



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1675 OF 2004

IN THE MATTER OF THE ESTATE OF ELIZABETH WAIRIMU GITAGIA (DECEASED)

GEORGE MBUGUA KIARIE.....APPLICANT

VERSUS

JANE WAMBUI MBUGUA.....1ST RESPONDENT

PAUL MBAKI MBUGUA.....2ND RESPONDENT

RULING

1. The application that is the subject of this ruling is the Applicant's Summons dated 14th January, 2019 in which the Applicant seeks orders that this Honorable Court do review, vary and rescind the ruling and subsequent orders issued by Hon. L. Njagi on 23rd March, 2012; and reinstate the Grant of Letters of Probate with Will Annexed issued to him by the Court and confirmed on 3rd March, 2008.
2. The Application is based on the grounds appearing on the face of the said Summons, the Supporting Affidavit of George Mbugua Kiarie sworn on 14th January, 2019 and a Further Affidavit sworn on 5th April, 2019. The Applicant's case is that he was granted the letters of probate with will annexed in this cause on 30th September, 2004 which was confirmed on 3rd March, 2008. He however came to learn on or about 18th December, 2018, that the said grant had been revoked on 23rd March, 2012.
3. It is the Applicant's case that Hon. Justice L. Njagi who issued the ruling dated 23rd March, 2012, misdirected himself when he found for the Respondents in revoking the grant as the Applicant was condemned unheard. The Applicant maintains that he was neither served with the Respondents' Summons for Revocation of Grant dated 20th May, 2010 nor any pleadings used in the proceedings that led to the revocation of the grant issued to him as aforesaid. He alleged that the proceedings, pleadings and documents filed on his behalf by Kiai Nuthu & Associates Advocates alleged to have been acting for him were fraudulent and a tactical attempt by the Respondents to make it appear as if he was involved in the proceedings.
4. The Applicant in his Affidavit dated 5th April, 2019 challenged the authenticity of the Respondents' Summons for Revocation of Grant dated 20th May, 2012, arguing that there were glaring anomalies and differences between the documents filed in Court and those annexed in the 1st and 2nd Respondents joint Affidavit filed in Court on 15th March, 2019. It was his contention that the exhibits produced had handwritten cancellation markings using a pen, while the pleadings filed in Court had no such additions and cancellations.
5. In his submissions, the Applicant referred the Court to the case **in the Estate of Magangi Obuki (Deceased) [2017] eKLR** wherein the Court quoted **Article 50 (1) of the Constitution** and stated as follows:

“One of the tenets of the right to be fairly heard enshrines an opportunity to present one's case in a matter before the court or any tribunal or body as by law established regardless of the possible outcome. The right cannot be taken away under any circumstances whatsoever. Article 25 of the Constitution expressly provides for that position.”

6. It was the Applicant's evidence that there was no inordinate delay in the filing of this application as he became aware of the irregular revocation proceedings on 18th December, 2018 and promptly filed the instant application on 15th January, 2019. He urged the Court to reinstate the grant of letters of probate with will annexed issued to him on 30th September, 2004 and confirmed on 3rd March, 2008.
7. The Respondents swore a joint Replying Affidavit in which they deposed that the deceased herein was the sister of their biological father and that she had adopted them after their parents passed away. They averred that their father and the deceased herein had an understanding that the Respondents would inherit the property from her as her foster children while his other children would benefit from his estate. Upon their father's death, the properties held by his estate indeed devolved upon the Respondents other siblings, including the Applicant's father,

one Peter Kiarie Mbugua alias Peter Mbugua Gitagia.

8. The Respondents averred that the Deceased had died testate leaving behind a Will prepared in the Kikuyu Language on 25th of August, 1995. She developed dementia a few years later and was certified as suffering from a mental disorder as at 21st May, 2001. It was the Respondent's submission that they were prompted to file the Summons for Revocation of Grant dated 20th May, 2010 after they discovered that the Applicant herein had petitioned the Court for a Grant of Probate with respect to the estate of the deceased by way of an illegitimate will dated 26th June, 2001 drafted in English, which language the deceased did not comprehend.

9. The Respondents contended that the Summons for Revocation was duly served upon the Applicant's own advocates Messrs Gachiri Kariuki & Kiai Advocates, which firm was already on record having prepared the Summons for Confirmation on behalf of the Applicant; therefore there was no obligation to serve the Applicant personally. Further, that the Applicant was subsequently represented by the firm of Kiai Nuthu & Associates Advocates, which firm prepared and filed pleadings on his behalf and engaged the Respondents in numerous correspondence.

10. It was therefore the 1st and 2nd Respondent's submission that the Applicant had not established any grounds, or met the criterion for setting aside, reviewing or varying the decision of the Court delivered on 23rd March, 2012.

11. Having carefully considered the rival arguments of the parties to this matter, it is my view that the following issues arise for determination:

a) Whether the Applicant was served with Summons for Revocation of Grant dated 20th May, 2010 by the Respondents.

b) Whether the Applicant has made a case to warrant review, rescission, variation, recall and or setting aside of the proceedings, ruling and orders of the honourable Court rendered on 23rd March, 2012 which revoked the grant of letters of probate with will annexed issued to him.

12. The Applicant has argued that he was never served with the Respondents' Summons for Revocation of the Grant dated 20th May, 2010 or any pleadings used in the proceedings that led to the revocation of the grant issued to him aforesaid. An Affidavit of Service is the basic material that assists the Court to settle contestation on the issue of service. The Court however notes that no Affidavit of Service has been tabled by the Respondents as proof of service.

13. The Respondents are however convinced that the Applicant was properly served with the Summons for Revocation. They assert that the Summons was served upon the firm Messrs Gachiri Kariuki & Kiai Advocates, which firm was already on record for the Applicant as having prepared his Summons for Confirmation of Grant. The Respondents argue that the application is therefore an attempt to frustrate the Respondents from enjoying the fruits of the successful litigation.

14. Indeed, the Applicant herein did file a Summons for Confirmation of Grant of Probate dated 14th November, 2007 which Summons was prepared by the firm Gachiri Kariuki & Kiai Advocates. A perusal of the Court record further reveals that a Notice of Change of Advocates dated 7th September, 2010 was filed by the firm Messrs Kiai Nuthu & Associates Advocates, indicating that the Applicant had appointed their firm to act for him in this matter. The Court record also reveals that the said firm engaged the Respondents advocates in correspondence and filed submissions on behalf of the Applicant dated 8th November, 2010 in opposition to the Summons.

15. The Applicant has alleged that the proceedings, pleadings and documents filed on his behalf by Kiai Nuthu & Associates Advocates purported to have been acting for him are fraudulent and a tactical attempt by the Respondents to make it appear as if he was involved in the proceedings. It is his assertion that he did not instruct the said firm to represent him in this matter.

16. **Section 107 of evidence Act** succinctly states:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

In the case of **STEPHEN WASIKE WAKHU & ANOTHER –VS- SECURITY EXPRESS LIMITED [2006] eKLR**, the Court stated as follows:

“A party seeking justice must place before the court all material evidence and facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available. Hence the legal dictum that “he who alleges must prove.”

17. The Applicant had previously been represented in this case and in matters relating to the estate of the deceased hereof by two firms: Ndingu Kiai & Mbutia Advocates who filed the initial Petition on behalf of the Applicant and Gachiri Kariuki & Kiai Advocates who filed the relevant summons for Confirmation on behalf of the Applicant. Messrs Kiai Nuthu Associates Advocates filed a Notice of Change of Advocates dated 7th September, 2010 and filed submissions on behalf of the Applicant dated 8th November, 2010 in opposition to their Summons.

18. I am not convinced on the basis of the material placed before me that the Applicant was not at all aware of the Respondents' Summons of Revocation of Grant and the subsequent proceedings that culminated in the Ruling dated 23rd March, 2012. No proof has been tendered before the Honorable Court by the Applicant to support his allegations of fraud made against the Respondents' and the law firm of Kiai

Nuthu & Associates Advocates on record for the Applicant.

19. Out of the three firms on record having previously represented the Applicant, one Mr. Kiai Advocate is evidently a partner in all three firms. There is no attempt to enjoin Kiai Nuthu & Associates Advocates in these proceedings. There is also no affidavit by them, or about them on record to explain their alleged scheme to defraud the Applicant, in concert with the Respondents.

20. In conclusion, the court finds that the Applicant's Summons dated 14th January, 2019 has no merit and consequently is dismissed with costs.

SIGNED DATED and DELIVERED in open Court this 16th day of September, 2019.

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L. A. ACHODE

JUDGE

In the presence of.....Advocate for the Applicant

In the presence ofAdvocate for the 1st and 2nd Respondent