



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 835 of 2001

IN THE MATTER OF THE ESTATE OF GITAU KINYANJUI GACHUI (DECEASED)

SUSAN NUNGARI GACHUI }

DAVID WAWERU KINYANJUI }.....

PETITIONERS/APPLICANTS

VERSUS

ALICE WANJIRU

WAMWEA.....OBJECTOR/RESPONDENT

RULING

By summons dated 24.07.07 stated to be brought under sections 68, 69 and 71 of the Law of Succession Act, Cap.160, the petitioners applied, *inter alia*, for the following orders:-

'2. THAT the objection for confirmation of Grant lodged by the Objector herein ALICE WANJIRU WAMWEA dated 30th March 2004 and filed on 31st March 2004 together with the caveat dated 24th April 2004 be dismissed for want of prosecution.

3. THAT pursuant to prayer 2 (two) above, the Summons for Confirmation of Grant under section 71 of the Succession Act filed on 12th March 2004 be set down for hearing and confirmation of the same as the court may direct.

4. THAT costs of this application be in the cause.'

The grounds upon which the application is based are:-

- a) THAT the objector has not taken any step to prosecute the objection or protest for a period of over 3 years since it was lodged.
- b) THAT the objector has not demonstrated to the court sufficient reasons and grounds to justify and sustain the protest after failing to provide the court with relevant original documents in support of the protest as directed by the court.
- c) THAT it will be meet and in the interest of just for this honourable court to grant the orders as prayed as the delay in confirmation of the Grant has greatly prejudiced the interests of the

dependants, some of whom are in urgent need of school fees,

The application is supported by the affidavit of Susan Nungari Gachui, 1st applicant sworn on 24.07.07.

At the hearing of the application before me, the petitioners/applicants were represented by learned counsel, Mr E.W. Makunja while there was no appearance for the respondent.

Applicants' counsel informed this court that the firm of Mutimu Kang'atta & Co. Advocates is on record for the objector/respondent and that they were served with the requisite hearing notice but had not appeared. Applicants' counsel sought to proceed with the application for dismissal of the protest dated 30.03.04 and lodged by the objector in the form of affidavit of service sworn on 30.03.04 and filed on 31.03.04 against confirmation of the Grant in question to the petitioners.

There is in the court file an affidavit of service by Jones Dan Muinde, process server sworn on 08.10.07 to the effect that on 02.08.07 he served on the objector's/respondent's lawyers, M/s Mutimu Kang'atta & Co. Advocates notice of hearing of the summons dated 24.07.07 for dismissal of the protest lodged by the objector herein. The hearing of the dismissal summons was fixed for 09.10.07. The hearing notice dated 25.07.07 is annexed to Muinde's aforesaid affidavit of service. In the light of the above evidence of service upon objector's/respondent's advocates and there being no explanation for non-appearance for the objector/respondent at the hearing, I directed the hearing to proceed, and it did.

Petitioners'/applicants' counsel referred to the grounds of the dismissal summons and pointed out that the objector had not shown any interest in prosecuting her objection some 4 years down the line. Petitioners'/applicants' counsel informed this court that the objector had availed a photocopy of agreement for sale dated 22.03.04, that the objector was directed by Aluoch, J (as she then was) to furnish the original agreement for sending to the document examiner for authentication but the objector had not done so. I interpose here to note that this matter appears to have gone before Aluoch, J once, i.e. on 16.07.07, and that her brief judicial notes do not include directions for the objector to avail the original sale agreement alluded to by petitioners'/applicants' counsel. However, the non-appearance of the objector either through counsel or in person at the hearing of the present dismissal summons leaves the petitioners'/applicants' counsel's statement from the Bar uncontested.

Petitioners'/applicants' counsel said that beneficiaries of the deceased's estate are of school – going age, in danger of dropping out of school as the petitioners/administrators could not access funds invested by the deceased through shares and that the administrators could also not access the deceased's Bank accounts before confirmation of the Grant. Petitioners'/applicants' counsel urged the court to dismiss the protest which had remained unprosecuted since 2004 and set down the summons dated 12.03.04 for confirmation of the Grant issued on 03.08.01.

I have given due consideration to the application before court.

The objector's objection to confirmation of the Grant in question through the objector's affidavit of protest sworn on 30.03.04 was filed on 31.03.04. It remained unprosecuted until the advent of the present summons dated 24.07.07 for dismissal of the objection. As recorded earlier, the objector/respondent was served through her advocates on record with the dismissal summons but failed to appear at the hearing of the said dismissal summons. No explanation has been availed to this court for the objector's aforesaid non-appearance at the hearing of the dismissal application. I surmise from the objector's/respondent's above conduct that she has lost interest in pursuing her objection/protest.

In view of the foregoing, I make the following orders:-

1. The summons application dated 24.07.07 is allowed and the objection by way of the objector's affidavit of protest sworn on 30.03.04 and filed on 31.03.04 is hereby dismissed for want of prosecution.
2. The petitioners/applicants may proceed to take a date for hearing, before a Judge in the Family Division, of summons dated 12.03.04 for confirmation of the Grant issued on 03.08.01.

3. Costs in the cause.

Orders accordingly.

Delivered at Nairobi this 29th day of August, 2008.

B.P. KUBO

JUDGE