



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO 436 OF 2002**

**and**

**SUCCESSION CAUSE NO. 854 OF 2014**

**IN THE MATTER OF THE ESTATE OF DUNCAN WAITHUO MUKAMI- DECEASED**

**Peter Muturi Waithuo & Another.....Applicants**

**Versus**

**Margaret Nyakarima Waithuo & Another.....Respondents**

**RULING**

The issue for determination is which of the two succession causes, namely numbers **436** of 2002 and **854** of 2014 relating to the estate of the above deceased person ought to proceed and which of the two ought to be terminated.

To make the said determination, it is necessary to examine the two files in detail. I will commence with Succession cause number **436** of **2002** filed by the Respondent **Margaret Nyakarima Wauthuo**. However, there is no consent to making of the grant signed by the other persons who could have applied for the grant in priority with the petitioner nor was a citation issued to them.

The grant was gazetted on 25<sup>th</sup> July 2003 and the same was confirmed by the court. No consent to the said confirmation or consent to mode of distribution was filed as required even though there is an affidavit of service showing that the applicants herein were served with the application but declined to sign.

The confirmed grant shows that title number **Thengenge/Karia/297** is to be shared in four equal portions among the following:-

*David Mkumi Waithuu*

*Peter Muturi Waithuo*

*Margaret Nyakarima Waithuo*

*David Wachira Waithuo*

On 14<sup>th</sup> October 2014 **Peter Muturi Waithuo**, took out citations citing **Maragaret Nyakarima** and **Margaret Wanjiku Waithuo** to accept or refuse letters of administration intestate to the deceased estate under Rule 21 of the Probate and Administration Rules. The reasons offered in the affidavit in support of the said citation is that the cited persons had not taken out letters of administration to the deceased's estate and had refused to sign the necessary papers to institute succession proceedings in court. There is an affidavit of service dated 30<sup>th</sup> October 2014 showing that the Respondents were served with the citation. No papers were filed in response to the said citation.

On 28<sup>th</sup> November 2014, **Peter Muturi Waithuo** petitioned to this honourable court for a grant of letters of administration to the deceased's estate, the grant was issued on 16<sup>th</sup> March 2015 and on 3<sup>rd</sup> September 2015, he applied for the said grant to be confirmed. The consent to the said confirmation is only signed by **David Makumi Waithuo**. The application was served upon the Respondents herein and the first Respondent instructed the firm of Karweru Co advocates who filed the affidavit sworn on 2<sup>nd</sup> December 2015 deposing *inter alia* that he represented the first Respondent in succession cause no. 436 of 2002, that the petitioner herein also attended to his office and signed forms **RL7** and **RL 19** and annexed copies of the said forms, and added that the said forms have since been paid for and lodged at the lands office and annexed a receipt in support of the said position. Further, counsel averred that the proposed sub-division in the applicants application is similar to the sub-division in the confirmed grant issued in succession cause no. 436 of 2002.

The applicant, **Peter Muturi Waithuo** filed a replying affidavit on 14<sup>th</sup> December 2015 in which he averred *inter alia* as follows:-

- i. *That they never appeared during the confirmation of the grant in Succ No 436 of 2002 and wondered why the case took up to 14 years to be concluded.*
- ii. *That they filed Succ case No, 854 of 2014 in October 2014 after the Respondents' were served with citations and did not respond to the citations and that they have kept the Respondents informed of the progress.*

There appears to be a deliberate misuse and abuse of court processes which should not be condoned at all. The Petitioner in Succ Cause No. 854 of 2014 knew of the existence of the first case but complain that it took long to be concluded, hence the reason why they filed the second case. The documents annexed to the affidavit of Karweru advocate show that they signed forms **RL7** & **RL 19** and their photographs are annexed thereto. They have not said that they were dissatisfied with the mode of distribution in the said grant. We cannot have two succession files in respect of the same estate. This court cannot condone such a flagrant misuse of court process. The applicants were misguided in filing a second case. If they were aggrieved with the grant issued in Succ Cause No 436 of 2002, the legal option was to apply for its revocation if they had grounds rather than commence a second case relating to the same estate.

Rule 73 of the Probate and Administration Rules provides that:-

*“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”*

In *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others*<sup>[1]</sup> this court observed as follows:-

*"It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black law dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use "An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use".[2]*

*The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. ....It is recognized that the abuse of process may lie in either*

*proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.*<sup>[3]</sup> The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*
- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.*
- (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.*
- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*
- (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.*<sup>[4]</sup>
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*
- (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.*<sup>[5]</sup>

In the words of **Oputa J.SC** (as he then was) in the Nigerian case of *Amaefule & other Vs The State*<sup>[6]</sup> he defined abuse of judicial process as:

*“A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process.”*

In yet another Nigerian case of *Agwusin Vv Ojichie*. Justice Niki Tobi JSC observed:-

*“that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.”*

In the above cited case, this court observed as follows:-

*"It's settled law that a litigant has no right to pursue paripassu two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available to the petitioners simultaneously. The petitioners cannot lawfully file two similar petitions as they have done. The pursuit of the two processes at the same time constitutes and amount to abuse of court/legal process."*<sup>[7]</sup>

Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.<sup>[8]</sup> The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.<sup>[9]</sup>

Turning to these two cases, I find no difficulty in concluding that the two cases relate to the same estate and that the act of filing the second case amounts to gross abuse of court process. I hold that this is a proper case for the court to invoke the provisions of Rule 73 cited above to make such an order as may be necessary for the ends of justice to be met and in this connection I find that ends of justice do demand that succession cause number 854 of 2014 be struck off and I hereby dismiss the said cause.

The petitioner(s) in the said cause are at liberty if they so wish to bring such application(s) as they may deem fit in succession cause no. 436 of 2002 to ventilate their grievancies if they have been aggrieved by the grant or orders made in the said cause.

No orders as to costs.

Right of appeal 30 days

Dated at Nyeri this 27<sup>th</sup> day of January 2016

**John M. Mativo**

**Judge**

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<sup>[1]</sup> Succ Cause no 920 of 2009

<sup>[2]</sup>Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

<sup>[3]</sup> Public Drug Co V Breyerke cream Co, 347, Pa 346, 32A 2d 413, 415

<sup>[4]</sup> Jadesimi V Okotie Eboh (1986) 1NWLR (Pt 16) 264

<sup>[5]</sup> (2007) 16 NWLR (319) 335.

<sup>[6]</sup> (1998) 4SCNJ 69 at 87.

<sup>[7]</sup> Supra note 1

<sup>[8]</sup>Ibid