



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO 1184 OF 2010

(IN THE MATTER OF THE ESTATE OF NJOROGE S/O GITHAIGA alias MATHEW NJOROGE GITHAIGA)

ANDREW MWANGI NJOROGE.....APPLICANT

VERSUS

PATRICK NDIRANGU NJOROGE.....1ST RESPONDENT

EPHANTUS NDIRANGU NJOROGE.....2ND RESPONDENT

GERALD GICHOHI NJOROGE.....3RD RESPONDENT

RULING

By an application dated 14th May, 2015, the respondents sought for an order to set aside an order issued by this court pursuant to its ruling delivered on 19th March, 2015 (Wakiaga, J.). When this application came up for hearing *inter partes* on 21st November, 2016, Mr Anthony Mwangi Ng'ang'a, the learned counsel for the applicant, informed this honourable court that there was an earlier application for revocation of grant dated 1st February, 2013 which, apparently, had not been disposed of. Based on this information I directed the hearing of this application to be prioritised and the same to be disposed of by way of oral evidence.

When the applicant's summons for revocation of grant came up for hearing on 8th February, 2017 Mr Wamahiu held the applicant's counsel's brief and sought for an adjournment on the ground that he, the counsel for the applicant, had "rushed to Nairobi for an emergency". The application was thus adjourned since the respondent's counsel was also absent in any event.

The summons for revocation of grant was scheduled hearing again on 23rd March, 2017. This time round, Mr Waruinge held brief for counsel for the applicant and again applied for adjournment on the same ground as in the previous application for adjournment that counsel for the applicant had rushed to Nairobi to attend to an urgent personal matter. Mr Kariuki for the respondents opposed the application because he was ready to proceed.

For the reasons I gave in my ruling, I rejected the application for adjournment. I noted, inter alia, that it cannot be a coincidence that every time the applicant's application comes up for hearing, his counsel has to attend to some emergency in Nairobi. The file was therefore placed aside for hearing at 11.25 AM on the material day.

At that time neither the applicant nor his client was in court when the matter was called out. Against this background Mr Kariuki applied for the matter to be dismissed for want of prosecution. I allowed the application and dismissed the summons for revocation of grant accordingly.

In the wake of the dismissal order, the applicant made the application dated 30th March, 2017 but filed it in court on 12th April, 2017 seeking to set aside, review or vary the dismissal order. It is this application that is the subject of this ruling.

The application is supported by the affidavit of Anthony Mwangi Ng'ang'a, who as noted, is counsel for the applicant. In that affidavit counsel deposes that his client was always in court whenever this matter came up for hearing. This is obviously untrue because his client never responded every time this cause was called out.

Counsel has also deposed that he could not attend court the last time his client's application came up for hearing because he had been belatedly notified to take his daughter from school in Nairobi on the material date. I am unable to accept this reason because there is no evidence of any notice of any form asking counsel to collect his daughter from school as alleged.

I am inclined to agree with respondents that the applicant's application lacks any merit and is calculated to delay the distribution of the deceased's estate.

Be that as it may, I have since noted from the record that the summons for revocation of grant which counsel for the applicant effectively misled me into believing that it is pending for determination was in fact a subject of the ruling by my predecessor at the station, Wakiaga J. This is clear from the very first paragraph of the ruling where my brother wrote as follows:

1. There are two applications pending before court:

a) Application for revocation of grant dated 1st February, 2013 and filed on the same date by ANDREW MWANGI NJOROGE under certificate of urgency through the law firm of C.M. KINGORI & CO. ADVOCATES.

b) Application dated 20th May, 2013 by the said ANDREW MWANGI NJOROGE through the law firm of NGANGA MUNENE & CO. ADVOCATE, in which they sought that the Respondents PATRICK RUORO NJOROGE, EPANTUS NDIRANGU NJOROGE AND GERLAD GICHOHI NJOROGE be committed to civil jail for a period not exceeding six (6) months for being in contempt of court order issued on 25th February, 2013.

It is obvious from this paragraph that my brother acquitted himself on the two applications; for our purposes, it is the application dated 1st February, 2013 that is pertinent. Having been deliberated upon and a decision rendered, it would be out of step for me to reopen the same application and dispose of it as if it has not been heard and resolved.

It follows that even if the applicant's present application was to succeed, it would be in vain because I am not prepared to entertain a regurgitation of an application that has effectively been disposed of. I should suppose that if, for any reason, the applicant is aggrieved by the decision rendered in respect of his application of 1st February, 2013, the appropriate course should have been to appeal against it rather than misrepresent to court that the application has not been disposed of.

I am inclined to dismiss the applicant's application dated 30th March, 2017 with costs to the respondents. For the reasons I have given, and for completeness of record I vacate the orders I made on 21st November, 2016 directing that the applicant's application dated 1st February, 2013 be heard. It is so ordered.

Signed, dated and delivered in open court this 23rd day of November, 2018

Ngaah Jairus

JUDGE