

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Succession Cause 598 of 2002

IN THE MATTER OF THE ESTATE OF MBUGUA NGANE (DECEASED)

NAOMI WANJIKU.....PETITIONER

RULING

The applicants, Lucy Wanjiku Mbugua and Mary Ndane Mbugua, are among the beneficiaries of the estate of the late Mbugua Ngane. They filed an application by way of a chamber summons brought under **Rules 59(1) and (3), 73 and 63 of the Probate and Administration Rules and Order XLIV rule 1(i) (b) of the Civil Procedure Rules and Section 47 of the Law of Succession Act.** They sought the following orders:-

- “1. The order and the certificate of confirmation of grant issued on and dated 9th June 2006, be and is hereby reviewed by deleting NAOMI WANJIKU as the sole heir of all the deceased’s assets and inserting specific shares of each beneficially entitled person.***
- 2. In the alternative the properties/assets of the deceased be distributed as per his declared wish and/or equally between the two houses.***
- 3. The costs of this application be provided for.”***

The said application was supported by an affidavit sworn by Lucy Wanjiku Mbugua. She stated that her co-applicant was her sister and the deceased herein was their father. The deceased was survived by nine daughters and a widow, their step mother, who was also the petitioner. Out of the nine daughters, only three were married. The applicants were the only surviving children of their late mother, Wanjiru Mbugua, who died at Elementaita where their later father had settled. She further deposed that after the death of their mother, their father took them to their paternal grandmother in Limuru where they grew up. Their step mother never lived with the applicants and never took any responsibility in their upbringing. The petitioner was married to the deceased in 1950 and in the early 1950s the deceased and the petitioner left Elementaita and moved to Central Province where they worked in European farms until late 1960s when the deceased purchased shares in Jogoo Co-operative Society and moved to its farm in Molo.

Their late father acquired several properties, some of which were listed in the petition that was filed by the petitioner. The deponent stated that during his life time the deceased gave clear directions as to how his estate was to be distributed upon his death. The suggested mode of distribution was set out in paragraph 20 of Lucy Mbugua’s affidavit. In 2002, the deceased’s family members agreed that these succession proceedings be commenced so that they could distribute the estate of the deceased. After the letters of administration were issued, the respondent and her family members secretly applied for confirmation of the grant without notifying the applicants. The applicants denied having signed the consent to the application for confirmation and alleged that their signatures were forged. When the application for confirmation came up before court, the applicants were absent. The applicants said that they were opposed to the manner and mode of distribution of the deceased’s estate. They therefore urged the court to review the orders that were made on 9th June 2006 to the extent that all the assets of the

deceased were to pass on to the petitioner and instead have the shares of each beneficiary specified.

Mr. Mwangi for the petitioner opposed the said application. He submitted that the applicants had made a similar application earlier and which was dated 12th September 2006. The application had been dismissed for want of prosecution. He said that the applicants should have sought to have the earlier application reinstated. Counsel further submitted that there were no sufficient grounds to warrant a review of the orders that were made on 9th June 2006. The petitioner was intending to include the applicants in the distribution of the estate of the deceased but the applicants were delaying the issue of distribution of the same, Mr. Mwangi submitted. He further submitted that the applicants had wrongly invoked the provisions of the Civil Procedure Rules in their application. He urged the court to dismiss the application in its entirety.

I have carefully considered the application, the affidavits that were sworn by all parties as well as the submissions by the two advocates. **Rule 63** of the **Probate and Administration Rules** sets out the **Civil Procedure Rules** that are applicable in **Probate and Administration** matters and **Order XLIV** is one of those. This court can therefore consider an application for review of orders made in a **Probate and Administration** matter.

The fact that an application has been dismissed for want of prosecution does not make it *res judicata*. A party can file a subsequent application similar to the one dismissed for want of prosecution and the same will be considered on its merits. I therefore overrule the first two limbs of the petitioner's objection to the applicant's application.

I will now turn to the substantive issue as to whether the applicants consented to the application for confirmation of grant that was filed on 25th November 2005, and whether the applicants attended court on 9th June 2006, when the grant was confirmed. The applicants have denied that they signed the affidavit that was filed in support of the application for confirmation of the grant. That assertion was not denied by the petitioner. It would appear that the applicants' names (and not signatures) were written against their names alongside the names of the other beneficiaries in the said affidavit. When the application for confirmation of grant first came up for hearing on 19th May 2006, the court did not confirm the same as it noted that the consent had not been executed properly and that some of the beneficiaries were absent. The matter was stood over to the 9th June 2006. On that date the court record shows that the applicants were absent. The petitioner told the court that although the applicants were absent they had duly signed the affidavit of consent to confirmation of the grant. Since there were adult representatives of some deceased beneficiaries of the estate and since it appeared that all the others had consented to the confirmation of the grant, the court granted the orders sought and all the estate of the deceased was vested upon the petitioner. It is important to note that in the affidavit of consent to confirmation of the grant, the beneficiaries of the estate had stated that all the deceased's estate be passed on to the petitioner, who was to distribute the same amongst the beneficiaries. If indeed the applicants had not been consulted when the application for confirmation of the grant was filed and had not signed any affidavit in support thereof and were not present when the application came up for hearing, the petitioner acted improperly if not fraudulently. It matters not whether the petitioner is going to include the applicants in the distribution of the deceased's estate, the applicants were entitled to be notified of the institution of the said application so that they could either agree or oppose the same. I am satisfied that the applicants have shown that the orders of 9th June 2006, ought to be reviewed. It is important that all the beneficiaries of the deceased's estate agree on the manner and mode of distribution of the estate. If they fail to agree then the court will have to distribute the estate amongst all the beneficiaries in whatever mode that it will deem appropriate. I therefore review the orders made on 9th June 2006 by deleting **NAOMI WANJIKU MBUGUA** as the sole heir of the deceased's estate. So as to give the beneficiaries an opportunity to agree on the mode of distribution of the estate, this matter will be mentioned on 9th February, 2007. The petitioner shall bear the costs of the application.

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

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Karigo Thuo for the applicant and Mr. Gai holding brief for Mr. Mwangi for the respondent.

D. MUSINGA

JUDGE