



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 62 of 1991

**IN THE MATTER OF THE ESTATE OF BILDAD KIHURIA alias BEDAD KIHURIA
(DECEASED)**

GLADYS WAMBUI WACHIRA..... 1ST APPLICANT

CHARLES MWANGI NJOGU..... 2ND APPLICANT

VERSUS

JANETRUDE GATHIGIA KIHURIA 1ST RESPONDENT

AGNES MUTHONI MWAI..... 2ND RESPONDENT

RULING

By summons dated 02.07.07 and filed on 10.07.07 stated to be brought under rules 49 and 73 of the Probate and Administration Rules (made under the Law of Succession Act, (Cap.160), the applicants applied for the following orders:-

1. That the application dated 13.03.06 for revocation of confirmation of grant filed by G.M. Muhoro & Co. Advocates be dismissed for want of prosecution as no steps have been taken to prosecute it since it was stood over generally on 28.06.05 (24 months previously).
2. That the restriction registered against L.R. Iriaini/Cheche/853 on 13.02.03 and caution registered on 03.01.91 by Agnes Muthoni Mwai, 2nd Respondent against L.R. Iriaini/Cheche/853 be removed forthwith to enable the sub-division of L.R. Iriaini/Cheche/853 to be registered and issuance of titles of six (6) acres to Gladys Wambui Wachira, 1st Applicant and 3¾ acres to Charles Mwangi Njogu, 2nd Applicant 'administrator of Njogu Njeru Kagema to be made pursuant to the order of the High Court on 11.5.2000.'

The application is grounded upon the affidavit of Charles Mwangi Njogu sworn on 09.07.07 which essentially makes the following averments and prayers:-

- a) That the deponent, Charles Mwangi Njogu, 2nd applicant was appointed administrator of the estate of his father Njogu Njeru Kagema by the court on 31.03.04 in Succession Cause No.463 of 2004 and made a party to this case on 31.01.05.
- b) That on 13.02.03, Advocate G.M. Muhoro caused a restriction to be entered against the Title to

L.R. Iriaini/Cheche/853.

- c) That on 03.06.91 a beneficiary, Agnes Muthoni Mwai, 2nd Respondent placed a caution on L.R. Iriaini/Cheche/853.
- d) That the restriction and caution have prevented Gladys Wambui Wachira from registering sub-divisions and partitions of 3¾ acres for 2nd Applicant and 6 acres for 1st Applicant, respectively, on L.R. Iriaini/Cheche/853.
- e) That survey of the land pursuant to court order of 11.05.2000 was carried out by Gatome & Associates on 17.01.03.
- f) That on 18.03.03 (*sic* – correct date is 13.03.03) the respondents herein filed summons for revocation of confirmation of grant; that the summons went before Aluoch, J (as she then was) on 28.06.05 and was stood over generally on application by G.M. Muhoro Advocate; that the summons remains unprosecuted for 24 months without good reason, thereby provoking the present application dated 02.07.07 for dismissal of the revocation summons dated 13.03.03 since the said unprosecuted summons is preventing the present applicants from getting their Title Deeds, to their detriment.
- g) That the summons dated 13.03.03 has prevented the applicants herein from registering their sub-divisions of L.R. Iriaini/Cheche/853, i.e. No.1617 (2.43 hectares), No.1618 (1.52 hectares) plus the respondent's No.1619 (14.67 hectares).
- h) That the restriction and caution alluded to at prayer 2 of the present summons be removed, with costs to the applicants herein.

At the hearing of the present application before me, the applicants were represented by learned counsel, Mr S.M.W. Kinuthia while there was no appearance for the respondents.

This court noted that there is in the court file an affidavit of service by Samuel Ng'ang'a, process server sworn on 17.07.07 to the effect that he served M/s G. Muhoro Advocates on 16.07.07 with a copy of the summons dated 02.07.07 which indicated it was coming up for hearing on 19.11.07 and that the said firm acknowledged service by affixing their rubber stamp and signature. The court noted that there are such rubber stamp and signature affixed at the back of the accompanying affidavit on 09.07.07. As there was no explanation for the respondents' non-appearance at the hearing, this court directed the hearing to proceed, and it did.

Applicants' counsel's submissions were along the lines of the summons dated 02.07.07 and its supporting affidavit plus annexures.

The court record confirms that on 28.06.05 the parties went before Aluoch, J (as she then was). The Judge marked the matter as stood over generally 'to enable counsel G.M. Muhoro to take further instructions.' The court file further shows that on 28.07.05 the parties appeared before the Deputy Registrar and the revocation summons was fixed for hearing on 20.12.05. There is, however, an entry for 08.12.05 showing that the matter was called out before the Deputy Registrar on 08.12.05 at 3.28 p.m. but there was no appearance for any party and the matter was 'taken out.' The next entry is for 10.07.07 before the Deputy Registrar. It appears that only the present applicants were represented before the Deputy Registrar on this latter day but there was no appearance for the present respondents. The Deputy Registrar fixed the present summons for dismissal dated 02.07.07 for hearing on 19.11.07. As already recorded, the present applicants appeared through counsel on this latter date while there was no appearance for the respondents despite service.

There is no response in the court file by the respondents to the dismissal summons dated 02.07.07. I surmise therefrom and from their non-appearance at the hearing on 19.11.07 that the respondents have lost interest in pursuing their revocation summons dated 13.03.03.

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

1. The summons dated 13.03.03 for revocation of confirmation of grant is hereby dismissed for want of prosecution in accordance with prayer 1 in the summons dated 02.07.07.
2. Prayer 2 in the present summons dated 02.07.07 is also granted and it is hereby directed that the restriction and caution alluded to in the said prayer 2 be removed forthwith.
3. The respondents shall bear the applicants' costs of the present application.

Orders accordingly.

Delivered at Nairobi this 3rd day of September, 2008.

B.P. KUBO

JUDGE