



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

**Succession Cause 2364 of 2006**

**IN THE MATTER OF THE ESTATE OF SAMSON MWAURA WAMWATI (DECEASED)**

**WILSON WANDETO MUNYI..... OBJECTOR/APPLICANT**

**VERSUS**

**NJUGUNA NG'ANG'A..... PETITIONER/RESPONDENT**

**RULING**

By summons dated 05.03.07 stated to be brought under rules 49 and 73 of the Probate and Administration rules, the petitioner/respondent applied for the following orders, namely:-

1. That the summons for revocation of grant application filed by the Objector/Applicant, Wilson Wandeto Munyi herein be struck out.
2. That the objector be condemned to pay costs of this application as well as the entire cause.

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

1. The proceedings herein are *res judicata*.
2. The issues the subject matter of the cause herein were the same issues which were in Thika Succession Cause No.(289 of) 2004 where the applicant herein was an objector.
3. The issues herein have been heard and determined by a court of competent jurisdiction.
4. The application herein is fatally defective and an abuse of the court process.
5. The objector is guilty of non-disclosure and laches.
6. The court has no jurisdiction to determine the application or grant the orders sought.

The application is supported by the petitioner's/respondent's affidavit sworn on 05.03.07.

At the hearing on 17.07.07 of the application, learned counsel, Mr C. Wainaina said he was representing the petitioner/applicant while learned counsel, Mrs W.J. Kiarie said she was representing the objector/respondent.

In the present summons by Njuguna Ng'ang'a dated 05.03.07, he seeks the striking out of Wilson Wandeto Munyi's summons filed on 04.10.06 seeking revocation of grant stated to have been issued on 13.07.04 to Njuguna Ng'ang'a under Thika Chief Magistrates Court Succession Cause No.289 of 2004 relating to the estate of the same Samson Mwaura Wamwati the deceased in the present High Court case. It is Njuguna Ng'ang'a's case in his summons dated 05.03.07 that the summons filed by Wilson Wandeto Munyi on 04.10.06 is *res judicata* because the issues raised in it were raised before the Thika subordinate court and determined by that court. I pause here to note, firstly, that the grant in the Thika case was issued on 22.09.04 NOT on 13.07.04 as stated in Munyi's application filed on 04.10.06. Secondly, the summons filed by Wilson Wandeto Munyi on 04.10.06 for revocation of the subject grant to Njuguna Ng'ang'a was not dated when this matter first came up before me on 04.10.06 when the said applicant Wilson Wandeto Munyi acted in person and acknowledged that his said summons had inadvertently not been dated. That summons now bears the date of 04.10.06 written in different ink from the ink used in signing the said summons. Someone must have inserted that date subsequently and did so without the court's authority. That is cheating and due note should be taken that this court strongly disapproves of such dishonest behaviour.

At the hearing on 17.07.07 of Njuguna Ng'ang'a's summons dated 05.03.07 for the striking out of Wilson Wandeto Munyi's undated summons filed on 04.10.06, the parties advocates presented their rival arguments for their respective clients. The arguments or submissions are a matter of record and I shall not repeat them here. The central issue arising therefrom is whether Wilson Wandeto Munyi's summons filed before this court on 04.10.06 for revocation of the grant issued by the Thika court to Njuguna Ng'ang'a on 22.09.04 is *res judicata*.

I note that Wilson Wandeto's entry into the Thika court proceedings was by way of his affidavit of protest sworn on 04.05.05. That affidavit is annexed to Njuguna's summons dated 05.03.07. Munyi's aforesaid affidavit filed in the Thika court alludes to chamber summons dated 07.03.05 and to a further affidavit dated 01.04.05. Munyi does not say whose chamber summons or further affidavit he was referring to but from the context in his affidavit I surmise that he was referring to Njuguna's Ng'ang'a's chamber summons and affidavit. Both the chamber summons and the further affidavit are missing from the Thika court file which was called for and attached to the present High Court case file. Whether the two documents are missing by accident or by design, I leave as an open question. Paragraph 14 of Wilson Wandeto Munyi's aforesaid affidavit of protest sworn on 04.05.05 states:

**'That in view of the fact that the deceased himself had sold the land to me prior to his death, and from the foregoing, it is clear that I am only beneficiary to the estate of the deceased, so that I am proposing that LOC. 5/KAGUMOINI/1734 be inherited by myself entirely.'**

There is also annexed to Njuguna Ng'ang'a's summons dated 05.03.07 a caveat ascribed to Wilson Wandeto Munyi dated 01.02.05 in which B.N. Mburu & Co. Advocates notified the Chief Magistrate, Thika that nothing should be done in the estate of the deceased, Samson Mwaura Wamwati who died on 06.05.05 without notice to Wilson Wandeto Munyi. My understanding of Wilson Wandeto Munyi's position in the Thika case was that he was claiming that property LOC. 5/KAGUMOINI/1734 be inherited by him as one who had purchased the same from the deceased, Samson Mwaura Wamwati. That is not the same thing as seeking revocation of the grant in question to Njuguna Ng'ang'a. It is a question of mode of distribution which needs not necessarily affect issuance of the grant to Njuguna Ng'ang'a. The proceedings brought before the High Court by Wilson Wandeto Munyi vide his summons which was initially undated but filed on 04.10.06 are proceedings to revoke the grant issued to Njuguna Ng'ang'a by the Thika court on 22.09.04. The issue of revocation of the grant was not before the Thika court and, therefore, the doctrine of *res judicata* does not apply to the present summons filed in the High Court on 04.10.06 for revocation of the grant to Njuguna Ng'ang'a.

This court was urged to find that the objector, Wilson Wandeto Munyi had not complied with rule 60 of the probate and Administration Rules in that he did not enter appearance in Form 26 of those rules. Rule 60 provides:

**'60. Every interested person (whether or not he has been served with notice thereof) who wishes to**

**be heard upon or to oppose any application, and has not already appeared in the proceedings, shall enter an appearance in Form 26 in the registry in which the application is made giving his address for service, and may file such affidavits as he considers proper, to each of which the applicant may with leave of the court file an affidavit in reply.'**

The complaint that rule 60 of the Probate and Administration Rules was not complied with is a moot point. As I see it, the position of the parties to the present High Court proceedings is that they were parties to Thika Chief Magistrates Courts Succession Cause No.289 of 2004. There the objector, Wilson Wandeto Munyi was objecting to being left out of inheritance of the deceased's estate. The interest he was pursuing in the Thika court was that of a beneficiary on account of his purportedly being purchaser from the deceased. His application to be included in the inheritance equation did not succeed before the Thika court. Thereafter he decided to seek revocation of the same grant under which he had sought recognition as a purchaser. The revocation proceedings filed by Wilson Wandeto Munyi vide summons filed on 04.10.06 are a follow up of the proceedings which started in the Thika court where he had appeared seeking recognition as a purchaser. He is, therefore, no stranger to the proceedings involving the deceased's estate. I find that applicant Wilson Wandeto Munyi did not necessarily have to file appearance in the High Court in order to be able to participate in the High Court proceedings, which are a follow – up of the Thika Court proceedings. But even if I am wrong in this finding, I would find Munyi's non-filing of appearance in Form 26 a curable procedural irregularity. I, therefore, see no valid technical impediment to Munyi's quest to be heard by the High Court in seeking revocation of the grant in question. Whether he will succeed or not is a different matter.

The upshot is that I hold that the doctrine of *res judicata* does not apply to the present summons filed by the objector/applicant, Wilson Wandeto Munyi for revocation of the grant issued to the petitioner/respondent, Njuguna Ng'ang'a on 22.09.04 and that the said objector/applicant is properly before this court. Accordingly, the summons by the petitioner/respondent, Njuguna Ng'ang'a dated 05.03.07 is hereby dismissed. Costs shall be in the course.

Orders accordingly.

**Delivered at Nairobi this 14<sup>th</sup> day of November, 2007.**

**B.P. KUBO**

**JUDGE**