

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.118 OF 2012

IN THE MATTER OF THE ESTATE OF HARRISON KIMITI KIMANI (DECEASED)

JOSEPH KAMAU GATHERU.....APPLICANT

VERSUS

PETER KIMANI KIMITI.....

RESPONDENT

RULING

Harrison Kimiti Kimani, the deceased to whose estate these proceedings relate died on 31st July 2011. On 27th September 2011, Peter Kimani Kimiti (Respondent), a brother of the deceased, petitioned the Kiambu Chief Magistrate's Court (Succession Cause No.280 of 2011) to be issued with a grant of letters of administration intestate in respect of the estate of the deceased. The Respondent deponed that at the time of his death, the deceased was not married and therefore did not have any children. The Respondent was therefore the deceased's closest next of kin. The Respondent was issued with a grant by the said court on 14th December 2011.

On 23rd July 2012, Joseph Kamau Gatheru, the Applicant herein filed summons seeking to have the said grant issued to the Respondent revoked. The application was predicated on the provisions of **Section 76** of the **Law of Succession Act** and **Rule 44** of the **Probate and Administration Rules**. The Applicant complained that the Respondent had obtained the said grant after concealing from the court the fact that the deceased had creditors. In particular, he averred that the Respondent had failed to disclose that the deceased was in the process of selling part of a property that comprised the estate of the deceased to the Applicant. The Respondent filed a replying affidavit denying the allegations made by the Applicant in the summons. He denied that there existed an agreement between the deceased and the Applicant for the purchase of part of a property that comprise the estate of the deceased.

Directions have not been issued in this case. On 30th November 2012, the Respondent filed an application seeking to have the summons for revocation of grant filed by the Applicant dismissed for want of prosecution. The Respondent contends that since the summons was filed on 16th January 2012, the Applicant had made no effort or taken any steps to prosecute the said summons. He urged the court to allow the application. The application is opposed. Joseph Kamau Gatheru, the Applicant herein swore a replying affidavit in opposition to the application. He explained the reason why he had delayed in prosecuting the summons was because, in the intervening period, the Respondent had approached him with a view to amicably settling the matter out of court. He deponed that negotiations were at an advanced stage before the Respondent changed his mind and informed him that the dispute would be resolved in court. He urged the court to give him an opportunity to prosecute his application.

During the hearing of the application, this court heard oral rival submission made by Mr. Thuo for the Respondent and Mr. Irungu for the Applicant. The court has carefully considered the said submission. It has also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the Respondent laid sufficient basis for this court to dismiss the summons for revocation of grant for want of prosecution. The Respondent complained that the Applicant has been indolent in the prosecution of the summons. On his part, the Applicant gave explanation why he had not prosecuted the matter before the Respondent filed the present application. Upon evaluation of the facts of this case, it was clear to this court that the Respondent gave a reasonable

explanation for his failure to expeditiously prosecute the summons for revocation of grant. This court was persuaded that the Applicant was under the impression that the Respondent was negotiating with him in good faith with a view to an amicable settlement of the matter out of court. That was not to be. It was apparent that while the Respondent was negotiating with the Applicant, he was also making moves in court to have the Applicant's summons dismissed. This court is of the opinion that in cases such as the present one, the ideal situation is that the dispute ought to be heard and determined on its merits. The application for dismissal therefore lacks merit.

The same is dismissed but with no orders as to costs. The Applicant is ordered to take appropriate steps to have the case listed for appropriate directions by the court. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF APRIL, 2014

L. KIMARU

JUDGE