REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 113 of 1994

IN THE MATTER OF THE ESTATE OF MUMENYA NJOGU – DECEASED

AND

MUGO MUMENYA NJOGU ..... PETITIONER

VERSUS

ELIZABETH WAMUYU KABURU ..... 1ST OBJECTOR

ESTHER WAMAITHA MUTHUIRU ..... 2ND OBJECTOR

MARY WANJIRA GITHINJI ..... 3RD OBJECTOR

PETER MAINA KINYUA ..... 4TH OBJECTOR

R U L I N G

By an application dated 28th April 2008 and expressed to be brought under Rule 49 of the Probate and Administration rules and Order XLIV of the Civil Procedure Rules, Mugo Mumenya Njogu, hereinafter referred to as "the applicant' asked this court to set aside and or review the order dismissing the summons for confirmation of grant dated 11th July 2006 and secondly, that the exparte judgment delivered herein on 7th April, 2008 be set aside and the matter be heard de novo. He also prayed that the costs of the application be in the cause.

The application was supported by an affidavit sworn by the applicant who in the main deponed that he was a co-administrator of the estate of Mumenya Njogu – deceased together with his sister, Esther Wamaitha Muthuiru. A temporary grant of letters of administration was issued to them by this court on 19th September 1996. Subsequent thereto an application for the confirmation of the grant was filed but protests were raised by the other beneficiaries of the estate of the deceased including Esther Wamaitha Muthuiru, the co-administrator. The dispute was then set down for hearing by way of viva voce evidence. According to the applicant on the 18th February 2008 when the cause was scheduled for hearing he came to court early but could not trace his lawyer. This prompted him to run to town for purposes of calling his lawyer's office to confirm his whereabouts. That when he got through, he was informed that the lawyer had left for the United States of America for a sojourn that would last six months. That his office assured him that it had organised with another lawyer to have the matter adjourned to another date when his said lawyer will have returned to the country. He went on to depone

that though at the hearing of his application he was within the court precincts, his application was nonetheless dismissed as he was confused due to the failure of his advocate to attend court and as he was frantically looking for him. That the events that led to the dismissal of his application were not of his making and ought not to be visited upon him. He believes that the protesters whom I shall hereinafter refer to as "the 1st, 2nd, 3rd and 4th Respondents" respectively would not be prejudiced in any way should the matter be reopened. That the ends of justice will be better achieved if the order of dismissal is set aside. He also deponed that the court ought not to have proceeded to hear the protests after the dismissal of the application for confirmation of grant as the said protests are not capable of moving the court in themselves but rather they are responsonal in nature. That the protests have no basis in themselves in court in the absence of the application for confirmation of the grant.

The application was of course opposed. On behalf of the 1st, 2nd and 3rd respondent, the 3rd respondent filed a replying affidavit. In that affidavit she deponed that the application was defective and bad in law, that since the grant had been confirmed, the only remedy available to the applicant was an application for the revocation of the grant. She went on to depone that the applicant who is her brother was not in court on the material day. That on the material day the applicant's advocate had sent a court clerk to court who was present in court during the hearing and had even attempted to address the court when the application was called for hearing early in the afternoon. That the said court clerk never mentioned that the applicant was in court and his only request was to have the case adjourned as the counsel for the applicant was out of the country. That there had been inordinate delay in filing the instant application and finally that the applicant would not suffer any prejudice in the event that the application is rejected as he was provided for in the lifetime of the deceased.

In his opposition to the application, the 4th respondent deponed that the applicant was never in court when the matter was heard, that there had been inordinate delay in bringing this application which has not been explained and that the applicant stands to suffer no prejudice.

At the hearing of the application interparties, Mr. Ntarangwi, learned counsel for he applicant abandoned the prayer for review in the application. In support of the other prayers, counsel merely reiterated what the applicant had said in his supporting affidavit. The only addition being that the balance of convenience tilted in favour of the matter being set aside and that he was asking this court to exercise its wide discretion in favour of the applicant. Counsel relied on the following authorities in support of his case:-

(1) Maina v/s Mugina (1983) KLR 78

(2) Maina v/s Muriuki (1984) KLR 407

(3) Mugachia v/s Mwakibindu (1984) KLR 572

The ratio decidendi that runs through all these authorities is that there is no limit or restriction on the judges discretion in setting side an ex-parte order and or judgment except that it should be exercised on such terms as may be just because the main concern of the court is to do justice to the parties and that the discretion is intended to be exercised so as to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a litigant who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

In her oral submissions in opposition to the application, Ms. Mwai, learned counsel for the 1st, 2nd and 3rd respondents stated that under the law of succession Act, once a grant has been confirmed it can only be revoked and or annulled. It cannot be set aside. That the applicant is not being candid when he claims that he was in the court precincts when the application was dismissed. Counsel submitted that litigation must come to an end. Finally counsel submitted that the applicant had a remedy against his errand lawyer.

As for Mr. Kamwenji, learned counsel for the 4th respondent, he submitted that discretion had not been called for in the application. Rule 49 cited in the application was merely procedural but does not provide

a remedy. Finally counsel spelt out that even if counsel had been in court, he would not have remedied the situation as the applicant was not in court on the material day. The matter had been called out 3 times and there was no response from the applicant.

I have carefully considered the application, the supporting and replying affidavits, the rival oral submissions and the law. The application was expressed to have been brought under Rule 49 of the probate and administration rules as well as order XLIV of the Civil Procedure rules. Rule 49 aforesaid does not provide for the setting aside of any order made in a succession cause. Neither does it provide for the setting aside of a judgment. As correctly pointed out by Mr. Kamwenji, that rule provides a procedural remedy. It tells a litigant by what means he/she can move the court. It does not provide the substantive remedy. The only rule that deals with exercise of discretion is rule 73 of the probate and Administration rules. That rule was not cited in the application. Nor did the applicant quote in the body of the application the common rubric "..... And all other enabling provisions of the law ....." Had he done so perhaps I would have ventured to invoke the said rule and consider the application in a different light. He did not. Unlike the Civil Procedure rules which have order L rule 12 that deals with situation where there is failure to cite a proper order, rule or other statutory provisions under or by virtue of which the application had been brought, which failure is not fatal, the law of succession Act has no such equivalent provision and nothing can come to the aid of the applicant in the circumstances. The application is thus incompetent.

How about order XLIV of the Civil Procedure rules? That order deals with applications for review. The applicant at the commencement of the hearing of the application abandoned the prayer for the review. Accordingly that order cannot come to his aid.

Had this application he drawn by the applicant, I would understand his inability to cite the proper provisions of the law. Not so for an advocate. It is simply inexcusable and outrightly negligent. However this court cannot call in aid the provisions of the law not cited to come to the assistance of the applicant.

Ms Mwai, also correctly in my view, submitted that the grant herein having been confirmed, it can only be annulled and or revoked. It cannot be set aside. I have carefully flipped through the law of succession Act and the rules made thereunder and did not come across any provision of the law that would allow me to set aside a confirmed grant as I am being asked to do in the instant application. Indeed note that counsel for the applicant had no response to this submission. He merely glossed over the issue.

The applicant says that sins of omission or commission by his advocate should not be visited upon him. That might well be the legal position. However that legal doctrine can only come to his aid if he is candid with the court. The applicant claims that he came to court and not finding his counsel rushed to town in a bid to contact him. The applicant does not say what he did once he was assured that his advocate was on top of the matter. He does not say that he came back to court to confirm the status of the matter. That is what a reasonable person would have done. However the applicant is silent on the issue. When what the applicant has said is juxtaposed with what the court clerk despatched by the applicant's lawyer informed the court on the material day, the contradiction is glaring. The said court clerk never mentioned that the applicant was in court. His only request was to have the matter adjourned to another date when applicant's counsel would have come back from overseas.

At this stage I wish to digress a bit and remind lawyers and their court clerks that court clerks have no right of audience before court. Court clerks have no right to address the court in any judicial proceedings unless as litigants, witnesses, accused persons e.t.c. I was therefore taken aback when a court clerk from the applicant's lawyer's offices after the matter had been called out for hearing three times, and there was no presence on the part of the applicant and or his counsel boldly and blatantly stood up and attempted to address the court on the need to adjourn the matter. Despite repeated caution, the court clerk brazenly went on to address the court. I was inclined to hold him in contempt and haul into the civil jail but on reflection I decided against it. However I must send out a clear warning that such conduct on the part of court clerks would not be tolerated nor condoned by this court in future.

This matter was not heard until after 1 p.m. on the material day. The respondents and applicant are all siblings. They all claim not to have seen the applicant in court or its environs. The respondents cannot all be lying. Further the matter was called out three times between 9 a.m. when the court started its sitting, at about 11.30 a.m. and slightly after 1 p.m. Surely if at all he was in court, the applicant would have responded. He did not and that means he was absent. Yet he wants this court to exercise its wide and unfettered discretion in his favour when he has clearly demonstrated singular lack of candour. This court cannot do so. If I was to do so I would invariably be assisting a party who is hell bent on obstructing and or delaying justice.

The order of dismissal sought to be set aside was made on 18th February 2008. The instant application was made on 28th April 2008, 2½ months later. There is no explanation as to why it took the applicant 2½ months to file the instant application. Certainly the delay is inordinate. Applications of this nature ought to be filed and prosecuted timeously. The applicant in failing to do so has exhibited indolence for which this court cannot come to his assistance.

This cause has been pending in this court since 22nd March 1994, a period in excess of 15 years. Yet the applicant wants this matter reopened all over again. I think to do so in the circumstances of this case is to go against the grain of public policy that litigation whatever its nature must at some point come to an end. That point in my view has now reached much as Mr. Ntarangwi vehemently submits that the desire to bring litigation to an end should not be sacrificed at he alter of justice.

On the submission that once this court dismissed the application for confirmation of grant, this court had no jurisdiction to hear the protests, I can only say that the applicant did not point out to this court the legal basis for such proposition. To my mind a protest is like a counterclaim in a civil suit. It cannot be said therefore that if the main suit is dismissed for one reason or another, a counter claim cannot stand on its own. I think that such submission is fallacious. Once the application for the confirmation was dismissed, the protests remained on their own and a determination thereon had to be made. The protests had a basis in law in the absence of the application for the confirmation of the grant.

The end result of all that I have said is that this application lacks merit and is accordingly dismissed with costs to the respondents.

Dated and delivered at Nyeri this 9th day of October 2008

M. S. A. MAKHANDIA

JUDGE