



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 2491 OF 2014

IN THE MATTER OF THE ESTATE OF GEORGE KAGIMBI MBOTE (DECEASED)

ROSALIA WAIRIMU KAGIMBI.....APPLICANT

AND

FIDELIS WANJIRU KIMANI

MICHAEL KIMANI WANJIRU

MARYANNE WANJIKU WANJIRU.....OBJECTORS

R U L I N G

1. The deceased to whose Estate these proceedings relate is George Kagimbi Mbote who died on 29th June, 2014. The Chief's widow Rosalia Wairimu Kagimbi (hereinafter the Applicant) obtained Letters of Administration in Limuru succession No. 128 of 2014 on 25th July 2014, and confirmed on 23rd October, 2014. On 24th November, 2015 the Applicant filed a **Notice of Motion** under **Order 45 rule 1** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act, Section 30** of the **Succession Act, Article 40** of the **Constitution** of Kenya seeking orders of the court to discharge, vary or set aside the ex-parte orders granted. While in the process of distributing the estate, Fidelis Wanjiru Kimani (hereinafter the Objector), applied for injunctive orders barring the Applicant from distributing the estate for reasons that she was also a widow of the deceased.

2. The grounds of the application as contained in the face thereof are that the said order has caused great hardship, inconvenience and financial loss/difficulties to the Administratrix (herein the Applicant) who resides and works in the United States of America. That there have are new and important matters of evidence which though were within the knowledge of the Applicant, they were not presented to the court during the granting of the orders which were granted ex-parte and without the presence of the Applicant.

3. The Applicant alleges that she is under threat of a civil suit regarding plot No. 3485/10 of certificate No. 018. That the leave to the Applicant by her employer in the USA has since lapsed and she risks losing her job permanently and yet her children are in college and in dire need of fees and other financial provisions.

4. That the Applicant lives in a rental house where she caters for her rent and other bills, yet the money collected from the estate is deposited in joint names of both parties' advocates hence the Applicant has no source of income. She urges that it would be in the interest of justice for the interim orders granted to the

Objectors to be lifted, reviewed and or varied to avoid causing her hardship.

5. The Applicant swore an affidavit dated 27th November, 2015 in which she deposed that she is the Administratrix of the deceased's estate and that she applied for Letters of Administration in Limuru succession No. 128 of 2014 which were confirmed on 23rd October, 2014.

6. The Applicant avers that she and the deceased got married in church on 3rd November, 1984 and were issued with a certificate No. 541940. That their marriage was never dissolved. That although the Objector purportedly filed in court a document to show that dowry was paid by the deceased to one Mary Wanjiku, on her behalf, the three witnesses named did not execute the document.

7. The Applicant also avers that Mr. Mbote Mundia, the father-in-law to the Applicant and John Nyoro Gathayo, a cousin to the deceased swore affidavits in which they deposed to have known the Applicant as the only wife of the deceased. That the Chief of Kahawa Sukari Location cancelled his earlier letter dated 18th August, 2014, in which he had stated that the Objector was a wife to the deceased after he conducted investigations, and discovered that the Objector was the caretaker of the deceased and not his wife.

8. The Applicant argues that the Objector cannot claim to have acquired Plot No.3485/10 jointly with the deceased in 1989, and yet her National Identity card No.13749946, indicates that she was born on 27th November, 1975 which implies that the Objector acquired the said plot with the deceased when she was of minority age. Further that the Objector in a letter dated 9th October, 2014, withdrew her claim in pursuit of motor vehicle Reg No. KBV 991 C in which the deceased was involved in a fatal accident.

9. The Objectors have opposed the application on grounds that the Applicant has not shown sufficient grounds or reasons to warrant the granting of the orders sought. That the application lacks merit, is an abuse of court process and is intended to hide mischief since the Applicant has interfered and intermeddled with the deceased's estate despite the court orders being in place.

10. The Objector argues that the speed at which the Applicant petitioned for Letters of Administration and the subsequent confirmation was suspect, since the whole process took only two months. That the Applicant had also filed another case in the Chief Magistrate's Court at Thika, Misc. Application No.118 of 2014 in which she had unlawfully and illegally instructed Fantasy Auctioneers to levy distress for non-existent rent arrears and a proclamation of attachable movable properties was issued against her in Kahawa Sukari Plot No.3485/10 where she resided with the deceased.

11. The Objector further avers that should the court allow the applicant's application, then the estate is likely to be wasted using the certificate of confirmation of grant issued by the Limuru court and her family is likely to be rendered destitute. She states that she was legally married to the deceased and that the Applicant was the estranged wife of the deceased for over five (5) years before his demise. That as much as Plot No. 3485/10 was bought by the deceased, it was developed by both the Objector and the deceased.

12. The Objector denied having withdrawn her claim for motor vehicle registration No. KBV 991C and asserts that the Applicant followed up the claim behind her back and was paid Kshs.850,000/= by CIC Insurance Ltd being compensation for loss of life of the deceased. That the Applicant has refused to deposit the said money in the joint bank account despite a court order to do so.

13. Mr. Maina learned counsel, for the Applicant filed written submissions in which he states that the Objectors on 24th November, 2014, sought and obtained interim orders staying the execution of the orders issued in Limuru Succession Cause No. 128 of 2014, following the confirmation of Grant issued to the Applicant. The orders thereby stayed the distribution of the estate of the deceased and barred the Applicant from levying distress in the property that the Objector continues to occupy and which property is part of the estate of the deceased.

14. Mr. Maina argues that the Objector misled the court to believe that she was a co-wife of the

Applicant, and was therefore entitled to inherit the estate and also to occupy the property which she currently occupies without any distress for rent being levied against her. That on 1st December, 2014, the Objectors also sought and obtained orders to the effect that all rent collected from Ruiru/Kiu Block 13/468 be deposited in the joint account which was to be opened in the names of the Advocates for both parties.

15. Counsel submits that the Applicant and the deceased worked and resided in the United States of America until 24th December, 2012 when the deceased returned to Kenya in order to develop the properties they had acquired in the country. That when the deceased passed on, the Applicant sought permission from her employer for purposes of making burial arrangements.

16. Counsel states that after the Applicant had acquired the Letters of Administration and Confirmation of Grant, the Objectors filed two applications under certificate of urgency seeking for the revocation of the grant on grounds that:

a) The objector is a second wife to the deceased and her children, Michael Kimani Wanjiru and Maryanne Wanjiku Wanjiru are step children of the deceased.

b) By virtue of the above, the Objector and her children ought to benefit from the deceased estate.

c) The Applicant with a view of disinheriting the Objectors concealed material facts from the court that the Objector is her co-wife and a dependant to the deceased and therefore deserved to benefit from the estate.

17. Counsel states that there were important matters of evidence which were within the knowledge of the Applicant, which were not presented to court at the stage when the Objector sought for grant of interim orders, since the Applicant was not given a chance to present her case before the orders were issued.

18. Counsel referred the court to the Court of Appeal decision in **CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR** which addressed the principle applicable in an application for setting aside *ex parte* interim orders.

19. Counsel further submits that whenever the Applicant sets the matter down for hearing, the Objectors always find excuses to delay the matter. That the Objectors are currently living in one of the properties forming part of the estate without paying any rent since obtaining the orders staying any distress for rent against her by the Applicant. That the applications by the Objectors are an abuse of the court process.

20. Counsel states that the Applicant has since lost her job in the USA thereby unfairly losing her sole source of livelihood, yet the Objectors are reluctant to prosecute this matter. At the same time they continue to unfairly enjoy the *ex parte* orders at the expense of the Applicant.

21. On the issue of delay Counsel referred to the case of **Stephen Somek Takwanyi & Another vs. David Mbutia Githara & 2 others Nairobi (Milimani) HCCC No. 363 of 2009** in which Kimaru, J dealing with the issue of abuse of the process of the court.

22. On 26th July 2016 Mrs. Njuguna Learned Counsel filed submissions for the 1st Objector in which she has opposed the application relying on the replying affidavit sworn by the Objector on 25th July 2016. She states that the orders the court is being asked to discharge are those staying the orders in Limuru succession cause no 128 of 2014 which were granted on 24th November, 2014.

23. Mrs. Njuguna submits that there were further orders staying unlawful and irregular distress for rent by the Applicant against the Objector at her matrimonial home Plot No. 3485/10 Kahawa Sukari. That the orders of 1st December 2014 were not granted *ex parte* and the Applicant was given 21 days to respond to the summons for revocation. That a date was to be taken at the registry for directions.

24. Counsel contends that the court ordered the rent collected from Ruiru /Kiu 13468 to be deposited in a joint interest earning account, which monies will be distributed accordingly at the appropriate time and therefore the Objector is not benefiting personally. She argues that pending the hearing and determination of the summons for revocation the Objector should stay in the matrimonial home where she lived with the deceased and her two children.

25. Counsel asserts that since the Applicant has been living in the USA, she has no matrimonial home to protect in Kenya. That the Objector developed the matrimonial home through monetary contribution with the deceased and should not be harassed out of the property.

26. Having that set out the rival arguments. The issue which rays itself for determination is whether it is in the interest of justice in the circumstances of this cause, to vary or set aside the *ex parte* interim orders granted to the Objector on 24th November 2014.

27. The Court of Appeal decision in **Maina v Mugiria Civil Appeal No. 27 of 1982 (unreported)**, outlines the court's wide and unfettered discretion to set aside an *ex parte* Judgement or Order. It sets out **the principles governing the exercise of the judicial discretion to set aside an *ex parte* judgment obtained in the absence of an appearance or defence by the defendant, or upon the failure of either party to attend the hearing as follows:**

a. Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E.

b. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.

c. Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93".

The object of the court is therefore to do justice to the parties to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error. The object is not to assist in the obstruction or delay of the course of justice.

28. Setting aside is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. See the decision of Kimaru J in the case of **Stephen Somek Takwanyi & Another vs. David Mbuthia Githara & 2 others Nairobi (Milimani) HCCC No. 363 of 2009.**

29. The Court of Appeal case in **CMC Holdings Ltd v Jame Mumo Nzioki [2004] eKLR** to which Counsel for the Applicant referred the court addressed the issue of setting aside *ex parte* interim orders thus:

"(iv) Applying the principle that the Courts discretion to set aside an *ex-parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence,

or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause by justice, the motion should be refused”

30. In her supporting affidavit the Objector averred that she was a wife to the deceased having conducted a Kikuyu Customary Marriage. That plot No. 3485/10 at Kahawa Sukari registered as share certificate No. 18 issued by Muoroto Housing Company Limited was bought and developed through the joint efforts of the Objector and the deceased. It is on these grounds that the court granted the interim orders two years ago.

31. The court notes that the Applicant and the deceased had contracted a church wedding which was never dissolved. Therefore even if the allegations by the Objector were true, that she and the deceased contracted a customary marriage that marriage was *void abinitio* because the deceased lacked capacity to enter into a second marriage.

32. The court also notes that by the Objector’s own averments in her supporting affidavit, she did not participate in the burial arrangements of the deceased. Further that what the Objector presents as proof of marriage is a handwritten paper which was not executed and cannot take the place of a marriage certificate.

33. Prima facie therefore, the Applicant is the widow of the deceased and the grant of Letters of Administration to the estate of the deceased issued to her has not been revoked. It is therefore evident that in the exercise of its discretion the court misdirected itself, based on the evidence supplied by the Objector to arrive at a decision which may result in injustice to the beneficiary of the estate.

34. On the issue of delay it has also been complained that whenever the Applicant sets the matter down for hearing, the Objectors always find excuses to delay the matter. That at the same time they continue to unfairly enjoy the *exparte* orders at the expense of the Applicant.

35. **Warsame J. as he then was**, in the case of **Mobil Kitale Service Station v Mobil Oil Kenya Ltd** HCCC No. 205 of 1990 (unreported) addressed the issue of delay as follows:

“It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously”.

The provisions of **section 1A** of the *Civil Procedure Act* command that:

“The overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

With all the foregoing in mind as well as the fact that the Objector has not been keen to prosecute her summons for revocation of grant I have no hesitation in granting the Applicant’s prayers sought.

36. In the premise the court finds that the application dated 24th November, 2015 has merit and is allowed.

SIGNED DATED and DELIVERED in open court this **15th day of December, 2016.**

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L. A. ACHODE

JUDGE