



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 2908 of 2003

ESTHER MUTHONI KURIA..... APPLICANT

VERSUS

FRANCIS KIMANI KURIA..... 1ST RESPONDENT

JAMES NJUGUNA KURIA..... 2ND RESPONDENT

RULING

By summons dated 09.12.05 brought under rules 49 and 73 of the Probate and Administration Rules made under the Law of Succession Act (Cap.160), the applicant sought the following orders:-

1. That the respondent's summons dated 26.10.04 and filed on 16.11.04 for revocation or annulment of grant issued to the Public Trustee on 04.12.03 be dismissed for want of prosecution.
2. That the costs of this application be borne by the respondents in any event.

The grounds upon which the application for dismissal is based are basically that the respondents herein have not set down their summons for revocation of the subject grant since filing the said application on 16.11.04 and that they do not seem interested in prosecuting the same and that the pendency of the said application is hindering the Public Trustee from administering the deceased's estate.

At the hearing of the summons dated 09.12.05 on 13.03.06, the applicant was represented by learned counsel, Miss M.W. Kagongona. Learned counsel, Mr. G.N. Wakahiu appeared for objector Obadiah Kirongo Ngechu while learned counsel, Miss A. Owoko appeared for the Public Trustee. The respondents herein appeared in person.

Applicant's counsel said she was served on the previous Friday, 10.03.06 with a replying affidavit by the 1st respondent. Counsel faulted the replying affidavit in that its service did not comply with Order L rule 16 requiring service within three clear days of the hearing. Counsel, therefore, submitted that the respondents had no *locus standi*. Secondly, counsel faulted the replying affidavit on the basis that in her view it does not answer the issue before court, namely, that the respondents have failed to prosecute their summons for revocation of the subject grant since filing their said summons on 16.11.04.

The 1st respondent told the court in essence that he served his replying affidavit on Friday 10.03.06 while hearing was on Monday 13.03.06 because he was carrying out 'through investigation of the land' and that he could not file the replying affidavit without relevant data.

After hearing the 1st respondent's response to the criticisms levelled against the late filing and service of his replying affidavit and its purported substantive defects, applicant's counsel decided to argue her application for dismissal of the summons dated 09.12.05 and leave the issue of the respondent's *locus standi* to be addressed by the court in its ruling on the dismissal application.

Rule 16 of Order L provides, *inter alia*, as follows:

'16 (1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing.

(3) If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be heard *ex parte*.'

In the present case, it is not that the 1st respondent did not file a replying affidavit but that he filed and served one late, i.e. on Friday 10.03.06 while hearing was on Monday 13.03.06. Such filing and service did not, therefore, comply with the three clear days requirement.

I note from sub-rule (3), though, that even where no replying affidavit or statement of grounds of opposition is filed, it is not mandatory for the application to be heard *ex parte* but it may be so heard. The court is given discretion in the matter. Assuming for the moment that the problem of late service is to be addressed on the basis of the Civil Procedure Act (Cap.21) and the rules made thereunder, the discretion given by sub-rule (3) of rule 16 of Order L plus the inherent power of the court under section 3A of the Act to make such orders as may be necessary for the ends of justice, I would hold that it is open to the court in an appropriate case to admit a late replying affidavit like the present one.

Additionally, the application now under consideration is brought, *inter alia*, under rule 73 of the Probate and Administration Rules, which empowers the court to make such orders as may be necessary for the ends of justice, etc.

In the present case, I consider it to be in the interests of justice for the 1st respondent's replying affidavit sworn on 10.03.06 to be admitted as an aid to the dispensation of substantive justice. In the premise, I admit the said replying affidavit. Accordingly, I rule in favour of the respondents on the issue of their *locus standi* and hold that they have *locus standi vis-avis* the summons for dismissal.

The 1st respondent deposes in his replying affidavit that he delayed in filing a replying affidavit to the summons for dismissal because he was carrying out 'through investigation of the land' and that he could not file a replying affidavit without relevant data. That is not an unreasonable approach to a sensitive subject like the present land dispute.

I note from the 1st respondent's replying affidavit that his investigations about the suit land have led him to the conclusion that there are irregularities regarding the manner in which the said land came to get into the hands of the deceased. One of the other issues raised in that affidavit is that property A.I.H. Ltd Narok Branch Plot No.0877 in Laikipia District was omitted from the list of the deceased's immovable properties (paragraph 17). This omission is conceded by the applicant herein in her replying affidavit sworn on 28.07.05 (paragraph 13). Paragraph 11 of the supporting affidavit of the 1st applicant, Francis Kimani Kuria in the summons filed on 16.11.04 for revocation of the subject grant deposes that the filing of the present cause is a duplication of Succession Cause No.198 of 2002 to which the Public Trustee should have filed his objections but did not. The 1st respondent has sought consolidation of the present cause with succession cause No.198 of 2002. In his same affidavit (paragraph 10), the same Francis Kimani Kuria who is 1st respondent herein deposes that one Titus Ng'ang'a of the Public Trustee's offices plus a former prison officer called Mungai Kinyanjui used their connections in the Public Trustee's offices and had the present succession cause filed, leading to the grant now being challenged. The 1st respondent herein adds in his replying affidavit sworn on 10.03.06 that there is also HCCC No.1672 of 2001 which is related to the present succession cause and that this succession cause should be stood over

generally until final determination of HCCC No.1672 of 2001.

Having duly considered the application for dismissal alongside the 1st respondent's replying affidavit of 10.03.06 in the context of the summons filed on 16.11.04 by the respondents herein for revocation of the subject grant, I am of the view that the respondents herein have raised grave issues which should not be swept under the carpet through dismissal of their summons for revocation of the subject grant at this interlocutory stage. The issues raised ought to go to full trial. It is true that the respondents to the present application for dismissal have delayed in prosecuting their summons filed on 16.11.04 for revocation of the subject grant. However, the inconvenience caused thereby can be compensated through an award of costs arising from the present application for dismissal.

In view of the foregoing, I make the following orders regarding the present application for dismissal for want of prosecution:-

- a) Prayer 1 in the summons dated 09.12.05 seeking dismissal of the respondents' application dated 26.10.04 is refused.
- b) The present succession cause No.2908 of 2003 to be consolidated with succession cause No.198 of 2002 relating to the same deceased's estate and the two causes also to be consolidated with HCCC No.1672 of 2001 said to be related to the same matter and all the three cases to be heard together.
- c) The respondents to the summons dated 09.12.05 to bear the applicant's costs of the said summons.

Orders accordingly.

Delivered at Nairobi this 18th day of April, 2006.

B.P. KUBO

JUDGE