



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 336 OF 2008

LYDIA WANJIRU THAGANA..... DECEASED

AND

MARY GATHONI WACHIRA

PHILIP MUTAHI THAGANA PETITIONERS

VERSUS

JANE WAIRIMU THAGANA

PETER KARIUKI THAGANA.....OBJECTORS

RULING

1. The applicants JANE WAIRIMU THAGANA and KARIUKI THAGANA on 15th February 2007 filed an affidavit of protest to the confirmation of the grant of letters of administration issued to the respondent herein on the grounds that their names were not included as beneficiaries of the estate of the deceased and that the deceased had bequeathed the estate the subject matter of this cause to Jane Wairimu Thagana and Peter Kariuki Thagana, Julia Wanjiru Thagana and Muthoni Thagana.
2. On 27th March 2009 directions were given that the protest and the application for confirmation of grant be heard simultaneously by way of viva voce evidence which was fixed for 29th June 2011 when the protest was dismissed and the grant confirmed for want of attendance by the protestors.
3. By Summons General form under rules 49, 63 and 73 of the P&A rules the applicant moved the honourable court for an order setting aside the order of 29th June 2011 dismissing the affidavit of protest and confirming the grant.
4. The application was supported by the affidavit of JANE WAIRIMU THAGANA in which she deponed that both applicants and their witnesses stay in Naromoru and on the way to court on the intended day found a major matatu crackdown causing a delay of five hours.
5. It was deponed that by the time they arrived in court after 12.00 the matter had been called out and protest dismissed. It was further deponed that the delay in filing the application was caused by the fact that they were unable to get proper advice and finally got the money to instruct an advocate and that the said delay was not inordinate.
6. It was deponed that the effect of the order of 29th June 2011 is that they have been disinherited of their mothers estate due to factors beyond their control.
7. In reply thereto the respondents filed a replying affidavit sworn by Mary Gathoni Wachira in which she deponed that the reasons given by the applicants for their failure to attend court were fictitious since there was no evidence tendered to confirm major matatu crackdown and that her witnesses were able to use the same route.

8. It was further deponed that the application has been overtaken by events since the grant has been effected and distribution done.

SUBMISSIONS

9. Directions were given that the application be heard by way of written submissions which have now been filed, on behalf of the applicant it was submitted that the effect of the order herein have far reaching effect on the beneficiaries of the estate as the applicants stand to be disinherited of their estate of their mothers since the applicants have stated that they are equally entitled to the estate and were therefore unable to state their case.
10. It was submitted that the delay in filing the application is not inordinate and that the fact that the estate has been distributed is not a bar to setting aside the orders since the court has unfettered discretion to set aside order given *ex parte* and the case of CMC HOLDINGS LTD vs NZIOKA CIVIL APPEAL NO. 329/01 [2004]KLR: DAVID LIVINGSTON OYIEKO v SIMON KIPRON SIELE NAKURU HCCC 521 OF 1999(2005)eKLR where the court held that it has inherent powers and discretion to set aside orders dismissing a suit because of the plaintiffs lateness in attending court.
11. On behalf of the respondent it was submitted that there is no provision for setting aside and that rule 63 of the probate rules never made order ixB of the civil procedure applicable to succession matters and therefore there is no provision for application for setting aside for none attendance at a hearing.
12. It was further submitted that rule 79 is a saving provision providing for inherent power which cannot cover jurisdiction and therefore the applicant should have moved the court under rule 44 for revocation or annulment of grant.
13. It was further submitted that the application lacks merit since there is no evidence of *matatu* crackdown which the applicants blame for their failure to attend court and that as per the case of CMC HOLDINGS LTD *supra* the applicants must not only show that they had a reasonable excuse for their failure but must also demonstrate that they have a reasonable case on merits.
14. It was submitted that the estate has already been distributed and therefore any order issued by the court would be in vain since the application does not deal with matters of distribution of estate. The case of AGA WANJIRU MWANIKI v JANE WANJIRU MWANIKI that the court could not revoke a grant where there was no prayer to that effect.
15. It was submitted that the applicants were guilty of undue delay and that the order sought will affect the beneficiaries who are now registered as owners of the estate and support thereof the case of in the estate of MBURU GITAU NAIROBI HIGH COURT SUCCESSION CAUSE NO. 1968 OF 1998 was used.
16. From the submissions and affidavit evidence herein the court has identified the following issues for determination:

a. Whether there is provision for setting aside an *ex parte* order dismissing affidavit of protest.

b. Whether the applicant have made up a case for setting aside the order of 29th June 2011 dismissing the protest and confirming the grant.

17. The application herein is brought under section 73 of P&A rules which is the inherent power of the court to make such orders as may be necessary for the end of justice and to prevent abuse of the court process. It must be pointed out that at this stage that the applicants are attacking is the order dismissing their protest and whereas I agree with the submission by the respondent that once a grant has been confirmed the same can only be set aside and or annulled, the issue before this court is whether the court can set aside an order dismissing an affidavit of protest which has not been heard on its merit.
18. I am persuaded that under Article 159 of the Constitution of Kenya and rule 73 of P&A rules the court has powers to set aside an *ex parte* order dismissing an affidavit of protest since the power to set aside *ex parte* orders are provided for in order to ensure that litigants does not suffer injustice or hardship as a result of among other things an excusable mistake or error.

19. I further find that the fact that the applicants have not sought an order to revoke the confirmed grant does not limit the powers of this court to set aside the order dismissing the affidavit of protest the input of which will be that the affidavit of protest will be reinstated for its determination on merit.
20. I have looked at the affidavit in support of the application to set aside the order and the affidavit in reply together with further affidavit and taking into account the nature of the matatu transport in this country and find that the reason offered by the applicants for their failure to attend court are reasonable and that the application was filed without an undue delay.
21. I would therefore allow the application herein and set aside the order dismissing the affidavit of protest and reinstate the same for hearing on its merits on priority basis in the interest of justice with the cost being in the cause.
22. I further direct that this matter be placed before the Resident Judge Nyeri 14th November 2014 for mention for purpose of taking a hearing date.

Dated, signed and delivered at Nyeri this 19th day of September 2014.

J. WAKIAGA

JUDGE

Court: Ruling read in open court in the presence of the advocates for the parties.

J. WAKIAGA

JUDGE

19/9/2014