



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Succession Cause 290A of 1997**

**In the Matter of the Estate of Edwin Kariuki Wanjaria..... (deceased)**

**RICHMOND WANJARIA KARIUKI.....**  
**APPLICANT**

**Versus**

**PERIS WANJIKU KARIUKI.....RESPONDENT**

**RULING**

In the Summons General Form dated 29<sup>th</sup> March, 2006 which the Applicant says was brought under Rule 73 of the Probate and Administration Rules, he prays for orders;

**“(a) That the Respondent be restrained by a Court Order from disposing assets previously forming part of the estate of Edwin Kariuki Wanjaria, until the Applicant’s application for revocation of grant is heard and determined.”**

In prayer (b) the Applicant is asking for costs of this application.

The application is supported by the Applicant’s affidavit dated 29<sup>th</sup> March, 2006 – where the Applicant says that the Respondent is his mother and the administrator of the estate of his deceased father. He claims that he and his brother were not aware of their mother’s petition for a grant of letters of administration in the estate of their father and they are not happy with the distribution of the estate as set out in the Certificate of Confirmation of grant and that therefore they are not satisfied with the administration of the estate by their mother.

The Applicant points out that as a result of that dissatisfaction, he filed a summons for revocation of grant in September, 2003 and blames his former advocate for failure to prosecute that Summons speedily. He expresses the hope that his present advocate, M/s Lucy Mwai & Company, will prove to be better than his previous advocates.

The Respondent, did not file a replying affidavit in this application.

During the hearing Mr. Mugambi holding brief for M/s Lucy Mwai, prosecuted the application relying on the Applicant’s supporting affidavit with all the annexures – and reiterated the fact that the grant of letter of Administration issued to the Respondent was confirmed on the 19<sup>th</sup> of April, 2002. The Respondent having filed no replying affidavit which when given the opportunity to reply on points of law only, could not understand what that was all about. An old woman in her advanced age would always go

into matters of fact.

As I am not hearing the Applicant's summons for revocation of grant which is therefore still pending, I have to be careful in what I say to-day and I therefore intend to be brief.

In the questioned petition for a grant of letters of administration in estate, the Petitioner who is now the Administrator and Respondent, included his son the Applicant now before me as one of the beneficiaries in the estate of the deceased. The relevant grant which was issued to the Respondent on 2<sup>nd</sup> November, 2000, was confirmed on 19<sup>th</sup> April, 2002 showing the distribution of assets in the estate of the deceased in the schedule at the bottom of the Certificate of Confirmation of Grant. The Schedule consists of 13 numbered assets.

Thereafter no summons for revocation of grant was filed until 11<sup>th</sup> September, 2003. After the filing of the summons for revocation of grant on that date, no further step has been taken under Rule 44 of the Probate and Administration Rules up to the day I am delivering this ruling so that as at to-day, no directions have even been taken under sub rule (3) of Rule 44 with the result, in law, that almost three years after the filing of the afore said summons for revocation of grant the Respondent has not been served with the said summons for revocation of grant, the Respondent has not been served with the said summons for revocation and from what is before me to-date, I must assume that indeed she is not legally aware that anyone has filed an application for revocation of grant. Service of this Summons General Form before me upon the Respondent cannot constitute service of the Applicant's Summons for revocation under Rule 44 of the Probate And Administration Rules. That being the position, on what basis does the Applicant become entitled to the restraining orders he is asking for a prayer (a) of his Summons General dated and filed 29<sup>th</sup> March, 2006 a period of four good years after the Respondent was empowered and authorised by this Court to administer the Deceased's estate? That is from the date of confirmation of the grant on 19<sup>th</sup> April, 2002 when the Court, but that action, bestowed upon the Respondent her powers under section 82 and imposed upon her duties under section 83 of the Law of Succession Act. The Respondent is therefore presumed to be acting under sections 82 and 83 of the Law of Succession Act and any person purporting to challenge what she has done, what she is doing and what she intends to-do must challenge her diligently, competently and with reasonable speed to effect justice within proper and relevant provisions under the Law of Succession Act, Cap.160 Laws of Kenya. Were that the position in these proceedings, almost three years since the summons for revocation of grant was filed, the said summons would have been heard and determined before to-day and in any case directions under sub rule (3) of Rule 44 of the Probate and Administration Rules would at least have been given and the other interested parties filed their respective replying affidavits for proceedings to more further head.

Now, if the Applicant can file summons for revocation of grant and slumber in an uninterrupted sound sleep as he is doing to-day, who will trust him to subsequently prosecute that summons for revocation of grant after he has succeeded in obtaining the orders he is asking for in prayer (a) of the Summons General Form before me now?

I have said that the Applicant has brought the Respondent in this Summons General Form, before he legally made the Respondent aware, through service of the Summons for Revocation of Grant, that he is challenging the Respondent in the exercise of her powers and the performance of her duties under sections 82 and 83 of the Law of Succession Act. I have also said that the Applicant has come to this court four years after the Respondent was entitled to exercise and perform and may have been exercising and performing those powers and duties to-date. I add that in the circumstances of these Succession proceedings, even if the first problem touching on the failure to serve the Summons for revocation of grant were not in existence, the Applicant having come to court for revocation or annulment of grant was obliged under sub-rule (2) of Rule 44 of the Probate and Administration Rules, to include in his supporting affidavit, particulars showing

**“ (b) the extent to which the estate of the deceased has been or is believed to have been administered or to remain unadministered, together with any other material information,”**

Such as a recent certified copy of the land register for parcel of land known as L.R. No. GETAI/KIREREMA/832, or A Certificate of Official search thereof, to enable this court know the present status of the title to that land. Even where the Applicant did not see it necessary to include such information in support of his summons for revocation or annulment of grant, the availability of such information to the court in an application like this Summons General Form dated 29<sup>th</sup> March, 2006 was, in my view, mandatory because if the court were to grant prayer (a) in the Summons General Form the Court must not do so when the court is not clearly seeing the whole present scenario. The Court ought not to grant the orders when the Court itself is in the darkness. Failure by the Applicant to provide such information is therefore fatal to the Applicant's Summons General Form dated 29<sup>th</sup> March, 2006.

Before concluding his ruling, an interesting small issue has just come to my mind. While a restraining order, meaning an injunction, may be made by a court under Rule 73 of the Probate and Administration Rules, can it be made in these Succession proceedings in the manner or form asked for by the Applicant? There are two separate court orders made and existing here. The first one was the order appointing the Respondent the Administrator and therefore issuing the grant of letters of administration to her. The second court order was the one where that grant of letters of administration was confirmed thereby completing the process of lawfully granting powers upon the Respondent under section 82 and imposing duties upon the same Respondent under section 83 of the Law of Succession Act.

Now the Applicant in his Summons General Form is asking the Court for restraining orders against the Respondent without taking into account the fact that, not only will the restraining orders being asked for be inconsistent with but they will also be contradicting the orders already made by the court granting the letters of administration to her and subsequently confirming the said grant of letters of administration.

Think of a similar situation under the Civil Procedure Rules, specifically order XXXIX, which is not applicable in Succession Proceedings. Their restraining orders or injunctions are not granted to stop the Respondent from complying with an existing substantive court order in the Respondent's favour. Restraining orders or injunctions under Order XXXIX of the Civil Procedure Rules are asked for and obtained where those orders are not directed against another court order with prior existence and substantive in nature.

Properly in law, that is not done and definitely not when the existence of a previous substantive court order is completely ignored as the applicant in the Summons General Form dated 29<sup>th</sup> March, 2006 has done.

The Normal and lawful procedure in such a situation is to apply for a stay of execution of the existing substantive court order. That procedure forces the Applicant to acknowledge the prior existence of the order whose execution he wishes to stay and if his application is granted, the order therefore will be consistent with and not contradictory to the previously existing substantive court order which ought to exist until the summons for revocation or annulment of grant is heard and determined thereby properly and lawfully deciding the fate of the previously existing substantive court order, just like in a stay of execution pending the hearing and determination of an appeal.

From all the foregoing therefore, the Summons General Form dated 29<sup>th</sup> March 2006 cannot be maintained. The same is hereby dismissed with costs to the Respondent.

Date, delivered and signed at Nyeri this 15<sup>th</sup> day of June, 2006.

**J. M. KHAMONI**

**JUDGE**