



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Succession Cause 3370 of 2005**

**IN THE MATTER OF THE ESTATE OF JOHN MUCHIRI NGURE (DECEASED)**

**SERAH NJERI GITORORO .....APPLICANT/RESPONDENT**

**VERSUS**

**JAMES NGIGI MUCHIRI.....1<sup>ST</sup> RESPONDENT/PETITIONER**

**AGNES WAMBUI KIHUGU.....2<sup>ND</sup> RESPONDENT/PETITIONER**

**RULING**

On 04.07.06 the applicant/respondent filed petition dated 11.05.06 under rules 49 and 24 of the Probate and Administration Rules seeking the following orders:-

1. That petition filed herein by James Ngigi Muchiri and Agnes Wambui Kihugu be struck out.
2. That in the alternative the Judge of the High Court do issue direction regarding the petition.
3. That costs of this application be paid by the petitioners.
4. That such further or other orders be granted as the court deems fit.

The grounds upon which the application is based are:-

- a) The petition was filed on 05.12.05 and has not been gazetted due to irregularities and defects.
- b) The applicant wishes to proceed in obtaining her late husband's dues, which were blocked by this petition.
- c) Other grounds to be adduced.

The application is supported by the applicant's affidavit sworn on 11.05.06.

Hearing of the application was on 30.10.06 whereat the applicant/respondent was represented by learned counsel, Mrs M. Muhuhu while the respondents/petitioners were represented by learned counsel, Mr L.N. Njogu.

Applicant's counsel drew the court's attention to the applicant's affidavit sworn on 11.05.06 to the effect that she instructed her advocates, M/S Muhuhu & Co. Advocates to file and they did file an objection to the petition filed by the respondents on 05.12.05 but that the objection was rejected on grounds that the matter had not been gazetted. The applicant's affidavit adds that the petition has not been gazetted and that it was found to have defects. It was the applicant's contention that the respondents have no interest in rectifying the anomaly and urged the court to deem the petition as void and strike it out to enable the applicant, who has deposed to be the widow of the deceased herein, to pursue her late husband's dues.

Applicant's counsel informed the court that the respondents have not rectified the anomaly in the citation alluded to by the Registrar; that the respondents filed no reply or objection to the application for striking out filed by the applicant; and that, therefore, the application for striking out should be allowed.

On the other hand, respondents' counsel pointed out that the anomaly in the petition was that the applicant had been left out. Counsel submitted that the way to rectify the anomaly in the petition was the filing and serving of the citation upon the applicant who is seeking the striking out of the petition. Counsel said the respondents had filed the citation and served it on the applicant personally on 09.06.06, following which the applicant entered appearance through her present counsel on 04.07.06. It was respondents' counsel's contention that the court has power to direct that the petition goes for gazettelement and that the process will clarify the anomaly and give the way forward on the petition. Respondents' counsel maintained that the summons for striking out was an afterthought, intended to prejudice and pre-empt the process initiated on 09.06.06. Respondents' counsel also attacked the applicant's affidavit, contending that it is defective, essentially, in that the jurat is on a separate page and, therefore, invalid.

In reply, applicant's counsel said that so far the respondents had made no effort to have the matter either gazetted or to take the next step, i.e. applying for directions. Applicant's counsel urged the court to allow the application for striking out with costs.

I have duly considered the arguments and counter-arguments of the parties.

As to the respondents' counsel's submission that the applicant's affidavit in support of the summons for striking out is fatally defective, I seem to recall that there are conflicting decisions of the High Court on the effect of a jurat being on a separate page. In the present case, I have examined the impugned applicant's affidavit and find that the text of the affidavit was concluded at the bottom of the first page, so the jurat started on the second page and was concluded there. There was no way the jurat could fit on the first page together with the text. In those circumstances, I do not see where else the jurat could be inserted. The defect complained of is one of form which I think is curable and I deem the applicant's affidavit sworn on 11.05.06 to be valid.

I note that the method chosen by the respondents/petitioners for rectifying the anomaly pointed out by the Registrar, i.e. leaving the applicant out, was to take out a citation to accept or refuse letters of administration intestate and serve it on the applicant on 09.06.06 and that the applicant entered appearance to the citation on 04.07.06. Further, the applicant in her summons for striking out now under consideration makes the following substantive prayers:

**'1. That petition filed herein by James Ngigi Muchiri and Agnes Wambui Kihugu be struck out.**

**2. That in the alternative (underlining added) the Judge of the High Court do issue direction regarding the petition.'**

As I understood it, it was the respondents' prayer that this court directs that since the applicant has been served with the citation and entered appearance, the petition should go for gazettelement and interested parties, including the applicant, take whatever action they desire in reaction or response thereto. This suggestion makes sense in the context of this matter and I consider it provides a reasonable way forward. Accordingly, I direct that the petition goes for gazettelement without delay. Costs shall be in the cause.

Orders accordingly.

**Delivered this 14<sup>th</sup> day of November, 2006.**

B.P. KUBO

JUDGE