



IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS CIVIL APPLICATION NO.1 OF 2013

IN THE MATTER OF: MIGORI PROBATE & ADMINISTRATION CAUSE NO.123 OF 2008

AND

IN THE MATTER OF: THE ESTATE OF GLADYS ODINGA ORINDA ----- DECEASED

AND

IN THE MATTER OF: LR NO. SUNA EAST/WASWETA 1/6151

AND

**IN THE MATTER OF: APPLICATION FOR REVOCATION OF GRANT OF LETTERS OF
ADMINISTRATION**

EUNITA ANYANGO GEKO 1ST APPLICANT

ESTHER ATIENO MAUCHA 2ND APPLICANT

VERSUS

PHILIP OBUNGU ORINDA RESPONDENT

RULING

1. The genesis of this matter began when the Respondent Philip Obungu Orinda applied for grant of letters of administration in respect of the estate of Gladys Odinga Orinda (deceased) vide **Migori Senior Resident Magistrate's Court Succession Cause No.123 of 2008**. He was issued with the said grant on 29th October 2008. Thereafter the applicants applied for a revocation/annulment of the said grant vide **Kisii Environment and Land Division Miscellaneous Civil Application No.1 of 2013**. The grant issued to the respondent was revoked vide an ex parte ruling delivered on 11th July 2013.
2. It is worth noting at this point that the respondent personally represented himself in his application for grant of letters of administration in Migori. Subsequently the firm of Oguttu Mboya & Co. advocates filed a summons for setting aside and/variation of ex parte orders under **Rules 49, 59, 63 and 73 of Probate and Administration Rules** and **Section 55 of the Law of Succession Act, Cap 160** and **Articles 47, 50 and 159 (2) (d) of the Constitution, 2010** dated 2nd August 2013. The summons for setting aside seeks orders:-

1. *That the instant Application be certified urgent and same be heard on priority basis.*
2. *Pending the hearing and determination of the instant Application, the Honourable Court be pleased to grant an interim Order of Stay of Execution of the Decree and/or orders of this Honourable Court rendered on the **11th day of July 2013**, together with all consequential and/or incidental orders.*
3. *Pending the Hearing and determination of the instant Application, the Honourable Court be pleased to grant an Interim Order of Stay of Proceedings and/or in particular, (sic) the Taxation of the Applicants' Bill of Costs, if any.*
4. *The Honourable Court be pleased to Rescind, recall, vary and/or set aside the Ex-parte proceedings, together with the Ruling of this Honourable Court rendered on the **11th day of July 2013**, together with all consequential and/or incidental orders thereto.*
5. *The Honourable Court to pleased to restore the Summons for Revocation of Grant dated **15th January 2013**, for hearing De-novo.*
6. *Consequent to prayer (5) herein, the Honourable Court be pleased to grant leave and/or liberty to the Respondent to file a Replying Affidavit, in response to the Summons for Revocation of Grant dated **15th January 2013**.*
7. *The Honourable Court be pleased to make such other and/or further Orders/Directions, as may be just and expedient in the circumstances.*
8. *Costs of this Application be paid out of the Estate of the Deceased.*

3. The application was supported by an affidavit sworn by the respondent contending that indeed he came to court on the scheduled hearing date being the 18th April 2013 but on getting to the gate/entrance of the court, he met security guards who demanded that he surrenders his national identity card before accessing the court premises, that he had forgotten his national identity card at home and consequently he was denied entry notwithstanding his plea that he had a hearing.
4. He further contended that as a result he was unable to attend to the hearing and/or participate in the proceeding whatsoever, that it was his genuine desire to attend the hearing and he is now ready and willing to participate in the matter to shed light on the true and factual situation concerning the degree of relationship between the Applicants and the deceased.
5. When the matter came before me on 21st August 2013, Mr. Odhiambo, counsel for the applicants raised a preliminary point to the effect that the notice of appointment by the respondent's/

applicant's counsel, M/s Oguttu Mboya & Co. Advocates dated 27th July 2013 and filed in court on 30th July 2013 was not properly before court as it contravened **Rule 9 (5)** of the **Probate and Administration Rules** under **Part III** which deals with applications for grant.

6. He further submitted that there was no compliance with the said rule as

the grant was made and same was not made at the registry at which the grant was made.
7. Secondly, he contended that there was no compliance with **Rule 60** of the **Probate and Administration Rules**; that the respondent/applicant has never appeared nor has he served any papers upon counsel for the applicants and that if he had indeed entered appearance and served he would have sought leave to file affidavits in reply. He therefore

contended that counsel for the respondent/applicant had no audience and that is why they only filed grounds of opposition. He further submitted that respondent's/applicant's counsel's application was incompetent and urged the court to strike out the application with costs.

8. Mr. Oguttu in response submitted that the objection was both mistaken and misconceived because firstly, summons for revocation of grant which originated these proceedings and the ones that were heard ex-parte by this court arose from the original petition filed at Migori vide **Probate and Administration Succession 123 of 2008**, that the filing of this summons before this court was undertaken in line with **Section 48** of the **Succession Act** and was so undertaken because applications for revocation fall exclusively within the jurisdiction of the High Court. He therefore

- contended that this summons for revocation is therefore a continuation of the succession proceedings relating to the estate of the deceased and it is not a separate and distinct suit.
9. Secondly, he submitted that to the extent that the current respondent who was petitioner in subordinate court was acting in person means that he applied for the grant as personal applicant even in the proceedings before this court until he appointed an advocate. Furthermore, that the only manner in which a personal applicant appoints an advocate is vide **Rule 9 (5) of the Probate and Administration Rules** as read together with **Rule 70** of the same rules and the statutory form for appointment of advocate is Form 63 in the 1st Schedule which form can be used subject to such adaptations, additions and amendments as may be necessary.
 10. Thirdly, that even if one were to argue that the adaptation, additions and

amendments provided by **Rule 70** do not suffice for each appointment, the same would meet its Waterloo in **Rule 73** of the **Probate and Administration Rules** saving the inherent power of this court which applies to both minor and inconsequential procedural issues.

11. Fourthly, that the respondent herein is described as the respondent in summons for revocation. He is not an interested party in these proceedings. He is a principal player and has been so cited. He is therefore bound by the provisions of **Rule 60** which refer to “**every interested person**” who could be either the applicant or the respondent.
12. Fifthly, that the effect and consequences of the overriding objective vide Civil Procedure Act has been amended to include **Sections 1A and 1B** thereof whose effect is to enable the court to hear and dispose of disputes justly, proportionately and expeditiously. Therefore there are days when technicalities are elevated to a fetish and substantive justice takes its proper place.
13. Sixthly, he submitted that the effect of **Articles 22 (3) (d) and 159**

(2) (d) of the Constitution is to ensure that the court does away with undue technicalities in order to dispense substantive justice and sustain the doctrine of natural justice.

14. Lastly he submitted that the contention that the notice of appointment by personal applicant could only be mounted at the registry where petition was lodged presupposes that the petition is still alive/subsisting. However that the position in this case has changed since the grant was issued by a subordinate court which had no jurisdiction to deal with revocation of grant as provided by **Section 76 of the Laws of Succession Act**. He also submitted in reference to **Section 25 of Cap 2** and contended that deviation from statutory form does not negate the substance of the matter; and that in the circumstances, this court should find that the objection herein has no merit and to dismiss it.
15. Mr. Odhiambo in reply submitted that the submissions by his colleague is a misapprehension of the objection since what they are contending with is the timing of the appointment of counsel by a personal applicant which should be done before and not after grant has been issued and annulled.
16. Secondly that the construction of **Rule 60** of the **P&A Rules** is so wide that to their mind it would encompass the applicant in the instant proceedings who throughout the proceedings has never appeared.
17. Lastly, that **Article 22 and 159** of the **Constitution** are not an invitation for chaos, nor are they intended to make courts abandon procedures and rules where constitutional rights of a person are being breached. He therefore submitted that the rules in this case have been flagrantly breached and his colleague has not audience.
18. After making the above submissions, it was agreed that both counsels would file and exchange authorities on the issues of law they submitted on.
19. I note that the authorities cited by both counsel do not really touch on the issues of law that have been submitted upon, that is the applicability of **Rule 9 (5) and Rule 60** of the **Probate and Administration Rules**.
20. After a careful analysis of the submissions made by both counsel, the following issues arises for determination:-

- *Does counsel for the respondent have a right of audience before this*

court?

21. As I indicated above, the genesis of this matter was in Migori when the respondent acting in person obtained the grant of letters of administration on 29th October 2008. After obtaining the said grant, the applicants correctly moved to Kisii High Court for the revocation of the said grant which was subsequently revoked in an ex-parte ruling rendered on 11th July 2013. The respondent's counsel before filing the application to set aside the ex-parte ruling on revocation/annulment of grant filed a Notice of Appointment of Advocate by a personal applicant for a grant and his counsel also filed an acceptance of appointment vide **Rule 9 (5) of the Probate and Administration Rules**.
22. For this court to appreciate the applicant's counsel's contention that the respondent's counsel has no audience before this court, this court needs to consider the provisions of **Rule 9(5) Part III of the Probate and Administration Rules**. **Rule 9 (5)** provides:-

"If a personal applicant desires, at any time after making his application but prior to the issue of the grant applied for to cease to be a personal applicant in relation to that application and to continue with such application through an advocate, he may do so by filing in the registry at which the application was made a notice in Form 63 of intention to act through an advocate and containing an express appointment of some person to be his advocate in the matter together with the name and address of the advocate and his acceptance in writing of such appointment."

23. In **Beatrice Kathini Kiilu –vs- Beatrice Nzeve Musomba & 6 others [2008] – High Court Machakos**, I stated the following:-

"Two issues arise from the provisions of Rule 9 (5): the appointment must be made prior to the issue of the grant applied for ---- in the present case, the appointment was made after the grant had not only been issued --- but confirmed."

I also said the following:

"I have perused the pleadings that are now being disputed and make the following findings:

- a. ----
- b. **that since the appointment was made after the issue of the grant applied for, the applicants did not have to comply with Rule 9 (5) of the Probate and Administration Rules."**
24. With the above case law in mind, it is my considered view that counsel for the respondent and the respondent himself did not have to file acceptance of appointment and notice of appointment respectively.
25. Secondly, on the issue of whether **Rule 60 of the Probate and Administration Rules** is applicable in this case which deals with entry of appearance, the said **Rule 60** stipulates:-

"Every interested person (whether or not he has been served with notice thereof) who wishes to be heard upon or to oppose any application and has not already appeared in the proceedings, shall enter an appearance in Form 26 in the registry in which the application is made giving his address for service, and may file such affidavits as he considers proper to each of which the applicant may with leave of the court file an affidavit in reply."

26. In **Wilson Wandeto Munyi –vs- Njuguna Ng'ang'a [2007] e KLR** Kubo J persuasively held:-

"The complaint that Rule 60 of the Probate and Administration Rules was not complied with. As I see it, the position of the parties to the present High Court

proceedings is that they were parties to Thika Chief Magistrate's court succession cause No.289 of 2004. There the objector Wilson Wandeto Munyi was objecting to being left out of inheritance of the deceased's estate. The interest he was pursuing in the Thika court was that of a beneficiary on account of his purportedly being purchaser from the deceased. His application to be included in the inheritance equation did not succeed before the Thika court. Thereafter, he decided to seek revocation of the same grant under which he had sought recognition as a purchaser. The revocation proceedings filed by Wilson Wandeto Munyi vide summons filed on 4th October 2006 are a follow up of the proceedings which started in the Thika court where he had appeared seeking recognition as a purchaser. He is, therefore, no stranger to the proceedings involving the deceased's estate. I find that applicant Wilson Wandeto Munyi did not necessarily have to file appearance in the High Court in order to be able to participate in the High Court proceedings, which are a follow up of the Thika Court Proceedings. But even if I am wrong in finding, I would find Munyi's not filing of appearance in Form 26 a curable procedural irregularity. I therefore, see no valid technical impediments to Munyi's quest to be heard by the High Court in seeking revocation of the grant in question. Whether he will succeed or not is a different matter."

27. Applying the above principle to the instant case, the respondent in this case needed not file an entry of appearance pursuant to **Rule 60** of the **Probate and Administration Rules** as this application is a continuation of the application for grant of letters of administration in Migori and also the summons for revocation/annulment of grant in the Land & Environment court at Kisii.
28. In any case, since counsel for the applicant's contention is that the respondent's counsel had no audience, my view is that though he filed his notice of acceptance of appointment under **Rule 9 (5)** which was not even necessary in this particular case, there is no legal bar against counsel appearing in the matter for the respondent. In case I am wrong on this finding, this court has the power to grant him the opportunity to enter appearance in keeping with the spirit of **Sections 1A** and **1B** of the **Civil Procedure Act** and **Article 159 (2) (d)** of the **Constitution** which provide that justice shall be administered without undue regard to procedural technicalities. The objection raised on behalf of the applicants is overruled. Respondents' counsel is at liberty to enter appearance in accordance with the law to enable this matter to proceed.
29. It is so ordered.

Dated and delivered at Kisii this 26th day of June, 2014

R.N. SITATI

JUDGE

In the presence of:

Mr. J.O. Soire for Odhiambo Roch for Applicants

Mr. Anyona for Oguttu (present) for Respondent

Mr. bibu - Court Clerk