



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Cause 1559 of 1995

IN THE MATTER OF THE ESTATE OF THE LATE

ZAKAYO KIPKOECH KIRUI

ROSEMARY CHEPKORIR SANG..... APPLICANT/OBJECTOR

VERSUS

MARGARET ISUTSA CHAMULA.....PETITIONER/RESPONDENT

RULING

By notice of motion dated 14.03.07 stated to be brought under rule 73 of the Probate and Administration Rules made under the Law of Succession Act, Cap. 160, the applicant/objector applied for the following orders, namely:-

1. THAT directions be given as herein below:-

(a) Evidence be taken by way of *viva voce*.

(b) The petitioner/respondent do file in court true and proper accounts/inventory of the estate within the next fourteen (14) days.

(c) Parties be given a hearing date on priority basis.

2. THAT costs be in the cause.

The grounds upon which the application is based are that:-

(i) The petitioner/respondent has failed to comply with the orders of court issued on 18.12.06.

(ii) No provision was made for the applicant and other female dependants.

(iii) The respondent is wasting the estate.

The application is supported by the applicant's/objector's affidavit sworn on 14.03.07 vide which the applicant/objector deponed, *inter alia*, that she swore the affidavit on her own and through authority given to her by other heirs of the deceased herein who were left out in the "Will" dated 04.08.88. The

applicant/objector listed the omitted heirs as:-

- (a) Rosemary Chepkorir Sang (applicant/objector).
- (b) Jennifer Cheptoo Chepkwony.
- (c) Khadija Irene Chelangat Muhamed.
- (d) Joyce Chepkruir Mutai.
- (e) Elizabeth Chebet Kirui

In the said affidavit, the applicant/objector also drew attention to the proceedings of 18.12.06 when summons dated 15.11.06 for revocation of grant of probate issued to Margaret Isutsa Chamula to be revoked came up, essentially on the broad ground that proceedings to obtain the grant were defective in substance; that at the said proceedings of 18.12.06 the administrator of the grant in question was given 21 days to file and serve a replying affidavit to the summons dated 16.11.06, with corresponding leave to the applicant/objector to file affidavit in response within 7 days of being served with the administrator's/respondent's replying affidavit; that since the respondent did not obey the court's order of 18.12.06, the applicant/objector now applied for directions as prayed in the notice of motion application dated 14.03.07; or, alternatively and without prejudice, the court should invoke its inherent and discretionary powers by allowing the summons application dated 16.11.06 thereby revoking the grant of probate issued to Margaret Isutsa Chamula for reasons that the application by summons dated 16.11.06 is unopposed.

The notice of motion application dated 14.03.07 came up for hearing before me on 17.09.07 whereat the applicant/objector was represented by learned counsel, Mr S.K. Siele while the petitioner/respondent was represented by learned counsel, Mr S.M. Mwenesi.

Applicant's/objector's counsel drew attention to petitioner's/respondent's replying affidavit sworn on 20.06.07 and filed on 25.06.07 in response to the applicant's/objector's summons dated 16.11.06 for revocation of the grant in question. Applicant's/objector's counsel urged this court to strike out and expunge the replying affidavit on grounds that it was filed outside the 21 days granted by this court on 18.12.06 and that it also purported to respond to the notice of motion dated 14.03.07 without the leave of the court. In applicant's/objector's counsel's view, the filing of the said replying affidavit without leave constituted abuse of the court process. It was also applicant's/objector's counsel's contention that the replying affidavit was scandalous of applicant's/objector's counsel in certain respects. Applicant's/objector's counsel added that the applicant/objector did not file affidavit response to the replying affidavit basically because it was not validly filed. Applicant's/objector's counsel submitted in essence that the replying affidavit the applicant/objector challenges merely mentions at paragraph 2 that the petitioner/respondent was served with the summons dated 16.11.06 but does not touch on the prayers in the notice of motion dated 14.03.07 and that, therefore, the prayers in the said notice of motion remain unopposed. Applicant's/objector's counsel urged the court to grant the prayers in the notice of motion dated 14.03.07. Alternatively and without prejudice to the foregoing, applicant's/objector's counsel urged that if the replying affidavit is allowed to be on record, the applicant be granted leave to file a further affidavit in response thereto within 14 days. Applicant's/objector's counsel also urged that upon directions being given as prayed in the notice of motion dated 14.03.07, the summons dated 16.11.06 for revocation of the grant be allocated a hearing date on priority basis, to save the deceased's estate from further wastage. Finally, applicant's counsel drew attention to an order made on 07.05.07 for the petitioner/respondent to pay the applicant's/objector's costs for 28.03.07 in the sum of Kshs.8,500/=, noted that no period for payment thereof was specified and asked that the petitioner/respondent be ordered to pay the said costs within 14 days.

For his part, petitioner's/respondent's counsel did not address the issue of the petitioner's/respondent's replying affidavit not having been filed within 21 days from 18.12.06 as ordered by the court or that it was filed outside the stipulated period without leave. He confined himself to submitting that the replying

affidavit responds to the notice of motion and the summons for revocation and that the replying affidavit is not scandalous. He submitted that the notice of motion dated 14.03.07 does not lie since it seeks directions from a judge on the summons dated 16.11.06 for revocation of the grant in question instead of seeking such directions before the registrar under rule 61 of the Probate and Administration Rules. In petitioner's/respondent's counsel's view, the invocation by applicant/objector of rule 73 which is residual is improper since there is a specific procedure provided by rule 61 for taking directions which procedure was not complied with. According to petitioner's/respondent's counsel, the appropriate forms of proceedings in this case are those prescribed under rules 59, 70 and the First Schedule to the Probate and Administration Rules, which he submitted do not provide for notice of motion. In counsel's view, the notice of motion is misleading and I understood him to say that this violates section 72 of the Interpretation and General Provisions Act, Cap.2. He urged that the applicant/objector should take his summons for revocation before the registrar for directions under rule 61. Petitioner's/respondent's counsel complained that although the applicant/objector was aware of the petitioner's/respondent's name as having changed from Margaret Isutsa Chamula to Margaret Isutsa Kirui who brought the present succession cause in the latter name, the applicant/objector brought the summons and notice of motion under consideration in petitioner's/respondent's former name of Margaret Isutsa Chamula who in counsel's view does not now exist. Finally, petitioner's/respondent's counsel pointed out that on 17.11.06 a notice of appointment of advocate for applicant/objector was filed instead of a memorandum of appearance under rule 60 and form 26 in the First Schedule to the Probate and Administration Rules and that, therefore, the applicant/objector is, strictly speaking, not before the court to be able to ask for anything to be done. Counsel added that there is no evidence of wastage of the deceased's estate. Petitioner's/respondent's counsel urged the court to dismiss both the notice of motion dated 14.03.07 and the summons dated 16.11.06 for revocation of the grant in question.

In reply, applicant's/objector's counsel essentially submitted that no rules had been breached by bringing the present application by way of notice of motion under rule 73 of the Probate and Administration Rules which invokes the inherent powers of the court. In his view the directions petitioner's/respondent's counsel was suggesting should be sought from the registrar had already been given by the court on 07.05.07 and that there was nothing improper in the said directions having been so given. He saw the raising by petitioner's/respondent's counsel of the procedural points in the informal manner adopted at the hearing of the notice of motion as a mere tactic to delay the hearing of the summons dated 16.11.06 for revocation of the grant in question. On the issue of the correctness or otherwise of the names used of the petitioner/respondent, applicant's/objector's counsel pointed out that the petitioner/respondent had vide paragraph 2 of her replying affidavit sworn on 20.06.07 acknowledged having been served with the summons dated 16.11.06 and notice of motion dated 14.03.07. Counsel submitted, therefore, that the petitioner's/respondent's case was not prejudiced by usage of the names ascribed to her in the two applications. Applicant's/objector's counsel submitted that issues of form and description of parties cannot justify striking out pleadings. He pointed out that the submissions made on behalf of the petitioner/respondent at the hearing of the notice of motion did not address the issues raised in the notice of motion and that in any case they should have come by way of a formal application. Applicant's/objector's counsel urged the court to disregard petitioner's/respondent's counsel's submissions and grant the prayers sought in the notice of motion.

I have given due consideration to the rival submissions of the parties.

The court record shows that on 19.01.07 the Deputy Registrar fixed the summons by the present applicant/objector dated 16.11.06 for further directions. The summons is stated to be brought under rules 76, 44 and 73 of the Probate and Administration Rules and it is for revocation of grant of probate issued to Margaret Isutsa Chamula basically on the grounds that the proceedings to obtain the grant were defective in substance. The date of issuance of the grant sought to be revoked is not specified in the summons. There is in the court file a grant of letters of administration with Will (and codicil) annexed of all the estate of ZAKAYO KIPKOECH ARAP KIRUI (Deceased) issued under the present succession cause to MARGARET ISUTSA KIRUI on 28.09.95. There is also in the court file a copy Deed Poll dated 31.10.86 to the effect that one Margaret Isutsa Chamula changed and renounced her aforesaid name and adopted the name Margaret Isutsa Kirui effective from that date. I note from the supporting affidavit of the present applicant/objector, Rosemary Chepkorir Sang sworn on 16.11.06 that she disputes any

marriage between the petitioner/respondent and the deceased herein. *Prima facie* the documentary evidence on record seems to establish that the petitioner/respondent Margaret Isutsa Chamula and the Margaret Isutsa Kirui to whom the grant of probate was issued on 28.09.95 are one and the same person. However, the grant of probate was issued to her in the latter name and it will be incumbent upon the applicant/objector to appropriately bring the latter name into his applications under consideration. The non-reflection of the said latter name in the applications is in my view a procedural irregularity which is curable upon an appropriate application being made therefor, and in the wider interests of substantive justice it would not warrant striking out of the pleadings.

The application of immediate concern to this Ruling is the notice of motion dated 14.03.07 seeking directions on the mode of hearing of the substantive application by way of summons dated 16.11.06 for revocation of the grant of probate to the petitioner/respondent herein and that a hearing date for that substantive application be granted on priority basis; seeking an order for the petitioner/respondent to file in court true and proper accounts/inventory of the estate within 14 days; and that costs be in the cause. The applicant/objector subsequently also asked the court to order the petitioner/respondent to pay her the costs for 28.03.07 in the sum of Kshs.8,500/= within 14 days.

On 18.12.06 the summons dated 16.11.06 came up for hearing before this court whereat Miss J.K. Lavuna appearing for the administrator, who is the petitioner/respondent herein, sought leave to file a replying affidavit and the court granted the petitioner/respondent 21 days to do so. The replying affidavit should have been filed by around the second week of January, 2007 but none was filed until 25.06.07, i.e. about 6 months later. The replying affidavit was filed by the petitioner/respondent in the name of Margaret Isutsa Kirui inordinately out of time without the leave of the court. No explanation was offered for such delay. Such casual approach by the petitioner/respondent to court directions or orders does not depict her as a serious litigant. Flippancy of this nature will not be countenanced by this court. The replying affidavit by Margaret Isutsa Kirui sworn on 20.06.07 and filed on 25.06.07 without leave is hereby struck out and expunged from the court record. The effect of striking out of the affidavit which purported to reply to both the summons dated 16.11.06 and notice of motion dated 14.03.07 is to leave the two applications without any reply thereto and, effectively, unopposed.

It was contended by petitioner's/respondent's counsel, *inter alia*, that the notice of motion dated 14.03.07 does not lie since it seeks directions from a judge on the summons dated 16.11.06 instead of seeking such directions before the registrar under rule 61 of the Probate and Administration Rules. The court record shows, *inter alia*, that this matter has been in and out of the registry for one set of directions or another. For instance, on 25.07.97 it went before the registry and the executive officer fixed a preceding summons by Geoffrey Cheruiyot Koech dated 18.03.97 for revocation of the grant of probate issued to Margaret Isutsa Kirui on 28.09.95 for hearing on 13.11.97. Subsequently the parties appeared before the late Kamau, J on 27.04.04 and recorded a consent whereunder that summons was withdrawn. Eventually the summons dated 16.11.06 by the present applicant/objector was filed under certificate of urgency, it came before this court on 17.11.06, the court certified it urgent and directed the parties to take a date at the registry for *inter-partes* hearing, and on the same date the registry fixed the hearing for 18.12.06. It was on this latter date when the administrator, who is the petitioner/respondent, sought leave to file a replying affidavit and she was granted 21 days to do so but she never did that within the stipulated period as already recorded. If the petitioner/respondent was serious in her present contention that the matter should have gone to the registrar under rule 61, she should have raised that issue previously but she never did. If the matter keeps going from the registry to court and back to the registry on such procedural technicalities, it may take ages for hearing on substantive issues to be embarked upon. This may delay and defeat substantive justice, which is undesirable.

Petitioner's/respondent's counsel also challenged the *locus standi* of the applicant/objector in the present proceedings on the basis that she filed notice of appointment of advocate but did not enter a formal appearance. The notice of applicant's/objector's counsel's appointment appears to have been served on the petitioner/respondent. The notice, duly filed is dated 16.11.06 and it is by the applicant/objector giving notice that she had appointed the firm of M/s Siele – Sigira & Co. Advocates and it bears an endorsement of the same date by the said firm that it had accepted appointment as the applicant's/objector's advocates. The said advocates should have followed up their appointment by filing

a formal Memorandum of Appearance but they never did. This was carelessness on their part. But they filed and served the applications now under consideration and articulated clearly the issues on which they seek determination by the court. This is a 1995 case and it remains undetermined for one technical reason or another. The adage 'justice delayed is justice denied' seems applicable here.

The notice of motion application subject matter of this Ruling was brought under rule 73 of the Probate and Administration Rules, which provides:

'73. Nothing in these Rules shall limit or otherwise affect the inherent power of court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'

The rule gives the court wide discretion in pursuit of substantive justice. The other rules which rule 73 essentially says should not unduly limit the court in pursuing justice should be handmaidens of justice, not its obstruction, and I hold that in the circumstances of this case they stand moderated by rule 73 accordingly. I accept the contention by petitioner's/respondent's counsel that the rules he alluded to, i.e. 59, 60, 61 and 70 of the Probate and Administration Rules do not provide for bringing an application like the one subject matter of the present Ruling by notice of motion. However, the issues raised in the summons dated 16.11.06 for revocation of the grant in question are serious and warrant being heard substantively and determined on merit upon hearing evidence thereon, which is what the application by notice of motion seeks. I am satisfied that substantive justice demands such hearing. Accordingly, the application, by way of notice of motion, dated 14.03.07 is granted and the following orders made:-

1. Hearing of summons dated 16.11.06 for revocation of grant to proceed by way of viva voce evidence.
2. Petitioner/respondent to file and serve true and proper accounts/inventory of the deceased's estate within 30 days.
3. Hearing date to be taken at the Registry on priority basis.
4. Petitioner/respondent to pay applicant/objector her costs for 28.03.07 in the sum of Kshs.8,500/= within 14 days.
5. Other costs in the cause.

Orders accordingly.

Delivered at Nairobi this 22nd day of October, 2007.

B.P. KUBO

JUDGE