



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 26 OF 2005

**IN THE MATTER OF THE ESTATE OF MUCHIRI GACHEMI alias JOSEPH MUCHIRI GACHEMI
(DECEASED)**

RUTH MARY WAMBUI..... APPLICANT

VERSUS

REGINA WANJIRU MUCHIRI.....RESPONDENT

RULING

Ruth Mary Wambui, the Applicant herein, took out the Summons dated 16th September 2010 in which she applied for the following order *interalia*:

- (i) An or reviewing by setting aside this court's orders made on 2nd July 2010.**
- (ii) An order of injunction to restrain the Respondents, their agents, children and servants from interfering with the Applicant's ownership, occupation and use of L.R. No. Othaya/Ihuririo/118.**
- (iii) Costs.**

The Applicant swore an affidavit he swore to support the Summons. Regina Wanjiru Muchiri, the Respondent herein, filed a replying affidavit she swore to oppose the Summons.

It is the submission of the Applicant that she was never informed of the hearing of the Summons for Confirmation of Grant. She averred that her previous advocate was served instead of her. The applicant also pointed out that **L.R. NO. OTHAYA/IHURIRIO/118** was amongst the property distributed yet it was not part of the assets of the deceased's Estate. She averred that the aforesaid land had been declared to be the property of the Applicant vide **Nakuru H.C.C.C. No. 54 of 2001**. The aforesaid decision has not been challenged on appeal. It is said title was issued to the Applicant but the same was cancelled. In short, the Applicant is of the view that the property was not available for distribution.

The respondent on her part, was of the opinion that the Summons has no merit. She stated that the Applicant was a co-administrator of Muchiri Gachemi alias Joseph Muchiri Gachemi, deceased. It is alleged that she had distributed the land in dispute vide the summons for Confirmation dated 5th February 2009 which application was withdrawn on 31st July 2009 hence she is blowing hot and cold at the same time. The Respondent further stated that the Summons for Confirmation of Grant was served upon the Respondent's erstwhile advocate hence she cannot now turn around and deny that fact. The Respondent further alleged that when the application for rectification of grant came up for hearing on 20th

May 2009, all the parties including the Applicant, were present and that the court was not informed that L.R. NO. OTHAYA/IHURIRIO/118 had been transferred to the Applicant.

I have considered the material placed before me plus the oral submissions of learned counsels from both sides. The main order sought by the Applicant is that of review. The Applicant avers that the order made on 2nd July 2010 should be set aside because the Applicant was not served. I have looked at the record and the averments plus annexures attached to the affidavits. It is clear that the applicant's advocate, Jessee Kariuki, was served with the summons for Confirmation dated 29th July 2008. The aforesaid advocate being the agent of the Applicant, did not oppose the application for Confirmation which was allowed as prayed on 2nd July 2010. By that time, there was no evidence that the Applicant had terminated the services of Jessee Kariuki. This ground must fail. The other ground which was ably argued is to the effect that the parcel of land known as L.R. NO. OTHAYA/IHURIRIO/118 was distributed yet it was not available for distribution as an asset of the Estate of the deceased. There is no doubt that the Applicant herein was a co-administratrix with the Respondent of the Estate of the deceased. In her application for Confirmation of Grant dated 5th February 2009, she listed L.R. NO. OTHAYA/IHURIRIO/118 as one of the estate's assets available for distribution. The Applicant withdrew the application on 31st July 2009. She is now claiming that the aforesaid asset is not part of the deceased's Estate. In fact in her application, she claimed she has a life interest over the property. With respect, I agree with the submissions of the Respondent that it cannot now lie in the mouth of the Applicant to state the contrary. The Applicant claims she was declared to be the lawful proprietor of the aforesaid land by this court vide Nakuru H.C.C.C. No. 54 of 2001. I have looked at that judgment and it is clear that the same was delivered on 30th September 2004. By the time of filing the Summons for Confirmation of Grant dated 5th February 2009, she knew of that judgment but she failed to disclose the same. I find the Applicant to be guilty of material non-disclosure. A careful perusal of the aforesaid judgment will reveal that the suit was filed against Muchiri Gachemi. It is also clear that the same proceeded for hearing as undefended. Muchiri Gachemi passed away on 26th October 2003. The case was filed in the year 2001. It proceeded for hearing *ex parte* on 16th September 2004. By then, the Defendant was dead. By then no one had applied for letters of administration to administer the deceased's Estate. It would appear the Applicant did not disclose to the trial Judge that the Defendant had passed away and that there was need for substitution. All these factors put the Applicant in bad light. The order that comments itself is that the application is for dismissal. I hereby dismiss the summons dated 16th September 2010. Since the dispute involves close family members, I direct each party to meet her own costs.

Dated and delivered at Nyeri this 29th day of July 2011.

J. K. SERGON
JUDGE

In open court in the absence of the parties with notice.

J. K. SERGON
JUDGE