



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 90B OF 2016**

**(FORMERLY NAIROBI SUCCESSION CAUSE NO. 249 OF 2012)**

**IN THE MATTER OF THE ESTATE OF MARY WAIRIMU KIMOTHO alias WAIRIMU  
KIMOTHO (DECEASED)**

**RULING**

1. On 26<sup>th</sup> October 2016, following a lengthy hearing in this matter, **Musyoka J** rendered his Judgment in respect of an application to revoke the grant in favor of **Margaret Mwihaki Njoroge**. The court granted the application and revoked the impugned grant.
2. He also made several orders consequent to the revocation, including order (g) to the effect that:

**“The persons interested in the estate of the deceased to agree on appointment of administrator, failing which there is liberty for them to more the court appropriately in a process that shall include the immediate survivors of the deceased, the co-owners of Kabete/Kibichiku/205, creditors (if any) and all other claimants who have been identified so far”**
3. The application filed on 27<sup>th</sup> February 2017 is expressed to be brought pursuant to this direction, and invokes Rule 73 of the Probate and Administration Rules. Prayer 1 seek the appointment of **Edward Njuguna Ngugi** and **Hezron Kaburu Boro** as the administrators of the estate of the deceased and the issuance of a new grant in their favor. The Applicants are **James Kariuki Ngugi**, **Nicholas Kibiku Mbugua**, **Edward Njuguna Ngugi** and **Grace Njoki Mbugua**, **Rachel Waithira Mbugua** and **Moses Muturi Mbugua** (the latter trio suing as legal representatives of the estate of **James Mbugua Kimotho**).
4. The application is supported by the affidavit of **Moses Muturi Mbugua**, sworn on behalf of all the applicants, stating that, as the rightful persons interested in the estate, they have agreed on the appointment of the two named administrators. A consent document executed by twelve individuals, is annexed to the affidavit.
5. The application was opposed by the Respondents who include the initial Petitioner **Margaret Mwihaki Njoroge** and other interested parties, of whom the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> raised grounds in objection to the procedure adopted by the Applicant, which they describe as alien to the Law of Succession Act.
6. In the meanwhile an application was made under section 26 and 29 of the Law of Succession Act by **Peris Wanjiku Mbugua** and **Virginia Wairimu Kariuki** claiming that, as blood sisters to the Applicants, their consent was neither sought, and nor are they named as beneficiaries or dependents of the deceased.

7. The arguments raised at the hearing of the application attended by the counsel for Applicants and 3<sup>rd</sup> Respondent appeared to revolve around the import of **Musyoka J's** direction (g) and the procedure adopted subsequently in bringing this application. The arguments were merely a re-statement of material filed by the respective parties. The court has considered the material canvassed in respect of the present application by way of affidavit, grounds in opposition and arguments. As well, the court has perused with care the judgment of **Musyoka J.**

8. The main ground leading to the revocation of the grant to the 1<sup>st</sup> Respondent by the honourable judge was the failure, by the 1<sup>st</sup> Respondent/Petitioner to involve the immediate relatives of the deceased, who had survived the deceased, and the dubious legal capacity of the said Petitioner to petition for a grant herein.

9. The court concluded that the process of obtaining and confirming the impugned grant was not "above board". The court remarked at "*the speed with which the administrator went about having the grant confirmed and the plot in question subdivided and sold off to third parties*". The latter constitute some of the interested parties/Respondents herein.

10. The honourable Judge dismissed the purchasers' (third parties) pleas that they acted in good faith and without notice, stating that:

**"The alleged purchasers cannot be protected by Section 93 (of the Law of succession) in such a case as the present where the seller is yet to establish that there was a trust in her favor that would have clothed her with the right to inherit the deceased's property and to thereafter dispose of it by sale. She acceded to that property by a process that was irregular, and sales by her are therefore equally irregular."**

11. The order upon which the present applicants have anchored their application must be read in that context. The Judge did not deem it appropriate to appoint administrators to the estate at that stage, leaving the matter open for the interested persons and/or beneficiaries to agree on an administrator or to commence an appropriate court process for the same. It would appear that a majority of the beneficiaries are agreed on the matter but the Respondents do not agree. That is hardly surprising given the positions taken by the various litigants at the trial before **Musyoka J.**

12. This dispute dates back to the year 2012. Section 51 of the Law of Succession Act provides for the manner in which a grant may be applied for. The court has wide powers under Section 47 of the Law of Succession Act with regard to any application or dispute before it. Rule 73 of the Probate and Administration Rules, invoked by the applicants herein is in the following terms:

**"Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

13. This provision resonates with the injunction in Article 159 (2) (d) of the Constitution requiring courts to administer justice without undue regard to procedural technicalities. Considering the age, history and nature of these proceedings, it is safe to assume that parties most likely to be interested, or their proxies have had notice of the dispute, starting from the initial gazetteement to the contentious proceedings before **Musyoka J.**

14. However, it is necessary, not only to require the present applicants to comply with the prescribed procedure, to a reasonable extent, but also to ensure that any parties hitherto unaware of the dispute are given some form of notice. To my mind it will be a travesty of justice and a waste of resources to require strict compliance by the applicants with Section 51 of the Law of Succession Act at this late stage of the proceedings. Not to mention delay in the resolution of this old matter, and the fact that there is presently no administrator in respect of the estate.

15. It is clear from the wording of order (g) by **Musyoka J** that the persons envisaged were the

beneficiaries to the estate, parties interested thereto and claimants “**identified so far**” as well as any creditors. In the interest of justice, and in order to maintain a balance of the interests of the present and potential parties, and for ensuring the reasonable compliance with the provisions of the Law of Succession Act, I will make the following orders in respect of the application filed on 27<sup>th</sup> February, 2017:

- a) That within 21 ( TWENTY ONE) days of today’s date, the applicants herein lodge an application for a grant by executing the prescribed forms in compliance with Section 51 (1) Law of Succession Act and Rule 70 of the Probate and Administration Rules; and
- b) In compliance with Section 51(2) of the Law of Succession of Act, the applicants do supply in the prescribed forms, the information required thereunder.
- c) That upon the Applicants’ compliance with order (a) and (b) above, the Deputy Registrar of this court causes to be published, the usual notice under section 67(1) of the Law of Succession Act as prescribed in Section 67(2) of the Law of Succession Act, to wit, by exhibition of the said notice on this court’s notice board, and also, daily alongside this court’s daily cause list on the Kenya Law website, for a period of 30 days.
- d) A grant will issue in favor of the applicants at the expiry of the 30 days stated in (c) above unless any objection or objections by **new** claimants, creditors or beneficiaries are lodged pursuant to Section 68 of the Law of Succession Act, and in respect of an issue **not** determined in the Judgment of **Musyoka J.**
- e) For the avoidance of doubt, the processes contemplated in orders (a) to (d) above will be undertaken within succession Cause No. 90B of 2016.
- f) In the event that the Applicants herein fail to comply with orders (a) and (b), within the period prescribed, other parties interested in the estate as beneficiaries of equal standing in priority have liberty to apply.
- g) Parties to this application will bear own costs.

Delivered and signed at Kiambu this **13th** day of **July, 2018.**

**C. MEOLI**

**JUDGE**

In the presence of:-

Mr. Omulo holding brief for Mr. Kirimi for the Applicants

Respondents - absent

Court Assistant – Nancy Mburu