



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO.117 OF 2010
IN THE MATTER OF THE ESTATE OF PETER MUIGA WAMBUGU
JANE NYOKABI MUIGA
LEMMY WAMBUGU MUIGA.....APPLICANTS
VERSUS
GEORGE GITONGA WAMBUGU.....RESPONDENT
RULING

1. The application is dated the 30th day of November, 2015 and is made under a Certificate of Urgency and is premised under the provisions of Rules 49 and 59 of the Probate & Administration Rules;
2. The Applicants seek the following orders;
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. **THAT the applicants and any other person wishing to object to the proposed confirmation pursuant to the application dated the 30th September, 2015 be granted an opportunity to file their protests;**
 - v. **THAT costs of this application be provided for.**

APPLICANTS CASE

3. This application is supported by the affidavits made by Jane Nyokabi Muiga, Betty Wanjiku Muiga and Gerald Kariuki Wambugu dated the 30th day of November, 2015 in which they depone as follows;
4. That the application dated 30th August, 2015 was never served on themselves nor upon their advocates, namely, the firm of M.K.Kiminda Advocates who had conduct of the matter on their behalf;
5. That failure to serve and to notify the applicants advocate who was on record was prejudicial as the applicants were denied the opportunity to comply with Rule 40 of the Probate & Administration Rules and other subsequent requirements;

6. That the respondent's counsel admitted in court that service had not been effected;

7. That the Summons for the confirmation of the Grant is dated the 30/09/2015 and was brought under Section 71 of the Law of Succession Act and Rule 40 of the Probate & Administration Rules; under Rule 40(6) there is a procedure to be followed by an applicant; the respondent admits that there was no service effected of the Summons for Confirmation; that the applicant's counsel herein saw the matter cause listed on the 24/11/2015 and was in attendance; that he informed the court that he was not aware of the date but the court nevertheless proceeded to confirm the matter;

8. That on the 15/03/2013 directions were given by the Hon. Justice Wakiaga upon issuing a Grant of Probate directing that the dispute be resolved at the stage of distribution; that notwithstanding the matter was heard and disposed of without compliance with Rule 40(6) of the Probate & Administration Rules.

9. Counsel submitted that the failure to attend court was not deliberate; and in the interest of justice the orders sought for setting aside of the order made on the 24/11/2015 be granted; that costs be provided.

RESPONDENTS RESPONSE

10. The application was opposed and the respondent relied on the Replying Affidavit made on the 15th December, 2015 by the petitioner/respondent; therein she admits that the summons for confirmation was not served; that the confirmation was based on the existing Will which made service immaterial as the presence of the applicants would not change anything;

11. That directions were given on 28/10/2011 that the matter be treated as Testate and on the 15/03/2013 a Grant of Probate was issued that the will was valid; the applicants herein were at liberty to challenge the will;

12. The applicants had filed joint objections on the 20/04/2011 and thereafter for 4 ½ years became indolent;

13. That no appeal has been filed by the applicants against the order for confirmation; and that there was also no application for revocation; that after this court confirmed the Grant it became '*functus officio*' ;

14. Counsel submitted that the application was not merited and urged the court to dismiss the application with costs.

ISSUES FOR DETERMINATION

15. After hearing the rival arguments this court has framed two issues for determination;

i. Whether a party may be punished for non- attendance despite having not been served with a hearing notice;

ii. Costs

ANALYSIS

Whether a party may be punished for non- attendance despite having not been served with a hearing notice;

16. On the 24/11/2015 Counsel for the applicants stated that he had seen the matter cause listed and attended the hearing and informed the court that the applicants had filed an objection on the 20/03/2011; and that he was unable to proceed due to the fact that he had just sighted the matter on the cause list and had not carried his file; and that he had not been notified of the hearing date;

17. Upon perusal of the court record it reflects that the date of 24/11/2015 was taken ex-parte and that

there is no affidavit of service demonstrating that a hearing notice was served upon the firm representing the applicants;

18. It is this court's considered view that the mere presence of the applicants' counsel in court at the hearing on the 24/11/2015 did not constitute a formal appearance as he had not been served with a hearing notice; and it does not matter for what purpose he appeared or what action he took on appearance;

19. The fact of the matter is that the applicants herein were not in attendance on the date set down for hearing of the application for confirmation as none of them had been informed of the hearing date nor had they been served with a hearing notice; it therefore follows that the applicants should not be penalized for not being in attendance and should be granted an opportunity to be heard.

20. It is the duty of this court to act judiciously so as to ensure that the litigants do not suffer injustice or hardship as a result of non-compliance of the rules of procedure; in this instance the respondent is found to have failed to inform the court of the existence of an Objection; irrespective of the fact that there was an existing will it was incumbent upon the respondent to annex to the application a written consent duly signed by the persons beneficially entitled; it is noted that such a document was not annexed by the respondent; therefore in the absence of this document the presumption is that the persons beneficially entitled being the applicants herein had not consented in writing in accordance with the provisions of Rule 40(8) of the Probate & Administration Rules;

21. This court is also guided by the principles of law that the administration of justice normally requires that the substance of all disputes be investigated and decided on merits; and that parties must be given an opportunity to be heard and to make their presentations and to explain their case;

22. Surprisingly a crucial prayer does not feature in the instant application; in that the applicants have not requested for an order for the setting aside of the Order of 24/11/2015 which should in the circumstances have been made; it is trite law that parties are bound by their pleadings; therefore it is not possible in law for this court to make such an order as it has not been pleaded; nevertheless this court finds that this is a suitable case for it to invoke its inherent powers to meet the necessary ends of justice and will stay the execution of the orders made on the 24/11/2015 pending the hearing and determination of the Objection proceedings filed by the applicants;

FINDINGS & DETERMINATION

23. The execution of the order made on the 24/11/2015 is hereby stayed pending the hearing and determination of the Objection filed by applicants.

24. The applicants are directed to list the Objection contesting the will for hearing within the next 120 days; in default this order will stand vacated; and the respondent shall be at liberty to apply for execution of the Certificate of Confirmation.

25. The respondent shall bear the costs of this application.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 27th day of July, 2017.

HON.A. MSHILA

JUDGE