



**In re Estate of Mbogo Muthage (Deceased) (Succession Cause
1190 of 2002) [2023] KEHC 19830 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19830 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 1190 OF 2002**

LM NJUGUNA, J

JULY 5, 2023

IN THE MATTER OF THE ESTATE OF MBOGO MUTHAGE (DECEASED)

BETWEEN

RICHARD MBOGO MUTHAGE APPLICANT

AND

GRACE MABUTI MURIUKI RESPONDENT

RULING

1. The genesis of this ruling is summons for revocation of grant dated 21.04.2016 filed by the applicant herein in which he had moved court for orders for revocation of the grant issued to the respondent herein.
2. The grounds upon which the said application was premised were that the same was obtained fraudulently by concealment of material facts and making of a false statement; that the grant was obtained by means of untrue allegations of facts essential in point of law to justify the grant and that the proceedings to obtain the grant were defective in substance.
3. Directions were given that the application be disposed off by way of viva voce evidence and wherein after the parties had argued their cases, the applicant sought to re-open its case seeking for orders inter alia that summons do issue to Phylis Nderu and Victoria Waruguru to appear before the court to testify for the reason that it was alleged that the two were previously before court during the confirmation of the grant being sought to be revoked.
4. The respondent opposed the said application stating that the applicant has closed his case and there was no cogent reason given to re-open the same. That the only reason why the applicant sought to reopen his case was simply to confirm if Phylis Nderu and Victoria Waruguru were present during the confirmation of the grant herein. He contested that it remained unknown how the same would aid the



applicant's case and that Waruguru is not only visually challenged but also immobile. This court was urged to dismiss the application.

5. The applicant submitted that the said oral application was not made in vain as the same had been previously made but the court had directed that it be made at the tail end of the hearing of the matter. The court was therefore urged to allow the said application.
6. I have considered the application herein and I find that the main issue for determination is whether the same is merited.
7. According to the court file, one of the respondent's witnesses Esther Muringo who is the daughter of the deceased stated that all her sisters, among them Phylis Nderu and Victoria Waruguru were either senile or deceased. She testified that she can confirm that Phylis Nderu might be able to attend court to testify but Victoria Waruguru may not be able to attend court completely owing to her incapacity.
8. In as much as the respondent opposed the application to re-open the case to allow Phylis Nderu and Victoria Waruguru to testify, the respondent has not satisfied the court that the testimony of the two is extremely crucial and would sway the outcome of the case. I however take note that the two had already tendered their testimony but the court file cannot be traced for purposes of reference.
9. The application before this court, in my view, appeals to the discretion of the court in making a determination. The law gives power to this court to adjudicate the matter at hand including the option to exercise its vast discretion. Further, Section 47 of the *Law of Succession Act* states:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

Rule 73 of *Probate and Administration Rules* states:

“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.

10. In applying discretion in this matter, I am guided by previous decisions of the court in similar matters. In the case of *Joseph Ndungu Kamau v John Njibia* [2017] eKLR the court stated:

“Needless to state, the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously.....The Ugandan Court in the case *Simba Telecom v Karuhanga & Ano* (2014) UGHC 98 the court held: 20. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.....

11. The court in the same case of *Joseph Ndungu Kamau v John Njibia* (*supra*) held:

“.....it is in the interest of justice to give an open-ended order. The reopening must be done within clearly defined parameters so as not to throw the proceedings generally open and cause delay.”



12. In the upshot, while considering that the trial court file cannot be traced, I find that the application has merit. I therefore order that the case be re-opened but only for purposes of hearing the testimony of Phylis Nderu and Victoria Waruguru. Their testimony shall be limited to the issues raised in the summons for revocation of the grant dated 21.04.2016. I therefore order that summons be issued to that effect.
13. Further the costs of availing those witnesses will be met by the applicant.
14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent

