REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Succession Cause 290 of 2006

IN THE MATTER OF THE ESTATE OF SIMEON MUGO MENGO – DECEASED

AND

ISAAC MUGAMBI MUGO ..... 1ST PETITIONER/RESPONDENT

ELIJAH MENGO MUGO ..... 2ND PETITIONER/RESPONDENT

VERSUS

ELIZABETH WAIRIMU KIMITA .. 1ST PROTESTER/APPLICANT

TITUS THUKU MUGO ..... 2ND PROTESTOR/APPLICANT

R U L I N G

By an application dated 30th October 2008 and filed in court the following day by **Elizabeth Wairimu Kimita** and **Titus Thuku Mugo** hereinafter referred to as "the applicants", I am being asked to set aside the order I made herein on the 6th October 2008. Upon setting aside the said order, the applicants would wish to have the cause heard in terms of this court's directions given on the 13th November 2007. The application is brought against **Isaac Mugambi Mugo** and **Elijah Mengo Mugo** hereinafter referred to as "*the respondents"* and is expressed to be brought pursuant to the provisions of Rule 49 and 73 of the Probate and Administration Rules.

In support of the application, the 1st applicant swore on behalf of herself and the other applicant an affidavit which gives brief background to the dispute herein which is this;

The 1st applicant is a sister in law to both the 2nd applicant and the respondents. Following the death of **Simon Mugo Mengo** alias **Mugo s/o Mengo**, on 1st March 1988, the first respondent petitioned and was granted letters of administration intestate on 15th January 2007. Subsequent thereto the 1st respondent applied for the confirmation of grant by an application dated 14th October 2007 and filed in court on 17th August 2007.

When the applicants got wind of the application and the mode of distribution proposed by the 1st respondent, they were averse to it. Accordingly the applicants separately filed affidavits of protest. On 13th November 2007 both the application for confirmation of grant and the respective affidavits of protest were placed before me for directions. I directed that the application as well as the protests be heard simultaneously by way of oral evidence.

On 6th October 2008, the application for confirmation of grant and affidavits of protest came before me for hearing. However the applicants were absent. Being satisfied that the hearing date had been taken by consent of the parties in the registry and their being no reason advanced for their absence I did on the application of the 1st respondent dismiss the two protests and simultaneously confirmed the grant as sought by the 1st respondent in his application dated 14th August 2007 aforesaid. It is this order that has triggered the instant application.

The applicants have explained away their non-attendance on 6th October 2008 on the grounds that they inadvertently

thought that the cause had been fixed for hearing on 6th November 2008 and not 6th October 2008. That though all the parties were present in the court registry on 27th November 2007 when they fixed the cause for hearing for 6th October 2008, the applicants thought that the case had been fixed for hearing on 6th November 2008 instead. It is for this reason that they were unable to attend court to prosecute their protests. That it would thus be in the interest of natural justice that the order of 6th October 2008 be set aside so that this cause can be heard on merit. The applicants contend that the Respondents will not suffer any damage if the order aforesaid is set aside and that they are ready and willing to meet the thrown away costs incurred by the respondents.

The application was opposed by the respondents. In a replying affidavit sworn by the 1st respondent on his own behalf and on behalf of the other respondent, he deponed that it was not true that the applicants got the hearing date wrong and that it was in their interest to join the respondents in this cause to finalise the distribution of the estate of the deceased without any further delay to save on time and due expense.

In their oral submissions in support of and in opposition to the application respective parties merely reiterated what they had deponed to in their supporting and replying affidavits.

I have now carefully considered the application, respective replying and supporting affidavits as well as rival oral submissions. My take on the same is in the following terms:

The application is expressed to be brought under rules 49 and 73 of the Probate and Administration Rules. I have carefully considered those provisions of the law. Rule 49 is purely a procedural rule. It tells an applicant how to approach the court where no provision for the application is made elsewhere in the rules. In other words it deals with applications not otherwise provided for in the rules. An application to set aside an order confirming a grant is not provided for in the rules. Indeed even under rule 63(1) of the Probate and Administration rules, orders IXA and 1XB of the civil procedure rules that dealt with ex-parte orders and judgments and also consequences of non-appearance and non-attendance of parties are not among the orders and or rules imported into the law of succession Act and in particular the probate and administration rules. The only provision of the civil procedure rules imported as aforesaid are orders V, X. XI, XVIII, XXV, XLIV and XLIX, together with the High (Practice and Procedural) Rules. Now if the desire of those behind the promulgation of the Law of Succession Act was that an ex-parte order confirming a grant could be set aside on application, couldn't they too have imported in the Act and the rules made thereunder orders IXA and IXB aforesaid. That the framers of the Act and the rules made thereunder chose to leave out the aforesaid orders must tell us something; the succession proceedings should be heard speedily and not be bogged down by unnecessary applications. Could the applicants then have brought this application pursuant to the provision of order XLIV rule 1? Perhaps. Under the rubric "*..... or for any other sufficient reasons.....*", the applicants perhaps may have been able to ventilate their case as to why they failed to attend court. However the applicants have not sought for a review of the order complained of. In my view therefore rule 49 of the Probate and Administration rules does not accord solace to the applicants.

How about rule 73 of the Probate and Administration rules? The rules provides that nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. This rules gives this court unfettered discretion to make such orders for the ends of justice. However like every discretion it must be exercised prudently and judicially. It must not be exercised capriciously. I also do not think that this provision should be invoked to set aside a properly confirmed grant. I am far from being persuaded that the applicants got the hearing date of the cause wrong as deponed to in their affidavit in support of the application. In any event the said supporting affidavit is even contradictory in terms: In paragraph 10 of the said affidavit, the applicants depone that on 27th October 2008 they learned from reliable sources that the respondents had attended court on 6th October 2008 for he hearing of the cause. Yet in paragraph 11 of the same affidavit they depone that on 20th October 2008 they decided to visit the court registry to find out the truth. Now if they heard on 27th October 2008 that their cause had been heard on 6th October 2008, how could they again have gone to court on 20th October 2008, seven (7) days earlier before they got wind of their cause having been heard and decide to find out the truth. Clearly the applicants are not being candid and that again should disentitle them to the relief sought.

I am however of the persuasion that once a grant has been issued it cannot be set aside whether confirmed or not. It can only be revoked and or annulled pursuant to section 76 of the Law of Succession Act and rule 44 of the Probate and Administration rules. To the extent that the instant application seeks to set aside a confirmed grant, it is bad in law and cannot see the light of day.

For all the foregoing reasons, I find that the application lacks merit and is accordingly dismissed with no order as to costs.

Dated and delivered at Nyeri this 10th day of February 2009

M. S. A. MAKHANDIA

JUDGE