



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE 2346 OF 2013

(MISCELLANEOUS 55 2015-CONSOLIDATED)

(SUCCESSION CAUSE 53 OF 1987 THIKA SPM'S CT)

IN THE MATTER OF THE ESTATE OF KAHACHO MACHARIA (DECEASED)

RULING

On 7th November 2014, by amended Summons filed on 10th July 2014, the Applicant sought orders of inhibition over the suit properties. This Court delivered Ruling that that subdivision and transfer of suit properties Loc 1/Kirwara/35, Loc1/Kirwara/932, Loc1/Kirwara/933& Loc1/Kirwara/35934 is /was halted till the application of 12th September 2013 for revocation of grant by Regina Nduta Kahacho was heard and determined.

On 8th April 2015, the Applicant Rachel Wanjiru Mwangi granddaughter of the deceased filed application under certificate of urgency that the Respondent, Wambui Kariru, widow of late anson Kariru who wanted to bury her late husband on suit properties Loc 1/Kirwara/35, Loc1/Kirwara/932, Loc1/Kirwara/933& Loc1/Kirwara/35934 be restrained by injunction. Upon perusal of the Court file **Succession Cause 53 of 1987 Thika Chief Magistrate's Court, vide Ruling of Ms. B. A.Owino of 27th October 2010**, the Trial Court found evidence that the Protestor ,Danson Kariru Muiruri bought 1 acre of the suit property L.R.Loc 1/Kirwara/35. The grant was confirmed as follows;

- a) **Esther Wanjiku Kahacho - 3.3 acres**
- b) **Danson Kariru Muiruri - 1.0 acres**

The Ruling of this Court of 5th October 2015; pursuant to orders in the Thika Law Courts File which was not set aside , reviewed or appealed against was to dismiss application of 8th April, 2015.

On 12th November, 2015 the Applicant Rachael Wanjiru Mwangi sought revocation of grant issued in **Thika Chief Magistrate's Court Succession Cause 53 of 1987**; on the ground that the sale alluded to in that the Respondent's husband bought 1 acre of the suit property is not true as the Applicant presented before Court; copy of proceedings by elders where Esther Wanjiku Kahacho was refunded the purchase price of the suit property to the Respondent's husband. The Proceedings and translated version are attached to the Applicant's application of 12th November 2015. Due to new additional information pursuant to the said application; the grant in Thika Law Court's file was revoked and the land reverted to estate of the deceased.

Meanwhile, vide Ruling of 16th February 2016, the new grant issued to Regina Nduta Kahacho on 29th February, 2016 was confirmed partly on the basis of beneficiaries who attended Court and partly in the absence of beneficiaries who despite being served with Summons to attend Court failed to do so and no explanation or representation was made by the parties.

On 1st November 2017, the Applicant Regina Nduta Kahacho through granddaughter Rachel Kahacho sought hearing of the application filed on 12th September 2017 seeking the Respondent to be held in contempt of Court for not attending Court despite service and not complying with Court orders; after Respondent was evicted by this Court's order to Gatanga Police Station; the Respondent went back and settled on the suit property L.R.Loc 1/Kirwara/35; contrary to court orders.

The Respondent Wambui Kariru represented by Mr Kamiru also filed application on 25th July 2017 to set aside all court orders as she challenged service of various applications, substitution of the deceased her late husband was not done; the eviction was irregular and illegal as she was not aware of the proceedings in Court and she was not properly joined to those proceedings. The dispute is between her late husband and the Applicant's grandmother.

DETERMINATION

I have considered the parties pleadings and submissions and find as follows; this matter originated from Magistrates' Court in **Succession Cause No. 53 of 1987**. There is also the decision of the **Civil Case No. 277 of 1980** that found that the defendant Danson Kariru was entitled to 1 acre of the 4.3 acres in from Loc.1/ Kirwara /35 with the two wives of the deceased being left to share the 3.3 acres. Pursuant to the said consent Danson Kariru on 5th June 1984 sought to have the said parcel of land subdivided into two portions 3.3 acres and 1.0 acre. The surveyors drew the mutation forms and payments were done for the survey works in the department of land. However, the transfer could not be completed as Esther Wanjiku Kahacho wife to the deceased was yet to obtain grant of representation.

On 13th September 1990 Danson Kariru and Esther Wanjiku Kahacho petitioned for grant of letters of administration intestate of Kahacho Macharia's estate in Senior Resident's Magistrate Court at **Thika Succession Cause No. 53 of 1987**. Danson on 13th August 2010 sought confirmation of the said grant plus transfer of the said 1 acre. The said grant of letters of administration intestate for the estate of the late Kahacho Macharia was confirmed on 11th November 2010. This prompted Esther Wanjiku Kahacho to file a protest and put a caution on the said parcel of land. Danson was aggrieved and filed application dated 5th August 2011 for removal of the said caution on the said parcel of land. Danson Kariru sought registration of the said parcel but did not succeed.

The Magistrate's Court in its orders of 6th June 1992 ordered the Land Registrar to transfer by transmission of the said 1 acre to Danson Karuru and for him to dispense with the production of the original title in Parcel No. Loc.1/Kirwara /35 which was in the names of the deceased and its whereabouts were unknown.

In an application dated 27th January 2013 Esther Wanjiku Kahacho sought to set aside the confirmation of grant made on 27th October, 2010. On 21st March, the Magistrate's court ordered execution to proceed. Esther Wanjiku Kahacho through her daughter Regina Nduta Kahacho filed a grant in the High Court as **Succession Cause No. 2346 of 2013** and the same was confirmed on 16th February 2017 to the effect that Loc.1/Kirwara /35 be shared equally to Mary Waithira Ndungu, Mary Ndungu, Njeri Kibunja, Wambui Chege, Nduta Kahacho, Njoroge Kahacho, Kariuki Kahacho, Waithira Kahacho, Wambui Kahacho and Nduta Kahacho.

On 5th October 2015 this court found that there was no appeal or review of the orders issued by Magistrate's Court on 27th October, 2010 and lifted the orders of arrest issued against Wambui Kariru. This court on 11th March 2016 granted for a new grant be issued to Regina Nduta Kahacho to administer the deceased's estate.

In the application dated 25th July 2017 the applicant, Wambui Kariru seeks the setting aside of the proceedings leading to the issuance of confirmed grant dated 16th February 2017. She avers that she was never served with the said application and as such she could not articulate their claim of 1 acre and refuted allegations that her late husband had been refunded his purchase price. She was never made a party to Misc. application no. 55 of 2015 which cancelled the subdivision of Loc.1/Kirwara/35 and she was never served with the applications and in this court never took part in the said proceedings. Her late husband was not properly substituted with her to take over the proceedings.

Order 10 Rule 11 of the Civil Procedure Rules provides that;

“where judgment has been entered under this order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

In **PATEL -vs- E.A. CARGO HANDLING SERVICES LTD [1974] EA75** at page 76 C and E the court held as follows:-

‘There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.’

The court further held as follows:-

‘That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a ‘triable issue’ that is on issue which raises a prima facie defence which should go to trial for adjudication.’

In the case of **MOHAMED & ANOR -vs- SHOKA [1990] KLR 463**, the Court of Appeal held that:-

“The test for the correct approach in an application to set aside a default judgment are; firstly whether there was a defence on merit; secondly whether there would be any prejudice and thirdly what is the explanation for any delay.”

The applicant via her application dated 25th July 2017 seeks to set aside ex-parte orders issued on application for confirmation of grant dated 27th October 2016 and subsequent eviction orders dated 11th July 2017. The applicant claim she was never served by the respondent/applicant as such could not defend the same. The respondent argues that the said application dated 12th November 2015 was served upon the applicant through her advocates on record. The Respondents served the applications and therefore service is a contested issue. I will give the applicant the benefit of doubt that she was never served with the applications. It is in the interest of justice to set aside the orders issued by this court on 27th October 2016 and have the matter heard interparties.

The applicant further seeks the revocation of grant confirmed vide application dated 27th October 2016. Having made the findings above I find that prior to confirmation of the said grant the applicant should be accorded fair hearing to defend the said application as she has an interest in the matter. It is therefore in order to revoke the confirmation of grant to allow the resolution of the issue of claim raised by the applicant. On the application filed on 12th September 2017 the applicant seeks order committing the respondent to civil jail for disobeying a court order given by this court on 10th July 2017 which sought the respondent/applicant evicted from the suit parcel of land. This application

is now overtaken by the present event of hearing the matter interparties.

DISPOSITION

- a) Having made the above findings on application dated 25th July 2017 I find that this application cannot stand.
- b) I set aside the orders of the application dated 27th October 2016 and revoke the said confirmed grant of letters of administration.
- c) A fresh grant will be issued to Regina Nduta Kahacho.
- d) The objector shall file a reply to the said application within 30 days, the respondent shall have an opportunity to respond within 30 days.
- e) The parties shall have the matter fixed for hearing at the earliest opportune time. Cost in the cause. It is so ordered.

DELIVERED DATED & SIGNED IN OPEN COURT ON 19TH DAY OF NOVEMBER, 2018.

M.W.MUIGAI

JUDGE –FAMILY DIVISION –HIGH COURT

IN THE PRESENCE OF:

.....**FOR THE RESPONDENT**

.....**FOR THE APPLICANT**