

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Succession Cause 205 of 1997

ESTATE OF THE LATE MWANGI KAMAU MUIRURI (DECEASED)

RULING

On 2nd March 2006 Mr. Peter Mbugua Kimemia filed an application seeking to have a grant of letters of administration that had been issued to Konde Mwangi Kamau on 29th September 1997 revoked on the ground that the same was granted fraudulently by making a false statement and concealing from the court some material facts. The said application was set down for hearing on 12th May 2006. When the said application was called out at about 9.00 a.m. or thereabout, Mr. Karanja Mbugua for the petitioner told the court that Mr. Mboga, Advocate for the applicant, was absent and he proceeded to urge the court to dismiss the application for want of prosecution. The court dismissed the said application with costs to the petitioner.

No sooner had the court made the aforesaid order than Mr. Mboga entered the court room and told the court that he had actually been in court together with Mr. Karanja Mbugua and he had only walked out briefly to attend to a call of nature, having indicated to Mr. Karanja Mbugua that he was ready to proceed with the application. He therefore urged the court reverse its orders and let the application proceed to hearing as Mr. Karanja Mbugua was still in court. That suggestion was not readily welcomed by Mr. Mbugua as he indicated that his client had already walked out knowing that the application had been dismissed. In the circumstances, Mr. Mboga filed a formal application which he presented before the court on the same day. In his affidavit in support of the said application, he explained the reasons for his absence from court as already stated hereinabove. He added that the applicant was a brother to the petitioner and had been excluded by the petitioner from the list of beneficiaries. He further stated that the applicant stood to suffer irreparable loss if the court did not allow his application as he would be completely disentitled from any share of his late father's estate.

Mr. Karanja Mbugua opposed the application and submitted that the same had been brought under the provisions of **Order IXB** of the **Civil Procedure Rules** which were inapplicable under the **Law of Succession Act**. He further submitted that the grant that was sought to be annulled had been confirmed in September 1998 and there had been indolence on the part of the applicant in moving the court. He added that the order sought to be set aside had not been extracted or annexed to the applicant's application.

Having considered the submissions made by both counsel in this matter, I am persuaded that Mr. Mboga Advocate was actually in court shortly before 9.00 a.m. on the material day together with Mr. Karanja Mbugua Advocate and had Mr. Mbugua drawn the court's attention to that fact, the court would have placed the file aside to see if Mr. Mboga was going to turn up. The nature of the dispute before the court is such that it requires to be resolved on its merits and in the circumstances, I am inclined to set aside the dismissal order that was made on 12th May 2006. I agree that the application in question should not have been made under the provisions of **Order IXB Rule 8** because **Rule 63** of the **Probate and Administration Rules** expressly sets out the provisions of the **Civil Procedure Rules** that are applicable in making applications under the **Law of Succession Act**. However, **Rule 73** of the said rules states as follows:-

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

I am of the view that the ends of justice shall be met by allowing the applicant's application. The costs thereof shall be borne by the applicant.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of September, 2006.

D. MUSINGA

JUDGE