REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 277 of 1996

IN THE MATTER OF THE ESTATE OF GITUNDU MUCHIRA – DECEASED

AND

LYDIA WAIRIMU MURENGO .... PETITIONER

VERSUS

GITHINJI WAMATHIGI MUCHIRA .... PROTESTOR

R U L I N G

By summons in general form dated 30th July 2008 expressed to be brought under Rules 49 and 73 respectively of the Probate and Administration rules, Julius Machira Githinji, hereinafter referred to as "*the applicant*" sought that "the application for revocation of grant of letters of Administration dated 6th June 2007 and presented before this honourable court on 12th June 2008 by Githinji Wamathigi Machira be reinstated and be heard on merits. That the costs of the application be provided for." The application was anchored on the grounds that the applicant stands to suffer great loss and damage if the application is not reinstated for hearing and that this being a long standing land case it should be handled with great care and be heard on merits.

The application was further supported by the affidavit sworn by Julius Machira Githinji. In the main he depones that the application for revocation of grant had been listed for hearing on 24th October 2007. On the said date his father attended court with a view to prosecuting the said application. That his said father went to the High Court room No. 1 where court sessions used to be held where he waited for 30 minutes before he learned that the High Court had relocated its sittings to the SPM's court. That he proceeded to the SPM's Court but by the time he got there he found that the application had been called out and dismissed for want of attendance. To the applicant therefore, his failure to attend court was not deliberate but was occasioned by sudden change in location where the High Court was sitting.

The application was opposed. In a replying affidavit dated 6th October 2008 and filed in court on the same day, Lydia Wairimu Murondo hereinafter referred to as "*the respondent*" countered the applicant's allegations in terms that the application was bad in law, mischievous and an abuse of the court process. That the explanation if any for not attending court by the applicant is not convincing at all to warrant this court's exercise of its discretion in his favour. That the applicant did not state the time that he arrived in court. That she was among those who arrived in court on time and was together with others directed to the SPM's court. The applicant was nowhere to be seen. In any event, the respondent deponed, this

cause was not among the first in the day's cause list and the same was not dealt with until much later in the day and by that time the applicant had not arrived. Accordingly the applicant was not being truthful about the reasons as to why he was not in court to prosecute his application and hence does not deserve this court's exercise of discretion in his favour.

At the hearing of the application, the applicant merely repeated what he had deponed to in his affidavit in support of the application in his oral submissions in support of the application.

Mr. Mugo, learned counsel for the respondent orally submitted in opposing the application that the application had been brought under the wrong provisions of the law. The applicant should have sought a review of the order of dismissal. That the affidavit sworn in support of the application was defective. Finally that the application sought to be reinstated lacked merit in the first place.

I have now considered albeit carefully the application, the supporting and replying affidavits as well as respective oral submissions and the law. The application as it were seeks my exercise of discretion in favour of the applicant. Like every judicial discretion it must be exercised judicially and not capriciously. It must be exercised on reason and not sentiment. The litigant seeking such exercise of discretion must be candid in whatever he says in support of the application.

I am aware that during the court of appeal sessions in Nyeri, the sittings of the High Court are disrupted in such way that High Court 1 finds itself sitting in High Court 2 and High Court 2 is relegated to sitting in he Senior Principal Magistrate's Court across the road. I am also aware that whenever this happens large posters and or notices are pinned all over the courtrooms notifying parties where each high court is sitting and there is always a member of staff readily at hand to assist any litigant with any critical information. With this in mind, how could the applicant have missed to see or lacked information as to where the High Court 2 was sitting. I have a distinct feeling that the applicant is not being candid with the court. I say so because in his own affidavit, the applicant has deponed that on 24th October 2007 he went to High Court 1 where court sessions used to be held. That cannot possibly be correct. From the record this case has always been handled by High Court 2 since 22nd May 2007 until today save for 2nd May 2008 when it was listed before court 1. It is noted that on that occasion the court made a specific order that "....... This matter shall be listed before court No. 2 on 16th May 2008." The applicant from the record was attendance. Before that date the matter had been heard by this court on 22nd may 2007.

Secondly, the applicant has deliberately avoided to state the precise time he arrived in the High Court precincts on the material day if at all. As clearly deponed to by the respondent, if indeed the applicant had arrived in court in good time as he claimed he would have been directed by the judicial staff on hand as to where this court was sitting the same way the respondent and other litigants were so directed. I doubt whether he sat in court 1 for 30 minutes as he claims. In any event court 1 was at the time being used by the court of appeal. Finally on this very same issue, it is also not lost on me that the applicant is ambivalent as to what time he finally found himself in the Senior Principal magistrate's court where court 2 was sitting. The respondent had deponed categorically that this cause was not among the first in the cause list and that the same was dealt with much later in the day, by which time the applicant had not arrived. This deposition has not been challenged and or controverted by the applicant. I have no reason not to take it to be true. I have this gut feeling that either the applicant never turned upon on the material day or if he did it was too late in the day. He is therefore not being candid when he claims that he attended court on the material day only to find himself in the wrong court and that by the time he located the correct court his matter had been called out and dismissed.

In any event the affidavit in support of the application is fatally defective. Although it is sworn by Julius Machira Githinji, it talks of the exploits of Githinji Wamathigi Machira, the Protestor on the material day. The offending paragraphs in that affidavit are paragraphs 4, 5 and 7 all inclusive. The source of information that the applicant has deponed in those paragraphs to is not disclosed. Sample this

"4) That on 24th October 2007 my father attended court with a view to prosecuting the said application.

5) That he went to high court No. 1 where court sessions used to be held.

6) ....

7) That he went to where the High Court was sitting but by the time he arrived there he found that his application had been called out and had been dismissed for want of prosecution or non-attendance.

From the foregoing, it is quite clear that the deponent is acting on hearsay evidence since he does not disclose the source of information that he has deponed to and whether he verily believed the same to be true. Those offending paragraphs of the affidavit are liable to be struck out and if they are, as they should, then there is no evidence in support of the application.

Order XLIV is among the orders in the civil procedure rules that have been imported into the law of succession Act

and the rules made thereunder. This order deals with review. Accordingly and as correctly submitted by Mr. Mugo, the applicant should have first sought to review and set aside the order of dismissal. He should not have sought the reinstatement of the application without first seeking a review and or setting aside of the order of dismissal. To that extent therefore this application is bad in law and incompetent.

Finally, I have also looked at the application for revocation of grant sought to be revived by this application. I note that the grant was issued on 22nd May 2007 in the joint names of the applicant and respondent willingly. The applicant claims that the proceedings leading to the grant were defective in substance, that the grant was obtained fraudulently by making a false statement, that the grant was

obtained by means of untrue allegation of fact, yet the applicant was a willing participant in those proceedings. I will say no more.

In the end, the decision I have come to in respect of this application is that it is unmerited. Accordingly it is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 20th day of November 2008

M. S. A. MAKHANDIA

JUDGE