



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 710 OF 2002**

**IN THE MATTER OF THE ESTATE OF CHRISTOPHER NJENGA GATHECA (DECEASED)**

**MARITHA WANJIRU NJENGA.....1<sup>ST</sup> APPLICANT**

**ESTER NJOKI NJUI.....2<sup>ND</sup> APPLICANT**

**LYDIA WANGARI WANJIRU.....3<sup>RD</sup> APPLICANT**

**STEPHEN GATHECA NJENGA.....4<sup>TH</sup> APPLICANT**

**MARY WANJIKU NJENGA.....5<sup>TH</sup> APPLICANT**

**VERSUS**

**PATRICK MURIMA GITAU.....RESPONDENT**

**RULING**

1. On 17<sup>th</sup> July 2018 the respondent Patrick Murima Gitau applied to set aside the orders issued on 11<sup>th</sup> July 2018 in favour of the applicants Maritha Wanjiru Njenga, Esther Njoki Njui, Lydia Wangari Wanjiru, Stephen Gatheca Njenga and Mary Wanjiku Njenga. On 17<sup>th</sup> July 2018 the applicants' counsel Mr. Malinzi informed the court that they had served an amended summons to the respondent's counsel on 25<sup>th</sup> July 2018 but that no response had been filed. The hearing notice had also been served. An order was made that the application was not defended and was therefore granted as prayed. The respondent feels aggrieved by the order and seeks that it be set aside so that he can be allowed to defend the application. His counsel swore a supporting affidavit to state that a hearing notice was served on them at 3.30pm on 9<sup>th</sup> July 2018, two days to the hearing date on 11<sup>th</sup> July 2018. The notice was received under protest because counsel was going to have three other matters on the same day and was not going to be available. Indeed, he did not attend court. The orders complained of were granted. In any case, he swore, the matter had been listed for mention, and no substantive orders ought to have been given.

2. The orders granted were in respect of the amended application dated 18<sup>th</sup> June 2017 which sought that the applicants be declared the dependants of the deceased Christopher Njenga Gatheca; that the court does find that the deceased's Will and testament did not adequately provide for the applicants'; and that the Will and testament be varied to adequately provide for the objectors.

3. The response was filed by Stephen Gatheca Wanjiru whose affidavit swore that the advocate for the respondent was served but chose instead to go to attend to his other cases which were in the subordinate court at Milimani. He stated that the amendment was to the application which had been filed in 2012 to which no response had been filed; and that there was similarly no response to the present application. Lastly, he stated that the application was served three days to the hearing date.

4. I have looked at the file. The application dated 24<sup>th</sup> July 2012 filed by the applicants sought orders that the Will by the deceased be declared null and void. The respondent filed a response opposing the application. On 26<sup>th</sup> April 2017 the applicants filed application to amend that application for 29<sup>th</sup> May 2018. The matter went before Justice Muigai. Both sides were represented. An order was made allowing the applicants to amend the application. Leave was given to the respondent to respond to the amended application. The court asked that the matter be mentioned on 27<sup>th</sup> May 2018. It appears nothing happened on 27<sup>th</sup> May 2018. On 28<sup>th</sup> June 2018 the applicants' counsel went to the registry and was given 11<sup>th</sup> July 2018 as date for the mention. It is notable that the respondent's counsel was served on 9<sup>th</sup> July 2018, two days to the mention date. There was no explanation why service could not be done earlier. There was no explanation why there

was no invitation to take an agreed date.

5. It is apparent that the court had asked for the matter to be mentioned on 29<sup>th</sup> May 2018 to take directions on the hearing of the amended application. When the matter was mentioned on 11<sup>th</sup> July 2018 and the amended application had not received a response, directions were still required on how the matter would proceed.

6. This application has to be placed in perspective. The deceased died on 1<sup>st</sup> November 2001. On 21<sup>st</sup> March 2002 the respondent petitioned for the grant of probate. The grant was issued on 21<sup>st</sup> March 2002. On 4<sup>th</sup> April 2003 an application was filed to confirm the grant. The application was allowed on 28<sup>th</sup> May 2003. On 14<sup>th</sup> June 2007 Maritha Wanjiru and Esther Njoki applied to have the Will declared null and void. On 28<sup>th</sup> February 2017 the applicants' application dated 24<sup>th</sup> July 2012 came for hearing. The evidence of Maritha Wanjiru Njenga was taken. She was cross-examined. The case was adjourned for further hearing. That was when the applicants applied to amend the application. Even if there was no response to the amended application there was the application of 24<sup>th</sup> July 2012 which had a response and which was partly-heard. The respondent was entitled to be heard on that response.

7. More important, 11<sup>th</sup> July 2018 was only a mention date. No substantive orders could issue. Counsel for the applicants led the court into that error.

8. Given the history of the case, considering that the matter was a part-heard, given that on 11<sup>th</sup> July 2018 the matter had only come for a mention, I allow the application and set aside the orders of 11<sup>th</sup> July 2018 allowing the amended application dated 18<sup>th</sup> July 2017. It is always desirable that an application be heard on merits before orders are given. I make no orders as to costs.

9. So that there is progress in the matter, I allow the respondent 30 days to file and serve response to the amended application dated 18<sup>th</sup> July 2017. The applicants shall have 14 days, upon service, to file further affidavits. Thereafter, the matter will be mentioned on **11<sup>th</sup> February 2019** for directions on the hearing.

**DATED and SIGNED at NAIROBI this 11<sup>TH</sup> day of DECEMBER 2018**

**A.O. MUCHELULE**

**JUDGE**