



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO: 85 OF 2006**

**IN THE ESTATE OF THE ESTATE OF EUSTACE KAGWA KANGETHE – (DECEASED)**

**RULING**

1. The application dated 20<sup>th</sup> February 2012 seeks that certain affidavits sworn on 17<sup>th</sup> September 2010 and 20<sup>th</sup> September 2010 be struck off the record for having been filed outside the time stipulated in the courts order of 11<sup>th</sup> July 2010.
2. The affidavit of the applicant states that on 2<sup>nd</sup> July 2010 orders were made to the effect that the agreed documents be verified by way of affidavits which should be filed and served within 30 days. The 30 days were to expire on 12<sup>th</sup> August 2010 by which time the objector had filed their affidavits. The affidavits filed in September 2010 were therefore well out of time. She also complains that one affidavit raises additional evidence that she does not have opportunity to respond to.
3. After the objectors were served with the application, the first objector responded by filing a replying affidavit sworn on 20<sup>th</sup> June 2012. She clarified that the orders in question were made on 12<sup>th</sup> July 2010 and not on 2<sup>nd</sup> July 2010 as averred by the applicant. She has attached to her reply an excerpt of the order made by Nambuye J. on 12<sup>th</sup> July 2010. She asserts that the said order granted the objectors thirty days to serve their affidavits. The petitioner was to file affidavits within 30 days of service upon her of the objector's affidavits. Thereafter either side had leave to respond to the affidavits served upon them. She argues that she filed objectors' affidavits on 12<sup>th</sup> August 2010 within the 30 days allowed by the court and that the affidavits filed in September 2010 were in response to the affidavits filed by the petitioner on 16<sup>th</sup> August 2010.
4. I agree with the objectors. No orders were made on 2<sup>nd</sup> July 2010 and 11<sup>th</sup> July 2010 as alleged in the application. The orders were actually made on 12<sup>th</sup> July 2010. There were four limbs to the said orders, namely:-
  - a. that by consent the parties had agreed on documents,
  - b. that the objectors were given leave to file and serve affidavits within 30 days from 12<sup>th</sup> July 2010,
  - c. that the petitioner was to file her affidavits within 30 days of service upon them of the objectors affidavits, and
  - d. that thereafter there was leave to either party to respond to the affidavits served upon them.
5. In compliance with the said orders the objectors filed two affidavits- one by Phyllis Wanjue Kagau sworn on 12<sup>th</sup> August 2010 and the other by Huron Muricho Junias Utuku sworn on 5<sup>th</sup> August 2010. The two affidavits were filed on 12<sup>th</sup> August 2010. The petitioner filed eight (8) affidavits on 13<sup>th</sup> August 2010. Thereafter the objector had the four contentious affidavits filed on 20<sup>th</sup> September 2010.

There was also the affidavit sworn on 13<sup>th</sup> August 2010 and filed in court on 16<sup>th</sup> August 2010 on behalf of the objector.

6. The matter was thereafter mentioned on 2<sup>nd</sup> February 2011 before Maraga J, when Mrs. Wang'ombe for the objectors prayed that her clients affidavits be deemed as having been filed within time. The court extended time for filing of further affidavits by 30 days. The affidavit filed on 16<sup>th</sup> August 2010 was deemed as duly filed, with the petitioner being given 30 days to file a further affidavit.

7. At the time the orders of 2<sup>nd</sup> February 2011 were being made the affidavits in question were on record. The court was aware of their existence as it was of the earlier affidavits. The court did not refer to these affidavits at all. It did deem them as duly filed since they had been filed procedurally.

8. The orders by Nambuye J of 12<sup>th</sup> July 2010 had given the parties unconditional leave to file further affidavits in response to the primary affidavits. The affidavits filed on 20<sup>th</sup> September 2010 were further affidavits in reply to the petitioner's affidavits of 13<sup>th</sup> August 2010. Nambuye J had granted leave for the filing of the said affidavits. It is my view that they were filed within the time allowed by the orders of 12<sup>th</sup> July 2010.

9. On the question of new matters being raised in the affidavits filed on 20<sup>th</sup> September 2010, my view is that the petitioner was given 30 days on 2<sup>nd</sup> February 2011 by Maraga J to file a further affidavit to respond to the matters raised in the affidavits filed on 20<sup>th</sup> September 2010. The petitioner did not avail herself of the opportunity given to her by the court. She had leave to respond to these affidavits, but she chose to squander the opportunity.

10. The application dated 20<sup>th</sup> February 2010 is clearly without merit. It is hereby dismissed with costs to the objectors.

11. I note that the summons for revocation dated 16<sup>th</sup> October 2006 is still pending. The applicants in that application shall fix it for hearing within 30 days. The Deputy Registrar is hereby directed to cause a date to be given for the hearing of the application on a priority basis.

12. The matter shall be mentioned after 30 days for compliance.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>st</sup> DAY OF January, 2014.**

**W. MUSYOKA**

**JUDGE**