



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 798 OF 2008

IN THE MATTER OF THE ESTATE OF NZEMBI MUSILA (DECEASED)

JOHN MIGWI.....1ST PETITIONER/APPLICANT

MUTAVA MUSILA.....2ND PETITIONER/APPLICANT

versus

MACHARIA CHEGE PROTESTER/RESPONDENT

R U L I N G

1. The grant that was issued herein was revoked on the

29th February, 2012 by **Makhandia J.** (as he then was) following a protest filed by **Macharia Chege**. Parties were directed to prosecute an earlier succession cause that was filed in the High Court at Nairobi to finality.

2. On the **26th April, 2012** the Petitioners filed an application seeking to be heard Exparte. They prayed for setting aside and/or varying the ruling delivered on the **29th February, 2012**. They also sought an order maintaining the grant in order for the application to be heard contemporaneously with the protest.
3. The application is premised on grounds that the non-attendance of the applicants/petitioners and their advocates was not intended; Counsel for the Protester deliberately or by oversight failed to serve the mention notice upon the applicant's advocates firm. That the **Nairobi Succession Cause No. 1097 of 2008** was a citation that has been overtaken by events in view of the petition herein.
4. In the affidavit in support of the application, it is averred that the Petitioners retained services of **M/s Musyoka Kimeu & Company Advocates** instead of **J. M. Mutinda & Company Advocates** on the **5th December, 2011**. It was denied that the advocates appeared in court on the **5th December, 2011** and **20th January, 2012** respectively. The applicants further stated that their advocates were ordered to file submissions in respect of the application. The mention notice was served upon the firm of **J. M. Mutinda**. Consequently the protest was allowed.
5. Further, they deponed that the Petitioners were willing to listen to the Protester's claim and if the grant stands revoked then the protest will not be ventilated.
6. The Protester/Respondent filed a replying affidavit stating that service on **J. M. Mutinda Advocates** was proper. Notice of change of advocates was made/filed after the ruling was delivered.
7. The applicant has moved this court under **Order 6(1) and 73** of the **Probate and Administration Rules**. He seeks orders to set aside the ruling delivered on **29th February, 2012**. **Rule 63 and 73 of the Probate and Administration Rules** provides that:

63. “Grant of administration to universal or residuary legatee when a deceased has made a will, but-

- a. *he has not appointed an executor; or*
- b. *the only executors appointed are legally incapable of acting, or have renounced their executorship, or have died before the testator or before receiving a grant of probate of the will, or have failed within the time limited by a citation to apply for probate thereof; or*
- c. *all proving executors have died before completing administration of all the property to which the will applies, a universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be administered.*

73. Duty of court to give notice to holder of grant to apply for confirmation. The court shall within one year from the date of any grant of representation, give notice to the holder of the grant to apply for confirmation thereof.”

Looking at these provisions, they do not apply to the matter at hand in anyway.

8. Looking at the substance of the matter, a notice of appointment of **Musyoka Kimeu and Company Advocates** was filed on the **5th December, 2011**. The notice was, however, not served on the Protester’s advocate. However, on the **5th December 2011**, **Musyoka Kimeu** appeared for the Petitioners and sought time to file submissions. A date was fixed by consent in court, **20th January, 2012**. On the stated date **Musyoka Kimeu** counsel for the Protester did not appear. Similarly he did not file submissions. The court gave a mention date and directed the Objector’s counsel to serve the Petitioners. The affidavit of service dated **9th February, 2012** indicate service was upon the firm of **J. M. Mutinda and Company Advocates**. This was erroneous. Despite the argument it is not explained why the Petitioners did not file submissions to canvass the application.
9. What informed the learned Judge to revoke the grant was the fact that there was another **Succession Cause No. 109 of 2008** filed in **Nairobi High Court**. Parties were directed to pursue that particular matter.
10. It is argued that it was a citation cause which has now been overtaken by events. Annexure MM-2 to the affidavit in support of the application is a copy of the application. No order has been availed by the Petitioners to show if the file has been closed.
11. A court has a discretion of revoking a grant even on its own motion if there is a good reason as provided by the law. This is a case whence the protester objected to confirmation of the grant because the Petitioners concealed something material from the court which the Petitioners do not dispute. In paragraph 11 of the affidavit they state as follows:

“... notwithstanding the fact that the Petitioners/Applicants are not only willing but are also able to listen to the Protester’s claim.” *Emphasis mine.*

This being the case it will be a waste of judicial time to reinstate the application for confirmation of the grant. The way forward would be either they discuss and agree on whether to proceed with the case in Nairobi or have a consent recorded taking into consideration the interest of the Protester.

12. In the premises I find the application lacking merit. Accordingly, it is dismissed with no orders as to costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of APRIL, 2015.

L.N. MUTENDE

JUDGE