



**In re Estate of Paul Waithaka Mburu (Deceased) (Succession Cause 1153 of 2013) [2024] KEHC 5801 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5801 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
SUCCESSION CAUSE 1153 OF 2013**

**J WAKIAGA, J**

**MAY 16, 2024**

**BETWEEN**

**GRACE MUTHONI MWANGI ..... APPLICANT**

**AND**

**ROSE WANJIRU MBURU ..... 1<sup>ST</sup> RESPONDENT**

**GRACE WANJIKU MBURU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Judgement dated 24<sup>th</sup> day of November 2014, the Court dismissed with cost, the Applicant's summons for the revocation and annulment of grant issued herein on the basis that the Applicant's contention that she was the deceased widow and that her children were the deceased could not be sustained in the face of the available evidence.
2. On the 4<sup>th</sup> August 2015, the Applicant filed an Application for stay of execution of the Judgement and decree issued herein pending the hearing and determination of her Application to be allowed to adduce more evidence in respect of her marriage to the deceased and to review or set aside the said Judgement.
3. It was supported by her affidavit in which she deposed that the first Respondent to file the cause herein and that she instructed the firm of D. N. Mburu to annul and revoke the grant who assured her of having filed the requisite papers but the same did not inform her of the outcome until the end of July 2015 when she was served with eviction notice on Makuyu/Kambiti Block 2 which she had developed with the deceased, pursuant to the Judgement herein.
4. It was contended that the parents of the deceased had filed affidavits confirming her marriage to the deceased copies thereof were attached to the Application.
5. On the 2<sup>nd</sup> day of October 2015 the Respondents filed their bill of cost.



6. On the 7<sup>th</sup> October 2015 the Respondents filed grounds of opposition on the grounds that the Applicant was asking the Court to sit on Appeal against its own Judgement and that there was no positive Order issued by the Court capable of being stayed having dismissed the Applicant's Application for revocation of grant.
7. It was contended that the Application was an attempt at securing a re-hearing of her Application which was dismissed with no evidence that the evidence sought to be adduced was different from what had been placed before the Court, the Succession Cause having ran its full course.
8. On the 21<sup>st</sup> October 2015 the 1<sup>st</sup> Respondent filed a replying affidavit in which she deposed that the Application dated 4<sup>th</sup> August 2015 was frivolous and an abuse of the Court process and that the affidavits sworn by her parents in law was riddled with falsehood as she never obtained any letter from the Chief of Kamahuha Location as claimed and that it is the deceased who put up the disputed property when he was still working with the armed forces and that she was in charge of the construction.
9. On 24<sup>th</sup> February 2016 the Applicant filed Grounds of Opposition to the taxation and stated that the same was pre-mature as there was a pending Application dated 4<sup>th</sup> August 2015 for review of the Judgement herein and that the bill was not drawn to scale.
10. On 13<sup>th</sup> October 2021 the Deputy Registrar delivered her Ruling on the bill of cost and taxed the same at the sum of Kshs.396,278/= and certificate issued thereon dated 8<sup>th</sup> February 2022.
11. On 18<sup>th</sup> March 2022 the Applicant under a certificate of urgency filed a Chamber Summons Application in which she sought stay of the execution of the certificate of taxation pending the hearing of the Application, an injunction restraining the Respondents from evicting the Applicant and her tenants or interfering with their occupation of Makuyu/kambiti 2 (mathengeta) 777 and 778 pending the hearing and determination of the Application and that this Application be consolidated and heard together with the pending Application dated 4<sup>th</sup> August 2015 in the interest of justice.
12. The Application was supported by an affidavit sworn by the Applicant in which she deposed that she was a second wife of the deceased and a beneficiary of his estate. She had on or about 4<sup>th</sup> August 2015 instructed the firm of Kanyi Kiruchi and Co Advocates to take over her representation from Ms D. N. Mburu & Co. which firm had been closed as the Advocate was not qualified to practiced law and as such denied her the chance to canvass her Application for revocation of grant via viva voce evidence as he was not qualified to conduct the hearing, which facts were not known to her.
13. It was deposed that her new firm of advocates lodged an Application seeking to review and setting aside the Judgement on the ground of new evidence that included an affidavit sworn by the parents of the deceased in support of the existence of her marriage to the deceased, which Application had not been executed.
14. That the Respondent had served her with the Notice of Execution of the certificate of taxed cost, while her Application was still pending and she was apprehensive that the Respondents may proceed to evict her from her matrimonial home.
15. Her new firm of Advocates were now ready to prosecute her Application and the mistakes of her former Advocates should not be visited upon her.
16. In response to the said Application, the second Respondent deposed that the Applicant was a relentless litigant who kept on switching from advocates and that she had not taken any steps to prosecute her



- Application herein since July 2015 when she was served with a notice to vacate the suit property upon the Court dismissing her Application for revocation of grant.
17. On 11<sup>th</sup> November 2022 the Respondent filed an Application in which they sought that the Applicant Application dated 4<sup>th</sup> August 2015 be dismissed for want of prosecution and an eviction order issued against the Applicant. They further sought for accounts from the Applicant of the rents she had been collecting from the suit property and compensation for mesne profit and or lost rent.
  18. In support of the Application Grace Wanjiru Mburu swore an Affidavit in which she deposed that on 19<sup>th</sup> December 2014 the Court dismissed the Applicant's Summons for revocation of grant and they proceeded to implement the grant and successfully transmitted the property to the beneficiaries and despite the Applicant/Respondent being put on notice the same has refused to grant vacant possession.
  19. That the Respondent Application was last fixed for 16<sup>th</sup> October 2017 by way of Written Submission which she failed to file and that since the same was unlawfully residing on the suit property, it was necessary for the Court to issue eviction Orders and issue Order for compensation.
  20. On 6<sup>th</sup> July 2022, the Court issued the following order by consent:
    - a. Leave is granted to the Objector to file further Affidavit.
    - b. Summon dated 4<sup>th</sup> August 2015 and 18<sup>th</sup> March 2022 be heard together
    - c. The status quo be maintained.
  21. To facilitate the hearing of the Applications herein on 15<sup>th</sup> November 2022, the Application for the dismissal of the Applicant's Application for want of prosecution was withdrawn and the parties agreed that the Applications be heard by way of oral evidence with parties filing their Written Statements which were duly filed.
  22. At the hearing herein, the Applicant testified that she was the second wife of the deceased and that her only interest was on the two properties known as Mukuyu /Kambati 2(Mathengeta) 777 and 778 since she built them with the deceased and had been living there since 2008. In cross examination she stated that she started living with the deceased in the year 2002 and did not have any children with the deceased. In the year 2003, the deceased introduced her to his family and in the year 2004, he introduced her to the first Respondent.
  23. She stated that when the deceased died, she appeared before the Air Force Board and that she was later on locked in the police cells at John Saga on account that she was a thief and that when she filed her Application, which was later on dismissed, the parents of the deceased were not made aware and that the father of the deceased wanted to testify and had filed an affidavit, but later on died before he did so. It was her case that the grant was issued without her knowledge and that her Advocate stated that he did not have a practising certificate.
  24. On behalf of the Respondents Grace Wanjiku testified and stated that she was a daughter of the deceased and that together with her mother, they applied for grant of letters of administration and the subject property distributed. It was her evidence that the deceased had married her mother in church and that immediately upon the death of her father, the Applicant came and stated that she was a wife of the deceased but did not appear before the board. She contended that the two property were registered in her father's name and that her mother used to collect the rent until the Applicant moved in.
  25. In cross examination she stated that she did not know the Applicant and that her mother was living in the village while the deceased lived on the suit property, she confirmed that her grand parents stated that the Applicant was her father's second wife.



## Submissions

26. On behalf of the Applicant, it was submitted that her Application was under Order 45 of the Civil Procedure Rules which provides for review upon discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge of the Applicant and or could not be produced. It was contended that she had filed an Application for revocation of grant which was not prosecuted by her advocate which did not have a practising certificate and that she had been living on the suit property since 2002 where she made substantial contribution in the development thereof and that the new discovery was that her advocate was a quack and that forms good ground.
27. On behalf of the Respondent it was submitted that the Applicant must demonstrate to the Court that there was discovery of new and important matter of evidence and or that there was some mistake or error apparent on the face of the record and or for sufficient reason as was stated in *In re Estate of Somoto Omwenje Isaka* [2020] eKLR. It was contended that the issue of the Applicant being a second wife to the deceased was dealt with by the Court while determining the Applicant's Application for revocation of grant and that the deceased was in a monogamous marriage.
28. It was contended that the Applicant's reliance on an affidavit sworn by the parents of the deceased could not be termed as a new and important evidence as the same could have been discovered through due diligence as was stated in the case of *In re Estate of Kwasi Lubaro* [2020] eKLR. it was contended that the Application was filed eight months after the Judgement but was not prosecuted for seven years until the Applicant was awoken by execution proceedings and the excuse given by the Applicant on the unqualified condition of her advocate must fail.
29. In support of the contention of unreasonable delay on the part of the Applicant reference was made to the case of *In re estate of Simoto Omwenje isaka* (supra) where the Court held that the Applicant had not advanced any reason for the delay of three years and *Stephen Gathua Kimani v Nancy Wanjiru Wariungi T/a Providence Auctioneers* [2016] eKLR where the Court stated that the long delay must be explained.

## Analysis And Determination

30. The following facts are not disputed, the Applicant filed for summons for revocation of grant and this Court (Ngaah J) on the 24<sup>th</sup> day of November 2014 dismissed the same finding that the Applicant was well aware of the Application for grant of letters and that from the evidence available the first Respondent was the only surviving spouse of the deceased and the second one of his children and therefore entitle to benefit from his estate.
31. Of importance for the purposes of this Ruling is the learned Judge observation that as at the time this matter was transferred to the High Court in Muranga and Judgement date given on 10<sup>th</sup> June 2014, it is only the Respondents Counsel who had filed submissions on behalf of his clients, no reason was given by the Applicant's Counsel or his representative why the Applicants submissions were not filed.
32. The Applicant has answered this through her affidavit confirming that the said Counsel was not qualified to practice laws and therefore the Applicants constitutional rights to free and fair hearing under Articles 50(1) and 27 of the *Constitution* were violated which to my mind is a justifiable ground for review of the Judgement of the Court herein.
33. I have, considered the fact that the Applicant is in physical possession of the suit property herein and the additional evidence she intended to adduce, without saying much thereon, might assist the Court in arriving at a just determination on the issues in dispute. Based on the matters raised during the



hearing of the Application in Court, I have come to the conclusion and hold that the Applicant has sufficient grounds for the setting aside of the Judgement of the Court herein as I take the view that directions having been given on the disposal of the same by Written Submissions and in the absence of the Applicant's Written Submission the hearing proceeded ex parte and ought to be set side.

34. The Applicant has explained to the satisfaction of the Court the cause of the delay in filing the Application herein, the Respondent shall suffer no prejudice should the Application herein be allowed.
35. I therefore allow the Application dated 4<sup>th</sup> August 2015, set aside the Judgement of the Court herein and the subsequent Orders issued herein and order that the cause be heard on priority basis in view of the age of the matter pending the hearing herein, the status quo to be maintained.
36. Cost shall be in the cause.
37. And it is ordered.

**DATED SIGNED AND DELIVERED AT MURANGA THIS 16<sup>th</sup> DAY OF MAY 2024**

**J. WAKIAGA**

**JUDGE**

In the presence of :

Ms Muremi for the Respondent

Mr. Mwangi for Ndungu for Applicant

Jackline – Court Assistant

