

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 123 OF 1996

IN THE MATTER OF THE ESTATE OF MUSA THAIRU MWANGI - (DECEASED)

JOSEPH MWANGI THAIRU.....1ST APPLICANT

PETER NJOROGE THAIRU.....2ND APPLICANT

-VERSUS-

PETER MBURU MWAURA.....RESPONDENT

RULING

1. There is no dispute that in the certificate of confirmation issued on 3rd October 1997 in respect of the deceased Musa Thairu Mwangi alias Thairu Mwangi alias Musa Thairu Daniel Mwaura Kamau alias Mwaura Kamau was to get 1.68 acres of Ndarugu/Gacharage/1589 which was in the name of the deceased. The applicants Joseph Mwangi Thairu and Peter Njoroge Thairu, both sons of the deceased, were the ones who had petitioned for the grant and subsequently had it confirmed. They are the ones who had on 26th August 1996 proposed in their application for the confirmation of the grant that Daniel Mwaura Kamau gets 1.68 acres of Ndarugu/Gacharage/1589.

2. By the time Daniel Mwaura Kamau died on 24th December 2013 the applicants had not transferred the parcel. The respondent Peter Mburu Mwaura is the son of Daniel Mwaura Kamau. In the application dated 6th November 2013 Daniel Mwaura Kamau had applied that the grant as confirmed be revoked because the applicants had failed and/or refused to proceed diligently to complete the administration of the estate by transferring the parcel to him. The application had been served but had not elicited any response.

3. The court allowed the application, but by not revoking the grant but by directing the deputy registrar to sign all the necessary papers to effect the transfer of 1.68 acres of Ndarugu/Gacharage/1589 to the respondent who had taken over his late father's case.

4. The applicants are seeking that the proceedings of 17th September 2019 and the ruling of 18th November 2019 be set aside so that they can be allowed to defend the application. This is contained in their application dated 28th November 2019. They stated that they were not served with the application and therefore did not know that it was coming for hearing. They only became aware when they came to the registry seeking to amend and/or rectify the beneficiaries of Ndarugu/Ituramiro/T.91 and were told the matter had been heard and was waiting decision.

5. The respondent swore a replying affidavit to say that the applicants were duly served with the application but failed to respond. He got the process server Daniel Mwaura Marai to swear an affidavit to say that he had served the application on the applicants and had subsequently filed a return of service. The same process server stated that he had been used severally to serve process on the applicants in this case, and therefore knew them personally and knew where they lived. The applicants did not swear any further affidavit. They were represented. There was no request to cross-examine the process server on the issue of service.

6. On the available evidence, I find that the applicants were served and simply ignored to deal with the application. Even then, the court still has the discretion to re-open the application if it is satisfied that the actions of the applicants were not intended deliberately to obstruct or delay justice (**Shah –v- Mbogo [1967] EA 116**). I am also aware that justice is best served when a matter is decided on its merits after each side is accorded an opportunity to be heard (**Gulf Fabricators –v- County Government of Siaya [2020]eKLR**).

7. I outlined the history of this case to show that the applicants have since 3rd October 1997 failed to implement the certificate of confirmation. They have since then, without any explanation at all, failed to give what was due to the late father of the respondent. They therefore do not deserve the exercise of the court's discretion in their favour.

8. I dismiss the application with costs.

DATED AND DELIVERED AT NAIROBI THIS 15TH NOVEMBER 2021.

A.O. MUCHELULE

JUDGE