



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL APPEAL NO. 48 OF 2000

LINAH NJOKI MAINA
JOHN MACHARIA MAINA

.....APPELLANTS

ANTHONY KIMANI MAINA

VERSUS

ARTHUR MUKURA NDEGWA.....RESPONDENT

RULING

The subject matter of this ruling is the Motion dated 7th July 2010 in which Linah Njoki Maina, the Appellant herein sought for the following orders:

1. *That this application be certified as urgent and the same be heard exparte in the first instance.*
2. *That the order of the court issued on 19th May 2006 marking this appeal as withdrawn be set aside and the appeal be reinstated for hearing on its merit.*
3. *That there be a stay of execution of the orders of confirmation of grant issued in Kangema Succession Cause No. 5 of 1997 in the matter of the Estate of MAINA GITWEKU and all other consequential orders pending the hearing and final determination of this application.*
4. *That there be a stay of execution of the orders of confirmation of grant issued in Kangema Succession Cause No. 5 of 1997 In the Matter of the Estate of MAINA GITWEKU pending the hearing and final determination of this appeal.*
5. *That the court issues a restraining order against the respondent ARTHUR MUKURA NDEGWA restraining him together with his agents servants and or employees from interfering with the applicants possession and ownership of land parcels No. LOC. 10/KOIMBI/612 and LOC10/KOIMBI/613 pending the hearing and determination of this application and the entire appeal.*

The Motion is supported by two affidavits of Linah Njoki Maina. When served with the motion, Arthur Mukura Ndegwa, the Respondent herein, filed a replying affidavit to oppose the same. When the Motion came up for interpartes hearing, learned counsels appearing in this matter recorded a consent order to have the same disposed of by written submissions.

I have considered the grounds set out on the face of the summons and the facts deponed in the affidavits for and against the application plus the written submissions. It is the submission of the Applicant herein that the Notices to Act in person and the Notices of withdrawal of appeal and all other letters alleged to have been written by her to court and to the Respondent's advocate were never made, authored, executed, filed nor served by the Applicant. The Applicant averred that those documents were forgeries. She urged this court to investigate the complaints. The Applicant blamed the firm of M/S Kirubi Mwangi Ben & Co. Advocates for her woes. She alleged that the aforesaid firm of advocates had previously acted for the Respondent herein and had indeed been engaged in having the file brought back from Nyeri to Kangema for execution. She claimed that the aforesaid firm did not disclose this to her and that is why she proceeded to engage them to handle her case on her behalf. She said the aforesaid firm should have disclosed the possible conflict of interest.

The Respondent on his part strenuously opposed the Applicant's application. He accused the Applicant of lying under oath. He claimed that the Applicant has not come to court with clean hands. He alleged that the Applicant wants this court to believe that she was not aware of the filing and subsequent proceedings in the lower court yet she was part and parcel of the proceedings. It is further alleged that the Applicant used to sign documents but she has now deemed it fit to thumb-print to give the impression that she is illiterate. It is also pointed out that the Applicant has conveniently changed her postal address for purposes of hoodwinking the Court.

The background of the facts leading to the filing the application appear to be largely straightforward. The Applicant herein applied to be given letters of administration intestate in respect of the Estate of Maina Gatweku, deceased, vide Murang'a S.R.M. Succession Cause No. 5 of 1997. The grant was made to the Applicant on 24th April 1997. The Respondent applied for the grant to be confirmed by the application dated 21st January 2000. The Respondent claimed that since there was an agreement of sale made between him and the Applicant he became a beneficiary of the deceased's Estate. In essence the Respondent claimed to have purchased a portion measuring 0.2 acres to be excised from **L.R. NO. LOC. 10/KOIMBI/482**. The trial Magistrate considered the application and came to the conclusion that the Applicant and her two sons had agreed to sell the aforesaid portion to the Respondent at a consideration of Ksh.52,000/= which amount was paid in full. The learned trial Magistrate proceeded to confirm the grant on condition that the Applicant transmitted to the Respondent the aforesaid portion of land. The Applicant was aggrieved, hence she was prompted to file this appeal. The Applicant avers that she was surprised when surveyors from Muranga Land's Office visited the land to subdivide the land on 13th April 2010. She denied ever withdrawing the appeal. She further denied ever selling land to the Respondent. She claimed she only borrowed a sum of Ksh.27,000/= from the Respondent, which amount she was willing to refund. I have examined the record. It shows that the Applicant wrote a letter to the Deputy Registrar of this Court in Kikuyu language dated 5th September 2001. It would appear one B.P. Musyimi on behalf of the Deputy Registrar, wrote responding to the Applicant's letter. He informed the Applicant that she would not be allowed to withdraw the appeal because she was represented by an advocate. Pursuant to the aforesaid letter, the Applicant wrote the letter dated 18th February 2001 intimating that she had withdrawn instructions from the firm of Waiganjo Gichuki & Co. Advocates. The record further shows there were various letters written to the Applicant by the firm of Waiganjo Gichuki & Co. Finally on 18th May 2001, a notice of Intention to act in person dated 3rd May 2001 was filed. The same appears to have been received by the firm of Waiganjo Gichuki & Co. Advocates. A letter dated 17th February 2006 allegedly signed by the Applicant was filed to formally withdraw this appeal. The Deputy Registrar marked this appeal as withdrawn on 19th May 2006. The Applicant has alleged that she did not author nor file the aforesaid documents. She claimed those documents were forgeries. Surprisingly the Applicant has not shown the steps she has taken to report to the relevant authorities to investigate the alleged fraud and forgery. In paragraph II of the further affidavit sworn on 3rd November 2010, the Applicant avers that she is an old woman who does not know how to read and

write. The Respondent has shown in his replying affidavit sworn on 21st September 2010 that the Applicant had previously signed documents but she is now thumb printing to hide the truth. I have carefully looked at the Applicant's averments made in paragraph 6 of the further affidavit in which the Applicant confirmed that she instructed the firm of Kirubi Mwangi Ben & Co. Advocates in the year 2008. The Applicant does not controvert the fact that she appended her signature by writing her name on the notice of appointment dated 5th August 2008. She does not also deny the fact that she signed the replying affidavit she swore on the same date in response to the application dated 18th June 2008. It is obvious that the Applicant is not telling the truth. She cannot expect to be believed when she now turns around and blames the Respondent and her erstwhile advocates for committing forgery against her. I am convinced the Applicant intended to withdraw this appeal but she changed her mind midstream. A court of law cannot countenance such blatant lies. This court has been urged to grant the orders sought in the Motion dated 7th July 2010 in exercise of its inherent power under *rule 73* of the Probate and Administration Rules. Let me reiterate that the Court cannot come to the aid of a party who has not been candid to it. The fact that the Applicant did not go back to the firms of Waiganjo Gichuki & Co. Advocates and that of Kirubi Mwangi Ben & Co. Advocates to seek for clarification over the issues in dispute shows that the Applicant has something to hide. If indeed, she did not withdraw her services from the aforesaid firm or firms of advocates, why didn't she go back there? The truth is that she did what she now denies.

In sum, I see no merit in the Motion. It is dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 18th day of March 2011.

**J. K. SERGON
JUDGE**

In open court in the presence of Miss Keli holding brief Miss Kimani for Applicant. No appearance Mwaniki for Respondent.