REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 122 OF 2002

IN THE MATTER OF THE ESTATE OF MOSES WACIRA KIMOTHO - DECEASED

BETWEEN

NAOMI WANJIRU WACHIRA ..... APPLICANT

VERSUS

TITUS MURAGURI WAROTHE ..... 1ST RESPONDENT

JAMES MUITA WANG'ONDU ..... 2ND RESPONDENT

LUCY WANGARI CHEGE ..... 3RD RESPONDENT

R U L I N G

By summons in general form dated 4th May 2009 and expressed to be brought under rules 49, 63 and 73 of the Probate and Administration rules, **Naomi Wanjiru Wachira**, hereinafter referred to as "*the Applicant*" sought as against **Titus Muraguri Warothe**, **James Muita Wang'ondu** and **Lucy Wangari Chege**, hereinafter referred to as "*the respondents*" in the main one orders "**..... That the honourable court be pleased to review its ruling and or orders of 10th February 2009."** The other 3 prayers sought in the application have since been rendered otiose.

The application was based on the grounds that the applicant was not served with the summons for revocation of grant, that there has been no inordinate delay in bringing this application, the respondents were neither dependants nor beneficiaries of the deceased's estate and that their action have the effect of disinheriting the true heirs, that the respondents despite being aware of the succession cause, never bothered to file any objection or protest and finally that it was only mete and just that the application be allowed.

The application was further supported by the affidavit of the applicant. In the main she deponed that this cause related to the estate of her deceased husband and that the grant had been confirmed to her on 14th July 2003. She thereafter proceeded to distribute the estate as per the confirmed grant and as a consequence fresh titles were issued. Sometimes in March this year, she was summoned by the Assistant Chief and served with an amended grant. That the 2nd respondent had filed a suit against her in Nyeri CMCCC No. 253 of 2001 in which he lost hence his claim was res judicata whereas the other respondents

were strangers in the cause.

At the hearing of the application, **Mr. Waruingi** learned counsel for the applicant submitted that the review sought is on the ground that the applicant was never served with the application for revocation of grant. Further the grant having been revoked none is existing. The purported amended grant issued on 10th February 2009 was a mistake that ought to be corrected.

The application was opposed. Through **Mr. M.K. Kiminda Esq., advocate** the respondents filed a replying affidavit. In essence they deponed through the 2nd respondent that the application was incompetent as it was brought under the wrong provisions of the law, the grant having been revoked and a new issued the orders for review being sought are not available, the applicant was duly served with the application for revocation of grant, that the respondents purchased parcels of the suit premises from the deceased, took possession and developed them and the applicant cannot be heard to say that they are strangers to the estate and finally that the applicant deliberately chose to absent herself from the hearing of the application hoping that the court would not hear the same.

In his oral submissions in opposition to the application, **Mr. Kiminda** stated that as far as the respondents were concerned the matter ended on 10th February 2009 when the grant was revoked. Rules 49 of the Probate and administration rules do not apply in the circumstances of this case. Rule 63 imports order 44 of the Civil Procedure rules in succession matters. Accordingly the application ought to have been by way of Notice of Motion. Under Order 44 the application does not satisfy the conditions set out therein. The order sought to be reviewed has not been extracted nor annexed to the application and finally that the grant having been revoked there is nothing to review and or set aside.

I have carefully read and considered the application, the various affidavits filed, rival oral submissions and the law. It is common ground that the grant which had been confirmed to the applicant on 14th July 2003 was by this court's ruling dated 10th February 2009 revoked. In revoking the grant, no fresh grant or an amended one was issued in its place. Accordingly the purported "**Amended certificate of confirmation of grant"** extracted by the respondents was self-serving and of no legal consequences. It is accordingly expunged from the record. The purported amended certificate of confirmation of grant was irregularly issued as there was no application for its amendment or rectification and in event no grant exists capable of being amended and or rectified, the same having been revoked as aforesaid.

I am being asked to review my ruling dated 10th February 2009 on the main ground that the applicant was not served with the application for revocation of grant. When the application for revocation of grant came up for interpartes hearing on 28th January 2009, the applicant was absent though the respondents were present. Having perused the affidavit of service, I was satisfied that the applicant had been duly served but for reasons that were unclear, she had failed to turn up for the hearing. Nothing has been brought to the fore by the applicant either in her supporting or supplementary affidavits to persuade me to think otherwise. I am still persuaded that the applicant was duly served with the hearing notice of the application for revocation of grant. The applicant does not dispute the fact that she stays in Bondeni village in Amboni Sub-location of Mweiga Kieni West Division. I have gleaned this information from the affidavit of service sworn by **Stephen M. Kamanguya** a court process server, on 27th January 2009. How else would the process server have gathered such detailed information about the applicant without it being true. The applicant claims in her supplementary affidavit that though she farms in Mweiga and has a house thereat, her actual home is in Muthinga at Ithekahuno where she was on 1st November 2008. That may well be so. However the applicant is not saying that she was in Ithekahuno the whole day. She does not say when she went to the said Ithekahuno. She could have been served before she went there or after she had come back. In any case going by the letter dated 2nd March 2009 addressed to the applicant by the Chief of Mweiga and annexed to the application, it is quite apparent that the applicant stays in Bondeni, the same place, the process server claims to have served her with the application. This denial of service is to my mind a mere afterthought and as correctly pointed out by **Mr. Kiminda** the applicant deliberately chose to absent herself form the hearing of the application under the false hope that the court would not hear the application.

Rule 63 of the Probate and Administration rules imports Order 44 of the civil procedure rules into the law of succession Act and the rules made thereunder. That being so, the application ought to have been by way of Notice of motion and not summons in General form. Further there was no need for the applicant to invoke rules 49, 63 and 73 of the Probate and administration rules when there were clear and specific provisions of the law to meet the applicant's exigencies.

Assuming however that the applicant had invoked the provisions of order 44 of the Civil Procedures rules, can it be said that the applicant has met the threshold set out in the said provisions of the law. The applicant is not saying she is seeking a review based on the discovery of new and important evidence which was not within her knowledge, or could not be produced by her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The applicant in an application for review must strictly prove the grounds for review, except for review on the ground of mistake or error apparent on the record, failing which the application will not be granted. See **Kithoi v/s Kioko (1982) KLR 177**. As it is therefore the application is silent on the ground(s) upon which review is being sought. When replying to **Mr. Kiminda's** submissions on the issue, **Mr. Waruinge** stated that the applicant was relying on "sufficient cause" for the application. However as I have already stated the applicant was duly served with the application for revocation of grant. I therefore do not see any other sufficient cause that would tilt my hand towards allowing the application. I would accordingly hold that the applicant has not satisfied the conditions set out in Order 44 rule 1 of the civil procedure rules for the grant of review sought. In any event the order sought to be reviewed has not been extracted nor annexed to the application. It is a mandatory requirement that in applications of these nature the order or decree sought to be reviewed and or set aside should be extracted and annexed to the application. Failure to do so renders the application fatally defective and incompetent.

The applicant it appears to me, got to know of this court's ruling complained of sometimes on 9th March 2009 when the chief summoned her for a meeting. The applicant of course states that she got to know of the issue at the end of March. This is what she has deponed to in paragraphs 8 of her supporting affidavit. Clearly the applicant is not being candid. If the Chief's letter is dated 2nd March 2009 and the meeting was scheduled for "**Monday 09.03.09 at 11.00 a.m."** that cannot pass for end of March 2009. Having known about the decision herein in March 2009 as aforesaid, it was not until 5th May 2009 that she filed the instant application. That is a delay of about 2 months. That delay is inordinate and unexplained. Much as the applicant claims in her grounds in support of the application that there has been no inordinate delay in bringing this application, I do however hold a totally different view. The delay of 2 months is inordinate.

Finally I wish to state that the grant having been revoked, there is nothing left to review and or set aside. The only redress available to the parties is to initiate fresh proceedings for grant of letters of administration intestate.

The application accordingly fails and is dismissed with costs to the respondents.

Dated and delivered at Nyeri this 22nd day of July 2009

M. S. A. MAKHANDIA

JUDGE

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