



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**SUCCESSION CAUSE NO.132 OF 2017**

**IN THE MATTER OF THE ESTATE OF JOSEPHAT WAINAINA KARURI (DECEASED)**

**A N D**

**STEPHEN MBURU WAINAINA.....1<sup>ST</sup> APPLICANT**

**NAHASHON CHEGE WAINAINA.....2<sup>ND</sup> APPLICANT**

**SERAH WANGUI KIMANI.....3<sup>RD</sup> APPLICANT**

**MARY NJOKI WAINAINA.....4<sup>TH</sup> APPLICANT**

**ELIZABETH MUMBI WAINAINA.....5<sup>TH</sup> APPLICANT**

**STANLEY KARANJA WAINAINA.....6<sup>TH</sup> APPLICANT**

**FELICINA WANJIRU WAINAINA.....7<sup>TH</sup> APPLICANT**

**V E R S U S**

**JANE WANJIRU GACHERU.....1<sup>ST</sup> PETITIONER**

**GRACE MUMBI WAINAINA.....2<sup>ND</sup> PETITIONER**

**R U L I N G**

Before me is the Notice of Motion dated 23/7/2019 filed by the applicants, Stephen Mburu Wainaina, Nahashon Chege, Serah Wangui Kimani, Mary Njoki Wainaina, Elizabeth Mumbi Wainaina, Stanley Karanja Wainaina and Felicina Wanjiru Wainaina. They claim to be the deceased's children from the 3<sup>rd</sup> house. The petitioners/respondents are James Wanjiru Gacheru and Grace Mumbi Wainaina.

The applicants seek the following orders:

- (1) .....spent;**
- (2) That there be stay of execution of certificate of Confirmation of Grant dated 25/11/2009 and confirmed on 1/12/2010;**
- (3) That the Hon. Court be pleased to set aside the orders issued on 9/5/2019 dismissing the applicant's application dated 13/6/2015 for want of prosecution;**
- (4) That the application dated 13/6/2015 be reinstated for hearing and the matter be fixed for hearing;**
- (5) Costs of the application to be in the cause.**

The application is premised in grounds found in the body of the application and the affidavit of Serah Wangui Kimani dated 23/7/2019 and the supplementary affidavit dated 26/7/2019 to the effect that though they are the deceased's children from the 3<sup>rd</sup> house, they were not involved in the filing of this petition. On hearing of it, they engaged Chuma Mburu Advocates to apply for revocation of grant; that though they paid him, he never kept them posted of the progress of the case and they were shocked to learn that it was dismissed; that the applicants

were served with notice to attend survey scheduled for 24/7/2019 and that is when they engaged their current advocate; that they are keen on prosecuting their application for revocation as they have been disinherited; that they blame their former advocate for failing to attend court and that had they known of the hearing date, they would have attended.

The application was opposed and Jane Wanjiru, deponed that she had been advised by her advocate that the application is incompetent for being premised on inapplicable provisions of law; that the applicants have all along been represented by counsel who was aware of the hearing date and attended court despite their absence; that Mr. Chuma Mburu had filed an application dated 25/1/2019 seeking to be allowed to cease acting for the applicants for want of instructions but the court rejected it because counsel had asked for adjournment on 9/6/2018; that the applicants did not prosecute their application for 4 years from date of filing and have not availed any explanation for the inordinate delay.

In reply, Serah Wangui stated that attempts to have audience with their advocate at his chambers were fruitless; that they were never served with the Notice of Motion dated 25/1/2019, filed by Mr. Chuma seeking to cease acting for them; that they are shocked to learn that on 9/8/2018, the counsel had sought to withdraw the application seeking revocation of grant; that it is evident that their counsel was compromised because he never got in touch with them; that the land has been subdivided such that their mother's house has been allocated to the 1<sup>st</sup> respondent and they were issued with a 21 days demolition notice; that they are entitled to LR.Nyandarua/Muruai/413 whereas the 1<sup>st</sup> house is entitled to Plot 799 Malewa as per deceased's wishes.

I have considered the affidavits and arguments of counsel. The history of this matter is that the deceased died on 9/3/1984, over 35 years ago. These proceedings were filed on 16/3/2009, 25 years later.

The grant was confirmed on 21/11/2013 and about two years later, on 13/6/2015, the applicants filed summons for revocation of grant which has been pending hearing till it was dismissed by this court on 9/5/2019.

This matter was transferred to this court from Nakuru to this court in 2017 and the matter was first fixed for hearing on 20/2/2018 but it seems the court was not sitting. It was adjourned to hearing on 9/10/2018. Mr. Chege, counsel for respondent was ready to proceed but Ms. Gathecha, counsel for the applicants sought an adjournment on grounds that she needed to advise her clients to withdraw the application. A mention notice was served on the applicants for 23/10/2018. On 4/3/2019, Mr. Chuma Mburu, the applicant's counsel did not appear though served and the matter was put off to 9/5/2019. On that date, Mr. Kihoro appeared on behalf of the applicants and indicated that the applicants were absent but that Mr. Chuma Mburu had filed an application dated 25/1/2019 seeking to cease acting for the applicants for want of instructions. It is then Mr. Chege counsel for respondent sought to have the application dated 13/6/2015 dismissed for want of prosecution. Mr. Kihoro indicated that the applicants had not given instructions to the counsel.

The application for revocation was filed way back on 13/6/2015. Directions were taken that the application would be heard by way of viva voce evidence. This case belongs to the applicants and they have a duty to find out how far the case has gone. Once they handed over the case to their advocate, it seems they never followed up with him to find out its progress till they were served with notice of distribution. The applicants have a duty to check with the advocate failing which they must check with the court on how their matter is proceeding. I agree that since the applicants filed the application dated 13/6/2015, they totally went to slumber only to be awakened by the notice of survey that provoked them to file the application under consideration.

There has indeed been inordinate delay in having the application dated 13/6/2015 prosecuted and as noted earlier, the applicants cannot lay the whole blame on their advocate. They have contributed to the delay.

***What should the court do?***

Once the notice of survey was issued on the applicants on 9/7/2019 and was due on 24/7/2019, they moved with alacrity to have the orders set aside. Equity scoffs at the indolent but assists the diligent. I will therefore give the applicants the benefit of doubt that they may not be wholly to blame for the delay. Since the advocate is not available to state his position, I will allow the appellants one chance to present their case so that justice may be seen to be done.

The respondents contend that the delay in having this matter finalized is intended to deny the respondents use of the land because the applicants are in occupation to the prejudice of the respondents. The court will indulge the applicants and set aside its order of 9/5/2019 dismissing the summons for revocation dated 13/5/2015. The court therefore grants the following orders:

- 1) The order dated 9/5/2019 is hereby set aside;***
- 2) The application dated 13/5/2015 is hereby reinstated;***
- 3) The court will allocate a hearing date when the applicants will be ready to proceed and in default, the order dismissing the summons for revocation dated 13/5/2015 will automatically be reinstated;***
- 4) The applicants are condemned to pay the thrown away costs forthwith, before the next hearing date;***
- 5) The applicants will also bear costs of this application.***

**Dated, Signed and Delivered at NYAHURURU this 9<sup>th</sup> day of October, 2019.**

.....

**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Ms. Wanjiru for the applicants

Mr. Chege for the respondent

Eric – Court Assistant