 176 CLR 256** refused the plaintiff's application on the ground that the plaintiff **“did not explain why he did not sufficiently testify when he initially gave evidence and why the Land Registrar is to be called to testify after the defendants had closed their case”**.

That case speaks to this case in that the applicant seeks to re- open the applicant's case after everyone has testified, after submissions have been filed, and the matter is pending judgment. I find the excuse given that she was misled over two years ago to withdraw from the case to be absolutely untenable. A perusal of the supporting affidavit reveals that it reproduces almost point by point the applicant's affidavit in the summons for revocation/annulment of grant. It does not say what new evidence the applicant has that she was not aware of at the time of withdrawing the application. Two years is a long time and amounts to obvious unexplained inordinate delay. It cannot be lost to this court that this could be an attempt to fill in gaps noted after all these proceedings have taken place.

The action of first withdrawing counsel, then withdrawing the and from the application appear very deliberate. Nowhere has it been explained what benefit was to accrue to the 2nd respondent upon the applicant's withdrawal from the matter.

In as much as the court has the inherent jurisdiction to make orders to ensure the cause of justice, in this case it is the applicant who is in fact doing and has done acts that amount to an abuse of the process of court, and which have already caused delay of justice in this case. the applicant has laid no basis for her application, has not demonstrated that she has new evidence that she was not aware of, and worse still, has made no explanation for the two-year-old delay in bringing this application. It is not sufficient that this is a family matter. That alone cannot be a panacea for all the ills I have set out herein above.

It is enough that I have heard her application. I have find it without no merit. The same is dismissed with no orders as to costs.

Dated, delivered and signed at Nyeri this 28th day of Sept. 2018.

Mumbua T Matheka

Judge

Albert

In the presence of:

Parties and Counsel N/A

The Judgment will be delivered on 18th October 2018