



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 585 OF 2016**

**IN THE MATTER OF THE ESTATE OF IBRAHIM MUCHERU WAHOTHI (DECEASED)**

**ANNE NYATHIRA MUSERU.....1<sup>ST</sup> APPLICANT**

**JOHN WARUI JOKIM KAGWATHI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**OBADIAH MBURU MUCHERU.....RESPONDENT**

**RULING**

1. The deceased Ibrahim Mucheru Wahothi died on 5<sup>th</sup> September 2013. On the basis that he left a Will dated 6<sup>th</sup> December 2005, the applicants Anne Nyathira Mucheru (the 1<sup>st</sup> applicant) and John Warui Joakim Kagwathi (the 2<sup>nd</sup> applicant) petitioned this court and on 6<sup>th</sup> June 2016 obtained a grant of probate with written Will. The applicants were the co-executors of the Will. The 1<sup>st</sup> applicant was the youngest of the five widows left by the deceased.

2. On 8<sup>th</sup> September 2016 the respondent (one of the children of the deceased's first widow Esther Wanjiru Mucheru) filed an application for the revocation of the grant. He also sought for the provision of accounts. The application was based on the grounds that the proceedings leading to the grant were defective in substance because the consent of the beneficiaries had not been obtained; the Will relied on was a forgery; the grant was obtained fraudulently by the making of a false statement or by the concealment of material facts; and that the grant was obtained by means of untrue allegation of fact essential in point of law.

3. In the affidavit sworn to support the application it was deponed that, following the death of the deceased, there was burial dispute in **Nairobi HCCC No. 25 of 2013** and **Nairobi Civil Appeal No. 68 of 2015** in which evidence had been adduced to reach the finding that the Will was a forgery; the applicants had proceeded to petition for the grant while aware of the fact that the Will was a forgery; the applicants had not informed any of the other beneficiaries that they were petitioning for the grant; the beneficiaries had not been made aware of the contents of the Will; the 1<sup>st</sup> applicant had used the grant to dispose of many assets of the estate; and that certain properties had been left out of the petition.

4. On 9<sup>th</sup> September 2016 the application went before Justice Muigai who certified it as urgent and proceed to issue the following orders:-

**(a) The application shall be served to all beneficiaries of the deceased's estate.**

**(b) The grant issued on 16<sup>th</sup> June 2016 is hereby revoked and all consequential orders, transactions and transfers with regard to the assets that comprise of the deceased's estate.**

**(c) That the registration ownership of the properties shall revert to the name of the deceased forthwith.**

**(d) The estate of the deceased shall be preserved under section 45 of the Law of Succession Act Cap 160.**

**(e) This matter shall be placed before the trial court Hon Justice A.O. Muchelule for further orders and directions.**

**(f) Any properties transferred to 3<sup>rd</sup> parties shall be held in trust for the benefits of the estate."**

5. It should be pointed out that along with the application for revocation was an urgent chamber application which sought that pending the hearing and determination of the application for revocation the respondent's be restrained from distribution, selling, leasing, transferring or in any way dealing with the assets of the deceased's estate.

6. An application dated 2<sup>nd</sup> November 2016 was filed (and amended on 9<sup>th</sup> March 2017) by the applicants seeking to stay the execution of the orders issued on 9<sup>th</sup> September 2016 revoking the grant, and the review and/or setting aside of the orders issued on 9<sup>th</sup> September 2016. The grounds on which the application was brought were that the application leading to the orders had not been served on them which contravened **rule 48** of the **Probate and Administration Rules**; that the issuance of final orders without affording the applicants a right to be heard offended **Articles 50** and **159** of the Constitution; that the respondent had obtained the orders through misrepresentation and material non-disclosure particularly when he had alleged that he had no knowledge of the Will or that the Will had been annulled by the court. In the joint affidavit sworn by the applicants to support the application they deponed that the application leading to the orders of 9<sup>th</sup> September 2016 had been heard and final orders given without them being served or afforded a chance to respond; that it was not true that the respondent was unaware of the Will or its contents because vide letter dated 23<sup>rd</sup> March 2016 his advocates had been written to and supplied a copy of the Will by the deceased's advocates Masore Nyang'au & Co. Advocates; the allegation by the respondent that the Will had been found to be fraudulent by the High Court and the Court of Appeal were not true (and the decisions of the two courts on the burial dispute of the body of the deceased were annexed); the 1<sup>st</sup> applicant had at the **High Court at Makadara in Criminal Case No. 5460 of 2013** been unsuccessfully presented in regard to the alleged forgery of the Will; and the petition leading to the grant had been regularly filed and gazetted and had received no objection.

7. The application was opposed by the respondent through his replying affidavit dated 23<sup>rd</sup> February 2018 whose case was that the applicants were deserving of the prayers since they had so far failed to comply with orders granted on 9<sup>th</sup> September 2016, and had failed to, among other things, account for their dealings with the estate; including the proceeds of sale and rent.

8. Mr. Mbigi for the applicants and M/s Githinji for the respondent filed written submissions on the application. I have considered the rival affidavits and the submissions.

9. It is trite that in order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made (**Tokesi Mambili and Others –v- Simon Litsanga, Civil Appeal No. 90 of 2001 at Kisumu**). An applicant may have to show that there was a mistake or error apparent on the fact of the record or for any other sufficient reason. It was alleged by the applicants that, in granting the orders dated 9<sup>th</sup> September 2016, the court fell into error or mistake. They also asked that it be found there were sufficient reasons to review and/or set aside the order.

10. There is no dispute that the applications dated 7<sup>th</sup> September 2016 and filed on 8<sup>th</sup> September 2016 by the respondent led to the orders issued on 9<sup>th</sup> September 2016. The applications were not served on the applicants. The orders issued on 9<sup>th</sup> September 2016 were issued under certificate of urgency, and ex parte. The applicants, who had a grant of probate of written Will, were not heard before it was revoked. **Rule 48(4)** of the **Probate and Administration Rules** requires that an application for revocation of probate be served on the executor at least 21 days prior to the hearing of the application. The application was not served, and the affidavits were not heard on the application before adverse orders were issued. It is against the rules of natural justice for a party to be condemned before being heard. **Article 50** of the Constitution of Kenya embodies the principle of natural justice which entitles the applicant to a fair hearing. That the applicants were not served and heard before the orders were issued made the orders irregular and have to be set aside to allow for a hearing in a fair manner.

11. The consequence is that the application dated 2<sup>nd</sup> November 2016 (and amended on 9<sup>th</sup> March 2017) is allowed with costs. The order issued on 9<sup>th</sup> September 2016, and all consequential orders, are reviewed and set aside. The applicants are given 21 days to respond to the application for revocation. Upon service, the respondent shall have 14 days to file any further affidavit. Following that, the matter shall be mentioned for directions on hearing.

**DATED and DELIVERED at NAIROBI this 1<sup>ST</sup> day of OCTOBER 2018.**

**A.O. MUCHELULE**

**JUDGE**