



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION NO. 881 OF 2012**

**IN THE MATTER OF THE ESTATE OF JOSEPH WACHIRA WAITHAKA (DECEASED)**

**BONIFACE MAINA WACHIRA.....APPLICANT**

**VERSUS**

**HENRY WACHIRA WAITHAKA.....1<sup>ST</sup> RESPONDENT**

**KEZIA WANJIRU WACHIRA.....2<sup>ND</sup> RESPONDENT**

**RULING**

Henry Wachira and Kezia Wanjiru Wachira, the 1<sup>st</sup> and 2<sup>nd</sup> petitioners/respondents filed this petition on behalf of the estate of Joseph Wachira Waitthaka who died on 26/3/2012.

On 8/4/2013, the petitioners/respondents approached this court with the application dated 15/1/2013. After hearing the beneficiaries who were present, the court granted prayer 2 of the application which sought orders that funds in the deceased's accounts in Equity Bank, Family Bank and Housing Finance be released to Henry Wachira Waitthaka, the 1<sup>st</sup> petitioner.

However on 7/5/2013, the applicant filed this application under consideration which is dated 6/5/2013 in which Boniface Maina Wachira, seeks an order that the court do discharge and set aside the orders issued by this court on 18/4/2013; that in the event the money had been withdrawn from the deceased's accounts, the withdrawals be reversed; that the respondents do render full account of all the moneys accrued from the deceased's estate and lastly that the respondents be barred from intermeddling, selling or disposing of the deceased's estate. The applicant claims to be a beneficiary to the deceased's estate by virtue of being the deceased's son and that the order issued by the court on 18/4/2013 was obtained fraudulently by concealment of material facts as the respondents failed to disclose the existence of Citation Cause No. 421/2012 in regard to the deceased's estate.

In his affidavit in support of the application, the applicant deponed that he is the son of the deceased and that in June 2012, he filed a citation 421/2012, citing the 2<sup>nd</sup> respondent to take out letters of administration of the deceased's estate (BMW1) and that the 2<sup>nd</sup> respondent through his advocate filed a reply (BMW2). He urged that the citation was last in court on 11/4/2013 when the court ordered the citor to take out letters of administration and he was shocked to learn that infact the respondent had filed this succession cause in 2012. The applicant avers that the respondents' actions are meant to defeat his claim.

The application was opposed and Henry Waitthaka swore a replying affidavit dated 15/5/2013 in which he averred that after the orders were issued by this court on 18/4/2013, the moneys in the bank accounts were released to him which he used to pay out to the different beneficiaries as listed at paragraph 6 of his

affidavit. He denied knowing the applicant nor had he ever heard of him and only knew the deceased's beneficiaries to be as listed in the petition; that his father left a will in which he is appointed an executor. He further averred that he has not even finished paying the outstanding debts as the cash in the bank was not sufficient and in any case, he does not intend to dispose of any of the assets of the estate.

Mr. Waiganjo, counsel for the respondent submitted that apart from the allegation by the applicant that he is a son of the deceased, he was not shown how he is related to the deceased. Mr. Waiganjo also submitted that the 2<sup>nd</sup> respondent Waithaka resides in America with his other siblings and that he was not party to the citation proceedings but the 1<sup>st</sup> respondent was.

Having considered the affidavits and submissions of counsel, there is no dispute that the applicant filed citation 421/2012 dated 15/6/2012 and cited the 2<sup>nd</sup> respondent. Although the proceedings in the citation were not availed to the court, it is not denied that the parties appeared before the court on 11/4/2013 as alleged by the applicant and that the 2<sup>nd</sup> respondent was ordered to file a succession cause. She never did. Mr. Waiganjo does not deny that he was appearing on behalf of the 2<sup>nd</sup> respondent in the said citation. Unknown to the applicant, this cause had been filed on 21/12/2012 and the respondents were even before this court on 18/1/2013. When the 2<sup>nd</sup> respondent and the counsel appeared before the court on 11/4/2013 in the Citation, they should have disclosed the fact that they had already filed this cause and taken directions on how to proceed, but they did not. The respondents then appeared before this court on 18/4/2013 with the full knowledge that the citation was still pending and the 2<sup>nd</sup> respondent had not done anything in compliance to the court order.

The 2<sup>nd</sup> respondent has not sworn any affidavit in response to this application to explain why she acted as she did. She cannot hide behind the 1<sup>st</sup> respondent, because both are administrators of the deceased's estate. This court does not believe that the 1<sup>st</sup> respondent was not aware of the existence of the citation because Mr. Waiganjo was acting for his mother, the 2<sup>nd</sup> respondent in that citation. The only conclusion this court draws is that the respondents moved under certificate of urgency to obtain the orders of 18/4/2013, with the intention of defeating the applicant's citation. When the respondents filed this cause, they were under a duty to serve the applicant having known that he had shown interest in the deceased's estate when he filed the citation. In my view, the respondents have not acted in good faith and I do not haste to state that their counsel, Mr. Waiganjo too, has not acted in good faith as an officer of this court because he was aware of these matters proceeding simultaneously and yet did not disclose that fact to the court. Mr. Waiganjo argued that the applicant has not shown that he is the son of the deceased but that is premature. That issue can only be established after the cause is heard. For the above reasons, I do agree with the applicant that the said orders were obtained by concealment of material facts and I hereby grant prayers 3 and 4. If there are any more monies still held in the deceased's accounts. I also grant prayer 5 and 6. In view of the respondents' conduct, they will bear the costs of this application.

**DATED and DELIVERED this 12<sup>th</sup> day of July, 2013.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Mwangi holding brief for Mrs Gatei for the applicant

N/A for the respondent

Kennedy – Court Clerk