REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

SUCCESSION CAUSE 336 OF 2002

IN THE MATTER OF THE ESTATE OF ALFRED THORONJO WAMBUGU – DECEASED

AND

GRACE WATIRI THORONJO …….... PETITIONER

VERSUS

1. JOSEPH WAMBUGU THORONJO)

2. CECILIA WANJIRA THORONJO)

3. WELLINGTON GACHACHA THORONJO)

4. HARRISON WANJOHI THORONJO) ……. PROTESTORS

R U L I N G

Before me is an application by way of Notice of Motion dated 29th March 2007. It seeks that "**this honourable court be pleased to set aside the exparte order of 27th March, 2007 and "that the order confirming the grant be revoked."** The application is expressed to be brought under Order L rule 1 of the Civil Rules, section 3 and 3A of the Civil Procedure Act, Rule 73 of the Probate and Administration Rules and O. 1xB Rule 8 of the Civil Procedure Rules. The application is based on the grounds that the protesters were entitled to a share of the estate of their deceased father, that the hearing date for their protest was taken exparte, was too short and the hearing Notice was received under protest. Further grounds advanced in support of the application were that the objectors advocates were unable to contact some of the objectors in sufficient time and finally that the Petitioner will not suffer any prejudice if the application was allowed.

The application was further supported by 5 affidavits sworn by **Cecilia Wanjira Thoronjo, 2nd protester, Wellington Gachacha Thoronjo, 3rd protester, Simeon Mbogo, Joseph Muthee** and **Barnabas Gathekia Kariuki.** All these supporting affidavits have attempted to explain away, why the protesters and or their counsel were unable to attend court for the hearing of the protest. For **Cecilia Wanjira Thoronjo,** she depones that she received a telephone call from her brother, informing her that the protest was scheduled for hearing on 27th March 2007. That was on 23rd March, 2007. That though the brother **Joseph Wambugu Thoronjo**, the 1st protester was in court during the hearing, he was not allowed to address the court. Above all she deponed that there was a communication breakdown between her and her lawyer on record and even as at the time of swearing the affidavit, she had not received a letter addressed to her by her lawyer notifying her of the hearing date of the protest. As for **Wellington Gachucha Thoronjo**, he deponed that on 23rd March 2007 he learned from this Court's Registry that the

protest would be heard on 27th March 2007. That he tried to contact his sister the 2nd protester herein and other brothers in Nyeri, Isiolo and Meru North Districts but was unsuccessful as their telephones were not going through. That he, together with his brother **Joseph Wambugu Thoronjo** duly attended court at the hearing of the protest but were told by the court that it was only their sister **Cecilia Wanjira Thoronjo** or their advocate who could address the court. **Simon Mbogo** is the clerk to the protesters' advocates **Messrs B.G. Kariuki & Company Advocates**. He depones that he is the one who received the hearing notice from the counsel for the Respondent under protest on 15th March 2007. He also stated that Mr. **B.G. Kariuki** had many cases scheduled for hearing at the High Court at Meru, Co-operative tribunal at Embu and Nkubu Law Courts on the scheduled hearing date for the protest. He is also the one who wrote a letter to the 2nd protester informing her of the hearing date, **Joseph Muthee** is yet another court clerk of the protesters' counsel. He depones that he was deputed by **B.G. Kariuki Esq,** to come to this Court for purposes of adjourning the hearing of the protest. The motor vehicle in which he was travelling however broke down between Meru and Nanyuki towns and his efforts to get another motor vehicle were unsuccessful. He managed to reach the court however at about 2 p.m. only to find that the case had proceeded exparte. Finally in his affidavit in support of the application, **Mr. Barnabas Gathekia Kariuki,** counsel for the protesters depone that the hearing notice was served on him on 15th March 2007 though he had not been invited to fix a hearing date. That the notice served on him was too short. That though he wrote to his client, his client had not received the letter informing her of the hearing date. He reiterates that he despatched his clerk to this Court to have the matter adjourned but due to mechanical problems that developed in the motor vehicle that he was travelling, he reached court long after the matter had been dealt with.

In support of he application learned counsel for the applicant orally reiterated, expounded and emphasized on what had been deponed to in the five affidavits already referred to. However it was his powerful submission that it was the duty of the court to do justice. In support of this submission counsel relied on the following authorities:-

1. Kenya National Union of teachers, Meru branch v/s Michael Kungu Kigia C.A. No. 122 of 2003 (Meru) (unreported).

2. Gandhi Brothers v/s H.K. Njage T/A H.K. Enterprises H.C.C.C. No. 1330 of 2001 (Nairobi) (unreported)

3. Philip Keipto Chemwolo and Mumias Sugar Co. Ltd v/s Augustine Kabende (1982-88) 1 KAR 1036.

Counsel maintained that it would be a draconian step to dismiss the application as it would mean that the protesters would be disinherited. As for coming to court by way of Notice of Motion, counsel fell back to the provisions of section 72 of the interpretation and general provisions act which provide that no document shall be impugned for want of form.

The application was opposed. In a 15 paragraph replying affidavit, **Grace Watiri Thoronjo** deponed that the Notice of motion was incurably defective, that the provisions of law cited in support of the application were inapplicable, that the grant having been confirmed, it could only be annulled or revoked, that neither counsel nor his clients were in court on the hearing date, that receiving court documents under protest does not grant a party an automatic adjournment, that the notice served on the Petitioner was sufficient, that the applicants were not being candid in their representations and finally that the difficulties, cited by the applicants in reaching each other were merely manufactured for the purposes of the application and there was no truth in them whatsoever.

In her oral submissions in opposing the application **Ms Mwai**, learned counsel expounded on what had been deponed to in the replying affidavit which I need not repeat here. Suffice to say that counsel distinguished the authorities cited by counsel for the protesters on the grounds that they were not relevant to succession matters. The authorities dealt with situations where ex-parte judgments had been entered in default of appearance and or defence which was not the case here.

I have anxiously considered the application, the supporting affidavit plus the annextures thereto as well as the replying affidavit and the submissions of respective counsels. I must state from the outset that I have not been impressed by lack of candour on the part of the protesters and their counsel. I think that it behoves a litigant seeking courts indulgence and discretion to be exercised in his favour to be honest and candid in whatever he says. I have no doubt at all in my mind and on the material before me that the protesters and in particular the 2nd protester were aware of he hearing date for the application. For reasons however best known to her she opted not to attend court. However having realised the folly of their actions, and in a bid to hoodwink this court, the protesters have as correctly submitted by learned counsel for the petitioner, cunningly manufactured and concocted a pack of lies regarding their inability to attend court when they were required to do so. In doing so, I am surprised that their counsel also fell for the trap, nay, I think he willingly connived with them. Why do I say so? According to the affidavit sworn by 2nd protester, she was on 23rd March 2007 notified by her brother that the protest was to be heard on 27th March 2007. That was 4 days before the scheduled hearing date. She thereafter contacted her counsel who also informed her that he had been served with a hearing notice over the matter. Further upon 3rd protester learning from the registry that the protest was to be heard on 27/3/2007 he contacted the lawyer on record who confirmed that he was aware as he had been served with a hearing notice. It therefore defies logic for the 2nd Protestor to claim that she was not aware of the hearing date. If by her own admission she was made aware of the hearing date for the protest by her brother – a Co-protestor, four clear days before the hearing date how could she not contact her lawyer and or even attend court. The allegation in her affidavit that there was a communication breakdown between herself her lawyer and brother is clearly a concocted story not borne out by the evidence on record. The affidavit of **Wellington Gachucha Thoronjo** is no better. Whereas he claims that he tried unsuccessfully to contact his sister meaning the 2nd protester and other brothers who stay in Nyeri, Isiolo and Meru North Districts but he was unable to reach any of them, as their telephones were not going through, yet her said sister clearly depones and concedes in her affidavit that indeed she received a telephone call from the said brother. Secondly, this brother was in Nyeri and he allegedly learned from the court registry that the protest was to be heard on 27th March 2007. He was however unable to reach his other brothers in Nyeri on phone; if that be the case would it not have been easier to reach them physically (the ones in Nyeri). Finally, it is also strange that he should be unable to reach any of his three siblings. What a coincidence! I cannot fathom how all of a sudden the telephones for the siblings of **Wellington Gachucha Thoronjo** could all be down at such critical moment and when they are all spread in three different districts; Nyeri, Isiolo and Meru North. It cannot be that there was no network in all these districts. The 3rd protester has attempted to drag this court into the dispute by alleging that he and his brother, the 1st protester managed to attend court on the material day but were denied opportunity to address the court. Nothing can be further from the truth. I do not know what the protester sought to achieve by this clearly hollow allegation. Did he hope to bring pressure to bear on the court so as to have the application allowed. The objectors are clearly treading on very dangerous grounds – perjury and contempt of court. I will say no more!

The plot thickens further by the claim by **Joseph Muthee,** that upon being instructed by his employer to come to Court and have the hearing of the protest adjourned he was unable to do so as the motor vehicle he was travelling in broke down, and he was only able to make it to court at 2 p.m. I doubt whether a trip from Meru to Nyeri which ordinarily should take no more than 3 hours should take 7 hours even if I was to grant the deponent the benefit of doubt and accept that indeed he had problems with means of transport. To my mind however, the conduct of counsel for the protesters in the whole episode cannot escape close scrutiny. Couldn't it have been much easier for him to contact a colleague in Nyeri for purposes of holding his brief and applying for adjournment. Further couldn't it have been more convenient if he had contacted counsel for the Petitioner earlier and sought her indulgence? I am persuaded to believe that counsel for the protesters did nothing in trying to have the protest adjourned. Rather he sat back believing that since he had received the hearing notice under protest, that was sufficient to grant him an automatic adjournment. Counsels ought to know that receiving court process under protest does not automatically grant such counsel an adjournment without more. Counsels must make effort to come to court either personally or otherwise and explain himself/herself reasons behind receiving the court process under protest and formally seek an adjournment if need be.

So much for lack of candour on the part of the protesters and their counsel. Had the determination of this

application turned on the integrity, honesty and candour of the protesters and their counsel, I would have had no hesitation nor difficult whatsoever in sending them away from the judgment seat. However I realise that this is a family dispute. Being a family dispute and considering the history behind and the broad principles that informed the enactment of the law of succession Act, I am reluctant to do so because I believe if I was to do so, I would not have solved the problems. Rather I would only help to exacerbate the same. As stated by Apaloo J.A. in **Philip Keipto Chemwolo case (supra)**

"…… ***blunders will continue to be made ……. And it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits …….***"

I agree completely and as I have already said the dispute is a succession cause involving close members of the family. It relates to the distribution of the estate of the deceased who was the father and husband to the protagonists in this cause. In the circumstances I think it is only fair that each party has his day in court but there is a question of inconvenience to the Petitioner which ought to be addressed. I will do so in a minute.

However before coming to the conclusion of this ruling, I must point out that strictly speaking the application ought to have been brought by way of chamber summons and not Notice of Motion. There is no provision for a Notice of Motion in succession matters. To that extent the Notice of motion is defective. Counsel for the applicants urged me to ignore this fundamental error and sought refuge in the interpretation and general provisions Act. In my view however section 72 of this Act can only be invoked where there are no express provisions as regards how the court's jurisdiction can be invoked. This is not the case here. Court procedures have to be complied with. They are not meant for kids play. They have to be honoured. Similarly I note that in the body of the application, counsel has invoked O.L. rule 1 of the Civil Procedure rules, section 3 and 3A Civil Procedure Act and Order IXB rule 8 of the Civil Procedure Rules. These provisions of the law are strangers to the law of succession Act. They are not among those provisions of the Civil Procedure Rules imported into the probate and Administration Rules by virtue of rule 63(1) of the Probate and Administration rules.

Are the aforesaid omissions fatal? In my view, if such omission were to be re-enacted in any other suits, my answer would have been a categorical yes. However as already pointed out, this being a family dispute and bearing in mind the history of the law of succession Act and the inferent, unlimited and unfettered discretion conferred to this court by virtue of Rule 73 of the Probate and Administration Rules, I am inclined to ignore those procedural inadequacies and concentrate on substantive justice. To this extent I would agree with the broad approach enunciated by Apaloo J.A. again in the **Philip Chemwolo** case in this manner.

"…….**. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline ……"**

Adopting as my own what **Lenaola J** said in the Kenya National Union of teachers case (supra) "…….**.** ***I shall take the same approach and with all the misgivings I have expressed in this judgment, I still see good sense in letting the doors of justice to remain open for each of the parties to this suit.***

However my exercise of discretion will have to come with a heavy price in the light of what I have already said regarding the conduct of the protester as well as their counsel. The protester and their counsel have clearly acted indescaptly with no respect for truth whatsoever. They will have to bear the costs.

In the event, I shall allow the application, set aside all the proceedings and consequential orders of 27th March 2007. I direct that the protest be set down for hearing within the next fourteen (14) days from the date hereof and thrown away costs which I assess at Kshs……. be paid to the Petitioner within the next fourteen (14) days from the date hereof. Failure to comply with any of the above orders within the time stipulated shall automatically render this order allowing the application being vacated and the proceedings

of 27th March 2007 being reinstated.

Dated and delivered at Nyeri this 6th day of june. 2005

It wasdismissed

M. S. A. MAKHANDIA

JUDGE