

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 526 OF 2006

IN THE MATTER OF THE ESTATE OF FRASIAH WANJIKU MWANGI (DECEASED)

RULING

1. On 18th November 2016 I delivered a judgment herein where I upheld the will of the deceased the subject of these proceedings. The matter has come back to me by way of a summons dated 13th March 2017, at the instance of Leonard Mwaura Muongi and Patrick Munyui Muongi, seeking the setting aside or review of the orders made in the judgment on the basis that the matter proceeded on 14th July 2015 a date that they were unaware of and in respect of which they were not served or notified.

2. There is a reply to the application, by Fredrika Mukonoiri Muchiri, through an affidavit sworn on 9th May 2017. She avers that the applicants participated in the proceedings to the extent that their advocate attended court and cross-examined the witnesses presented by the administrators. She also states that the applicants even presented a witness who testified and was cross-examined, and his evidence considered by the court in its judgment. She avers that the application does not disclose any grounds for grant of the orders sought.

3. Directions were given on 16th May 2018 that the application be disposed of by way of written submissions. Both sides have filed their respective written submissions. I have perused both sets of written submissions and taken note of the arguments made.

4. I have perused the record before me. It reflects that the matter was placed before me on 7th May 2013 for hearing. Miss Makobu was in attendance for Mr. Kinyanjui for the applicants in the revocation application, who are the applicants in respect of the instant application; Mr. Kamau was present for the administrators. The matter proceeded to oral hearing. The case opened with the administrators taking the witness stand first to propound the impugned will. Three witnesses were presented that day, two by the administrators and one by the applicants. Stephen Wanyoike Kinuthia and Fredrika Mukonoiri Muchiri testified on the administrator's side and were cross-examined by Miss Makobu for the applicants. Thereafter the administrators closed their case. Immediately thereafter the applicants put Joseph Kariuki Ndungu on the stand, and he was cross-examined by Mr. Kamau for the administrators. The matter was thereafter adjourned to a date to be fixed at the registry. The matter was next in court on 28th October 2013, Mr. Kamau was present for the administrators, while Mr. Chege held brief for Mr. Kinyanjui. The matter could not be reached and was allocated the 12th December 2013 as the date for next hearing. Come the 27th April 2015, Mr. Kamau for the administrators and Ms. Mabuti for Mr. Kinyanjui for the applicants were in court. The matter did not proceed, whereas Mr. Kamau informed court that he was ready to proceed, Ms. Mabuti applied for adjournment on the grounds that her client's file had been lost in Mr. Kinyanjui's car and that they were looking for it. I adjourned the matter to 14th July 2015 upon that request of the applicants. When the matter came up for hearing on 14th July 2015 only Mr. Kamau for the administrators was in court, the applicants were not represented, he applied that the applicants be deemed to have closed their case as the hearing date had been given in open court. I acceded to that prayer and ordered that the applicants be deemed to have had closed their case, and I directed that the parties proceed to file written submissions. In the end only the administrators filed written submissions, on 18th January 2015, and I proceeded to prepare the judgment that I delivered on 18th November 2016.

5. The applicants have submitted that the matter was not on the cause list of 14th July 2015 yet they have not attached copy of that day's cause list to support that allegation. They have also not placed before me any material to demonstrate the efforts, if any, that they made between 14th July 2015 and 18th November 2016 to find out what had transpired on 14th July 2015 and the steps they took to ameliorate the position. It would appear that they only woke up from their slumber after the judgment had been delivered and the file transferred to the High Court at Kiambu. There was no doubt laxity or indolence on the applicants' part. They did not take the matter seriously after 7th May 2013.

6. I note also that the applicants in their written submissions blame their advocates, who were on record then, for their predicament, and urge that a party ought not to be punished for the mistakes of her advocate. Curiously the issue of the advocate having made a mistake from which the applicants were suffering was not pleaded in the application nor averred in the affidavits sworn in support of the application. There can therefore be no basis for that submission.

7. In view of the above, I do not find any ground upon which I can set aside the judgment on record.

8. The applicants' alternative prayer is for review of the judgment on the grounds that they had discovered a new witness and facts that were not within their knowledge at the time of the hearing. Curiously, the applicants have made no mention of the alleged discovery in their affidavit in support of the application. Their affidavit does not provide any facts to back the alleged discovery and to explain why they were not able to avail the alleged information at the trial. I do not find any basis for the submission that there was any such discovery when the same is not averred to by the applicants in their affidavit.

9. In the end, it is my conclusion that there is no merit in the application dated 13th March 2017 and I do hereby dismiss it with costs. The applicants are at liberty to appeal against the same at the Court of Appeal within twenty-eight (28) days of the date hereof. The court file shall be returned to the High Court at Kiambu for final disposal.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31st DAY OF January, 2019

W. MUSYOKA

JUDGE

DATED, SIGNED and DELIVERED at NAIROBI this 15th DAY OF February, 2019

ASENATH ONGERI

JUDGE