



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 1081 OF 2012**

**IN THE MATTER OF THE ESTATE OF JOSEPH WAMBUA NDUTU (DECEASED)**

**ELIZABETH MBULI WAMBUA .....APPLICANT**

**VERSUS**

**1. PAULINE WANZA NZUKI )**

**2. RAPHAEL MUENDO WAMBUA)**

**3. PATRICK MULI WAMBUA )**

**4. ROSEMARY MWIKALI NYAGA)**

**5. ALBANUS MUIA WAMBUA ).....RESPONDENTS**

**RULING**

**The Application**

The Applicant has filed an application by way of a Chamber Summons dated 3<sup>rd</sup> October 2016, seeking orders that the ruling and all the orders made by this Court on 11<sup>th</sup> July 2014 revoking the grant of letters of administration intestate issued on the 17<sup>th</sup> January 2013 and confirmed on the 4<sup>th</sup> October 2013, together with the order that issued letters of administration jointly to Wanza Nzuki and Elizabeth Mbuli Wambua be set aside. The application is premised on the grounds that the Applicant was not served with the Objectors' application that resulted or gave rise to the said orders issued on the 11<sup>th</sup> July 2014, or with the hearing notice, the ruling or said orders, and as such the Applicant was condemned unheard. Further, that the Respondents intend to enter and sub-divide the suit property to the detriment of the Applicant and without authority.

The Applicant explained in a supporting affidavit she swore on 30<sup>th</sup> September 2016 that she the only living wife to Joseph Wambua Nduto (the deceased), and was married in the year 1971 by the deceased after his first wife namely Ruth Mbithe passed away, through a traditional marriage ceremony under the Kamba customary law. Further, that they later solemnized our marriage through a church wedding, and that her marriage/union with the deceased was blessed with five children.

The Applicant averred that she lived with her husband and their five children without interference and/or disturbance until 12<sup>th</sup> July 2011 when the deceased died, and that during her marriage with the deceased they acquired properties namely plot no 19-120 within Muka Mukuu Farmers' Society scheme together. The Applicant stated that she contributed money towards purchase of the property known as plot 19-120

in Muka Mukuu Farmers ' Society, and that from 1971 to date has been utilizing the said property together with her husband , two sons and three daughters.

According to the Applicant, the Respondents are not the wife and/or children of the deceased, as he never accepted them as his children at any given time, nor did he acknowledge to have married the 1<sup>st</sup> Respondent through any system of marriage. Further, that she was aware that on or around the year she was married, Pauline Wanza Nzuki was married to a Mr. Mulwa, and at that time she had two children namely Rosemary and Raphael.

Mr. Mulekyo , the Applicant's learned counsel, relied on the averments made in the pleadings, in oral submissions he made in Court during the hearing on 24<sup>th</sup> October 2016.

### **The Response**

The Respondents opposed the Applicant's application in a replying affidavit sworn by the 1<sup>st</sup> Respondent on 24<sup>th</sup> October 2016, wherein she stated that that the Respondents are a distinct house of the Deceased and his beneficiaries and dependants, and that he recognized and treated them as such. Further, that this court in making its ruling considered documents which not only confirmed their right to object to the Applicant's petition, but also considered it just for their family to be part of the administration to safeguard their interests as beneficiaries.

The 1<sup>st</sup> Respondent stated that they have their portion of the land on which they have settled on and reside on to-date, and that they occupy a different portion from the Applicant. Further, that the Deceased is the one who settled them in their respective portions.

Mr. Odawa, the Respondents' learned counsel, also asked the Court to rely on the Respondent's replying affidavit at the hearing on 24th October 2016.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions filed. I find that the main issue for determination is whether reasonable grounds have been shown for this Court to set aside the orders given herein on 11<sup>th</sup> July 2014. This Court is in this regard minded of the applicable law and the grounds for setting aside orders set out Order 45 Rule 1 (b) of the Civil Procedure Rules as follows:

- i) There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
- ii) mistake or error apparent on the face of the record,
- iii) any other sufficient reason,
- iv) the application must be made without unreasonable delay.

The Applicant has in this respect relied on lack of service of the application for revocation of grant, and of the hearing notice of the said application by the Respondents. The Respondents did not dispute or respond to this averment. I have perused the Court record and note that there is an affidavit of service filed on 24<sup>th</sup> June 2014 sworn by Josiah Munene, a licenced process server of the High Court of Kenya, as to service of the application which had an hearing date. The said deponent stated at paragraphs 2 to 4 therein as follows:

**2. "On 16th June 2014 I received from Objectors Summons for Revocation Application dated 9th June 2014 coming up for hearing on 24th June 2014 with instructions to effect service upon ELIZABETH MBULI WAMBUA the Administrator/Respondent herein ("the**

**Application).**

**3. On the same day at about 11 am I proceeded to Kangundo,. Tala and Kyanzavi accompanied with Raphael Muendo Wambua the 2nd Objector/Applicant who had been introduced to me by the Objectors' Advocate.**

**4. Upon arrival we proceeded to the boma where the 2nd Objector pointed to me an elderly lady ELIZABETH MBULI WAMBUA the respondent whom he called by name and she positively responded in Kiswahili language whom upon greetings and introductions confirmed to me that she was the Respondent upon which I handed to her the Application which she accepted service read but refused to sign my copy of the Application.”**

It is not evident from the said affidavit where the location of the “*boma*” where the Applicant was served was, as various locations are stated therein, and also whether the Applicant was known to the 2<sup>nd</sup> Objector who is deponed to have called her name as a way of identification. To this extent I find that the affidavit of service cannot be relied upon as proof of proper service on the Applicant.

It is a requirement of natural justice, and also a legal and constitutional requirement that a party be given an opportunity to be heard in any matter that is likely to affect his or her interests. There is also now a constitutional obligation placed on this Court to dispense substantive justice under Article 159(2)(d) of the Constitution, and not to pay undue regard to procedural technicalities. I particularly note in this regard that the Applicant disputes that the Respondents are beneficiaries of the deceased, and this issue needs to be decided before any further administration of the deceased's estate can proceed.

In light of these legal imperatives, and the findings in the foregoing as to lack of proper service of the application for revocation of grant and hearing notice on the Applicant, I find that there is sufficient ground to set aside the orders made on 11<sup>th</sup> July 2014.

The Applicant's Chamber Summons dated 3<sup>rd</sup> October 2016 is therefore accordingly allowed, and it is hereby ordered as follows:

1. The orders made herein by this Court on 11<sup>th</sup> July 2014 revoking the grant of letters of administration intestate issued on the 17<sup>th</sup> January 2013 and confirmed on the 4<sup>th</sup> October 2013, and that letters of administration be issued to Pauline Wanza Nzuki and Elizabeth Mbuli Wambua with respect to the estate of the deceased Joseph Wambua Ndotu be and are hereby set aside.
2. The Respondents shall serve the Applicant with the Summons for Revocation of Grant dated 9<sup>th</sup> June 2014 and filed herein on 10<sup>th</sup> June 2014 within 14 days of the date of this ruling, and the Applicant shall file and serve her response to the said Summons within 30 days of service.
3. The parties herein shall thereafter take directions as to the hearing of the said Summons.
4. Each party shall bear their respective costs of the Notice of Motion dated 3<sup>rd</sup> October 2016.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 11<sup>th</sup> day of January 2017.

**P. NYAMWEYA**

**JUDGE**