



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 257 OF 2014**

**IN THE MATTER OF THE ESTATE OF THE LATE KYENGO**

**KIILU NGUNGI alias KYENGO KIILU – DECEASED**

**MUTIE KIILU.....PETITIONER**

**VERSUS**

**BONIFACE MULI MWEU.....OBJECTOR**

**RULING**

1. By a Chamber Summons dated 27<sup>th</sup> December, 2017, the Objector herein seeks an order that these proceedings be struck out for being an abuse of the Court process. According to the Objector, he obtained a grant on 11<sup>th</sup> May, 2016 in respect of the Estate of the deceased herein in P & A No. 462 of 2014 and that the Petitioner herein was fully aware of the said proceedings since he cited the petitioner vide Citation No. 123 of 2013 and the Petitioner was given 60 days to petition which he failed to do.

2. As a result the Objector petitioned and obtained an order against the Petitioner which he obeyed. It was averred that the Petitioner did not appear in P & A No. 462 of 2014 and never raised any object in those proceedings. However the petitioner failed to disclose the existence of the said proceedings when this matter came up for confirmation on 12<sup>th</sup> January, 2017 and has in defiance of the order made in the said Citation proceedings excluded the Objector's interests in the said estate.

3. According to the Objector, he learnt of these proceedings when he filed a suit for trespass before the ELC being Suit No. 467 of 2017 against the Petitioner.

4. In response to the application the Petitioner averred that the grant herein was confirmed following the failure by the Objector to file any objection or complaint. The Petitioner insisted that he complied with the court order in filing the petition before this Court . It was his contention that the Objector did not serve him or any other beneficiary of the deceased's estate with the papers in the Succession Cause No. 462 of 2017. In his case, there were no parallel proceedings save for the Citation which became spent after his compliance. It was contended that the Objector has no interest in the deceased's properties but has attempted to grab one parcel of land.

5. The Petitioner averred that there is no procedure for striking out succession proceedings and that the P & A No. 463 was filed later than this cause.

**Determination**

6. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

7. The first issue for determination is whether the Court has the power to strike out proceedings in a succession cause. In **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself *inter alia* as follows:

**“The Law of Succession Act, like section 3A of the Civil Procedure Act has a saving provision as to the court's jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due**

process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”

8. Similarly **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 of 2005** held:

“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

9. It was therefore appreciated in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65** that the law is not that the High Court is only vested with inherent power and jurisdiction to prevent abuse of the Court process or to further the ends of justice in matters falling within the ***Civil Procedure Act*** and ***Rules*** but that the Court is clothed with inherent powers and jurisdiction all the time in all causes irrespective of legislative or other juridical foundations of any such cause or matter before it as the juridical root of the Court’s inherent power does not lie in section 3A of the ***Civil Procedure Act*** but in the nature of the High Court as a Superior Court of judicature.

10. I therefore have no doubt in my under that over and above the powers conferred upon this court by section 76 of the ***Law of Succession Act***, this court may in appropriate cases draw upon its inherent powers, a residual power, to strike out proceedings commenced in abuse of its process. It must however be noted that the Court’s inherent jurisdiction is not a substitute for the jurisdiction conferred upon the Court under the Constitution or by statute. The Court’s inherent jurisdiction is a reserve upon which the Court draws to ensure the ends of justice are met and to prevent abuse of its process. As was held in **Industrial & Commercial Development Corporation vs. Otachi [1977] KLR 101; [1976-80] 1 KLR 529**, section 3A is not a panacea for all ills. It was therefore held in **Elephant Soap Factory Ltd vs. Nahashon Mwangi & Sons Nairobi HCCC No. 913 of 1971** that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter.

11. In this case it is clear that there are two sets of proceedings in which contradictory orders in respect of the estate of the deceased herein have been issued. In succession cause No. 462 of 2014, a matter which was in respect of the Estate of **Kyengo Kiilu**, a certificate of confirmation of grant was issued in favour of the Respondent herein in which it was ordered that land parcel no. Makueni/Kalawa/103 be registered in the name of the Objector herein. That certificate was issued on 26<sup>th</sup> April, 2016 and pursuant thereto a title was issued on 20<sup>th</sup> November, 2017. From the documents filed herein, the said cause was instituted following the failure by the Petitioner herein to petition for grant in respect of the deceased’s estate.

12. However by a turn of events, this Court on 15<sup>th</sup> December, 2016 issued another grant in which the same parcel of land was directed to be registered in the names of other persons including the Petitioner herein. It is therefore clear that the certificate in succession cause No. 462 of 2014 was issued prior to the one issued herein. As I have stated hereinabove, the two certificates of confirmation cannot exist side by side.

13. Having considered this matter, for the orderly conduct of these proceedings, and instead of striking out these proceedings, I hereby revoke and annul the certificate of confirmation issued in this cause. The petitioners are however at liberty to take out summons for revocation of the certificate of grant issued in succession cause No. 462 of 2014. I further direct that the status quo in respect of the suit land parcel No Makueni/Kalawa/103 be maintained for a period of 30 days or unless otherwise directed by this Court or the ELC.

14. The costs of this application are awarded to the applicant as the Respondent did not comply with the court’s directions. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 6<sup>th</sup> day of February, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of the Objector in person.**

**CA Geoffrey**