



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**SUCCESSION CAUSE NO. 388 OF 2011**  
**IN THE MATTER OF THE ESTATE OF SIMON MWANIKI NGUGI,(DECEASED)**

**RULING**

By a summons dated 20th May, 2015 and premised under **Section 47** of the **Law of Succession Act** and **Rule 79** of the **Probate and Administration Rules**, the applicant, Naomi Waithera Mwaniki moved this court for orders:

1. Spent
2. Spent
3. That there be a declaration that L.R. NYANDARUA/MAWINGO SALIENT/139 did not at any given time form part of the estate of SIMON MWANIKI NGUGI (deceased) and could not be subject of distribution in any succession cause of the said SIMON MWANIKI NGUGI.
4. That the order of 1st December, 2011 requiring the Applicant to petition for fresh Letters of Administration for the estate of SIMON MWANIKI NGUGI be set aside.
5. That the costs of this application be paid by the Respondents

The application is based on six (6) grounds as listed on the face of the application namely:

- a. L.R. NYANDARUA/MAWINGO SALIENT/139 had initially been offered by Settlement Fund Trustees to SIMON MWANIKI NGUGI (deceased), but the deceased failed to accept the offer during his lifetime, thus leading to its withdrawal.
- b. The Applicant was initially not aware of the said withdrawal and as such after the death of the deceased, she petitioned for his estate in Nyahururu P.M. Succ.No.106 of 2006 and sought for distribution of the said parcel of land.
- c. That upon presenting the Certificate of Confirmation in the said cause at the Settlement Fund Trustees offices, the Applicant was notified of the aforesaid withdrawal and she was advised to institute the process of being offered the same land.
- d. The Applicant was subsequent thereto offered the said parcel of land and she accepted it and settled all the conditions of the offer and eventually the Settlement Fund Trustees issued discharge of charge in her favour, which facilitated the registration of the Applicant as the sole and absolute proprietor of the said parcel of land.
- e. The Respondents sought for revocation of the grant and Certificate of Confirmation issued in Nyahururu P.M. Succ. No.106 of 2006 and on 1st December, 2011 an order of revocation was issued and currently the Nyandarua Land Registrar has instituted the process of cancelling the Applicant's title deed.
- f. There was no service of the application for revocation upon the Applicant and as such the

Applicant was not aware of the application and she did not participate in its determination.

The same is further supported by the affidavit of the Applicant sworn on the 20th May, 2015.

The gist of the grounds and the affidavit is that Land Reference No.Nyadarua/Mawingo Salient/139 was offered to Simon Mwaniki Ngugi (now deceased) by the Settlement Fund Trustees. The said Simon Mwaniki Ngugi failed to accept the offer during his lifetime and the offer was withdrawn.

Upon the death of Simon Mwaniki Ngugi, the applicant herein petitioned for letters of administration in respect of the estate of Simon Mwaniki Ngugi vide Nyahururu P.M. Succession Cause No.106 of 2006 and sought the distribution of the said parcel of land being the only asset in the estate. The grant was issued and confirmed and on presentation of the confirmed grant to the Settlement Fund Trustees, it dawned on the applicant that the offer of the Land to Simon Mwaniki Ngugi had been withdrawn as he had failed to accept it.

The applicant was advised at the office of the Settlement Fund Trustees to initiate the process of being offered the same parcel of land. She complied and land was eventually offered to her. She annexes documents to that effect. She accepted the offer and made the requisite payments. The land was then transferred to her. A title deed was subsequently issued at the Nyandarua District Land Registry. The same is exhibited.

The applicant later learnt of the existence of a court order issued on 1st December, 2011 which had the effect of cancellation of her title to the said land. She denies ever being served with the suit papers in respect of the suit giving rise to the court order.

Replying on behalf of the respondents, Joseph Ngeke Njoroge depones that the applicant herein was aware of the challenged proceedings and was duly represented by her Advocates.

It is urged that the applicant's own exhibit (NW7) clearly shows that the title she claims arises from Nyahururu Principal Magistrates Court Succession Cause No.106 of 2006. Indeed that Succession Cause had initially been filed by one Bilha Wanjiku Mwaniki, wife to Simon Mwaniki Ngugi (deceased). Bilha subsequently died and one Daniel Ngugi Mwaniki was substituted thereof. The said Daniel also passed on and it is then that the applicant herein was substituted as the petitioner.

In paragraph 3 of the replying affidavit, it is deponed that the Respondents herein purchased their respective parcels from the late Bilha Wanjiku Mwaniki (deceased) then in the capacity as the administrator of the estate of the deceased Simon Mwaniki Ngugi. Sale agreements are annexed and marked "JNN3". It is stated that the Respondents were also named as beneficiaries in their capacity as purchasers of the parcel of land. This was in a chief's letter.

Both parties filed written submissions in support of the rival positions.

The setting aside of a court's judgment or order is a discretionary power exercised in order to avoid hardship or injustice being occasioned to party due to an excusable error or mistake. It cannot be exercised in favour of a person intent on abusing court process. The court is required to consider whether the applicant has a defence/case on the merits were the orders to be set aside and further to consider if the application is brought timeously without undue delay.

I have had occasion to consider the application, the supporting affidavit, the replying affidavit and submissions by counsel. Of determination are four (4) issues:

1. Whether the applicant was served with the application dated 20th July, 2015.
2. Whether the applicant has a good defence to the application dated 20th July, 2011.
3. Whether the Respondents were dependants of the deceased within the meaning of **Section 29** of the **Law of Succession Act**.
4. Whether Land parcel No.LR Nyandarua/Mawingo Salient/139 formed part of the estate of Simon

Mwaniki Ngugi (deceased).

5. Whether the orders of 1st December, 2011 should be set aside.
6. Which orders would serve the interests of justice in this matter.

It is the applicant's case that she was not served with the application dated 20th July, 2011. The rejoinder by the respondents is that the applicant's Advocates, M/s. Olaly Cheche and Co. Advocates were duly served and that the applicant was also served personally. I note from the affidavit of service that there was service on the firm of Olaly Cheche and Company Advocates and on the applicant. That firm was on record for the applicant in Nyahururu P.M. Succession Cause No.106 of 2006.

Whereas it may not necessarily follow that the firm of Olaly Cheche and Company had instructions to receive service in respect of the application for annulment in the High Court, the application in its heading clearly set out P.M. Succession cause No.106 of 2006 as the matter under challenge in the application for annulment. The firm of Advocates received and stamped and signed in acknowledgement of the service.

The process server Danson G. Mungai went ahead to serve the applicant as particularised in paragraph 4 of his affidavit of service sworn on 30th November, 2011.

The normal way of determining if there was service would have been for the process server to have been cross-examined on his affidavit of service. Where the case rests on personal service on the defendant/respondent, the process server must depone that either the defendant/Respondent was:

1. known to him
2. was identified to him by a person whose name is disclosed
3. admitted to him that he was the defendant/respondent (see **National Bank of Kenya Limited V. Ndzai Ndzai Katana Jonathan**).

In our instant case, the process server described service on the applicant in paragraph 4 of his affidavit of service sworn on 20th November, 2011 thus:

**“That on the same day accompanied by the 3rd applicant herein, I proceeded to Shabab, Gilanis Estate, then to the respondent's residence. On arrival, we found her and the said 3rd applicant pointed her out to me. I therefore approached her and upon my introduction and the purpose of my visit, she accepted service, but declined to sign on my copy alleging that the one I had served her advocate is enough.”**

The process server relies on one of the three (3) permissible modes of identifying the applicant namely identification of the applicant by a named person. This averment under oath is not challenged under cross-examination or otherwise.

The resultant effect is that even assuming the service on the firm of Olaly Cheche and Company was not enough (and I am persuaded it was, that firm of Advocate having been on record for the applicant), there was personal service on the applicant.

It is my finding that there was proper service on the applicant.

On whether the applicant has a good defence to the application dated 20th July, 2011, the applicant has challenged the capacity of the Respondents in the filing of the application dated 20th July, 2011 stating that they were not dependants of Simon Mwaniki Ngugi they being purported purchasers of part of the estate of Simon Mwaniki Ngugi.

I have considered the material before me and it is true for a fact that Respondents 1, 2 and 3 claim purchaser interest in the matter. It is important to note however that Ruth Wangari Ngugi is a wife to Daniel Ngugi Mwaniki a son to Simon Mwaniki Ngugi (deceased)

It is instructive that the 1st, 2nd and 3rd Respondents purport to have purchased part of the land forming the estate. The facts available on record indicate that the purported purchases were after the death of the deceased Simon Mwaniki Ngugi but before the letters of administration in respect of that estate were confirmed. In the circumstances, the 3 respondents do not even qualify as creditors as per **Section 66** of the **Law of Succession Act**.

Their respective claims can only be sustained against the particular individual/(s) they dealt with and who in essence were intermeddling with the estate of the deceased if at all the sales took place.

The 4th respondent is a rightful beneficiary to the estate. The claim by the applicant that the land under reference had not been transferred to the deceased as he had failed to accept the offer by the Settlement Fund Trustees are matters I would rather leave for the trial court in the new application for grant to deal with. Suffice to say that the transfer documents tendered specifically annexures “NWM 14”, the transfer of the land to the applicant, clearly shows her described as “*administrator*.” Her claim that the land was transferred to her directly by the Settlement Fund Trustees appears shaky. But as stated above, let that issue be resolved by the trial court when fresh letters of administration shall be applied for.

The prayer for a declaration that Land Reference No.Nyandarua/Mawingo Salient/139 belongs to the applicant is not tenable at this stage. On the material before me, the applicant appears less than candid in her explanations of how the land in question was transferred to her. Of concern would be whether the applicant who was then an administrator of the Estate of Simon Mwaniki Ngugi ever informed the beneficiaries of the turn of events and why the applicant as the administrator failed to pursue the interests of the deceased by making the necessary payments to midwife the process that the deceased had omitted to conclude. In my view, it will be of great importance to hear the Settlement Fund Trustee explain the true position regarding the land in question. It must be borne in mind that the position of an administrator of an estate of a deceased person in a fiduciary one and it is strange and it smack of mischief that the administrator failed to inform the beneficiaries as to her finding in course of the administration of the estate.

Finally, the explanation given by the applicant for the delay is not entirely convincing. There is inordinate delay in the bringing of the application at hand.

For the above stated reasons, the application before court fails. The same is dismissed. Each party to bear its own costs.

**Dated, Signed and Delivered at Nakuru this 11th day of February, 2016.**

**A. K. NDUNG'U**

**JUDGE**