



**REPUBLIC OF KENYA**

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

**PROBATE AND ADMINISTRATION DIVISION**

**SUCCESSION CAUSE NO. 2390 OF 2014**

**IN THE MATTER OF THE ESTATE OF WAITHAKA KUBIU (DECEASED)**

**ESTHER NJERI WAITHAKA.....APPLICANT**

**-versus-**

**LOISE NJERI NDUTA .....1<sup>ST</sup> RESPONDENT**

**PATRICK KAMAU WAITHAK.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. This is an application dated 16<sup>th</sup> March, 2016 seeking that the court do set aside or vacate the orders given by the court on 27<sup>th</sup> July, 2015 in their entirety. In the alternative, the orders be reviewed and the summons dated 28<sup>th</sup> August 2014 be heard on merit inter-partes. It is brought under **Section 47** of the Law of **Succession Act** as read together with **rules 44** and **73** of the **Probate and Administration Rules**.

2. The application is premised on the grounds that the Applicant/1<sup>st</sup> Respondent has never been served with the summons dated 28<sup>th</sup> August 2014 or any notices to attend the hearing of this case. That the person named as the 2<sup>nd</sup> Respondent Daniel Kamau Waithaka died in 2003 and this was not disclosed to the court. That the deceased respondent could not have been served with any notices or the summons and yet the process server purports to have served him in the year 2015. That the orders of 27<sup>th</sup> July 2015 were granted without compliance by the Applicant with the directions given by the court on 19<sup>th</sup> February 2015.

3. This application is supported by the affidavit sworn by the Applicant on 16<sup>th</sup> March, 2016 in which she deposes that she is the widow of the deceased. That upon the demise of her husband she petitioned Kiambu Chief Magistrate's court in succession cause No. 250 of 1989 and Letters of Administration were issued on 15<sup>th</sup> May, 1990 and the grant was confirmed on 21<sup>st</sup> July 1992. The Applicant and her son Daniel Kamau Waithaka were named as the Administrators of the estate.

4. The Applicant also avers that upon confirmation of the grant, the beneficiaries were given their titles from land parcel No. Kiambaa/Thimbigua/1810 among them being Kiambaa/Thimbigua/1810, 1811 and

1812.

5. That the Applicant also avers that she only learnt of this matter when she was served with a letter from the Deputy County Commissioner indicating that the titles to the parcels of land known as Kiambaa/Thimbigua/1810, 1811 and 1812 had been cancelled by a court order on 27<sup>th</sup> July 2015.

6. The Applicant further avers that she was not aware that there was a matter pending in court, since she has never been served with any court process. That at the time of the alleged service, the Applicant was undergoing treatment at P.C.E.A Kikuyu Hospital and there are no records in the file to show that she was ever served with the summons. That the person purported to have been served as her co-administrator, one Daniel Kamau Waithaka died in the year 2003.

7. The Applicant averred that upon perusal of court record, it was found that on 9<sup>th</sup> February, 2015, the court gave directions sought by the applicant for the hearing of the Summons by viva voce evidence and on the basis of written statement. That when the matter came for hearing on 27<sup>th</sup> July 2015 the directions were not complied with, which is an error on the face of the record.

8. The Applicant therefore prayed that the court gives her an opportunity to be heard as it has been denied by the absence of service of the summons and the notices.

9. The Respondents swore a joint Replying affidavit in which they deposed that the deceased was their uncle, and the parcels of land in dispute before subdivision, belonged to their grandfather Kubiwa Waithaka also deceased. That the Applicant and her son filed a petition for letters of administration in respect of the estate of the deceased in Kiambu succession cause 250 of 1989 without their knowledge.

10. The Respondents averred that on 8<sup>th</sup> October, 2014 the Applicant together with her co-wife one Joyce Wanjiru Njuhiga demolished their grandmother's house which they had been residing in and which was built in land reference Kiambaa/Thindigua/1810. That the Respondents accompanied the process servers during the service to the Applicant's residential home. That each time the Applicant was served, she declined to sign the service and stated that the Respondents did not have locus standi to claim any share of the property.

11. The Respondents further averred that the Applicant was at all material times informed of the times of mentions and hearings but did not attend court and also stated that she would not attend court since she had no property to give to the Respondents. That despite the order of the court dated 1<sup>st</sup> September, 2015 to have the titles cancelled the Applicant together with her co-wife destroyed the grave of the Respondent's mother. That the Respondents have been to various authorities in order to get their share from the Applicant, but this has borne no fruits. They urged the court to dismiss the application by the Applicant.

12. The counsels on record filed written submissions. Mr. King'ara learned counsel, for the Applicant submitted that the orders in question were granted following the filing of Summons for the revocation of grant dated 3<sup>rd</sup> September, 2014 which came up for hearing on 27<sup>th</sup> July, 2015. That on the hearing date the Respondents to the Summons were absent, hence the court proceeded to hear the matter ex-parte on the basis that they had been served with the hearing notices for that day.

13. Mr. King'ara contended that in the replying affidavit sworn by Loise Njeri Nduta and Patrick Kamau Waithaka on 11<sup>th</sup> April 2016, they annexed two affidavits of service and which they purport to be evidence of service but which counsel submitted was not sufficient nor was it good service. Mr. King'ara argued that the affidavit by George Ndonye talks of a hearing notice for 3<sup>rd</sup> June, 2015, yet this is not the day on which the orders sought to be set aside were given. That the second affidavit by Janet Wanja Waithaka, talks of hearing notice received on 20<sup>th</sup> July 2015.

14. Mr. King'ara supported his submissions with the decisions in **Kipruto -vs- Attorney General [2010] 2EA 226** and **Remco Limited vs Mistry Jadva Parbat & Co. Limited & Others [2002] 1-EA-233**.

15. Mr. Gachoka for the Respondent submitted that, where in previous occasions the Defendant has refused to accept service or cannot be found, then the court shall pronounce the affixing of summons on the outer door of his/her residence or business premises as proper service as was the case in this matter. That the Process Server did what was practicably possible and cannot be expected to only effect service at the convenience of the Applicant.

16. Mr. Gachoka further contends that the Summons for revocation of grant dated 18<sup>th</sup> September 2014 was duly served upon the Respondent and an affidavit of service filed on 19<sup>th</sup> September, 2014. That it is on record that the Applicant merely dismissed the process server who effected service and failed to respond in the matter alleging that the Applicant in the Summons for revocation of Grant had no locus standi to address the court on the matter of the estate. That the summons for revocation of grant had been filed appropriately as prescribed under **section 75** of the **Law of Succession Act** and **rule 44** of the **Probate and Administration Rules**.

17. Counsel further submitted that the Applicant was severally served with invitations to take dates at the High Court Registry but never responded and the Respondent would proceed to take dates and serve hearing notices upon the Applicant. That in some instances the process served upon the Applicant through registered post, as is evidenced in the court file, but the Applicant ignored all communication to her by the Respondents. He argued that it would be prejudicial to the Respondent to allow the Applicant's application as it is based on pure malice and continuing the injustice visited on the Respondents by disinheriting them.

18. Having examined all the documents relating to the pleadings and especially the affidavits of service and having also perused the submissions of counsels I find that the only issue for determination is whether there was service.

19. I note from the record that among the two process servers, none of them talked of having served the substantive summons for revocation, and on the other hand, the Applicant denied having been served. George Ndonge one of the Process servers stated that he affixed the hearing notice on the Applicant's door.

20. **Order 5 Rule 8** demands that service be made on the recipient of the notice in person and only where after using all due diligence the recipient cannot be found is affixing permitted. It has not been demonstrated to the court what due diligence was carried out by Mr. Ndonge before he resorted to affixing the process on the Applicant's door. The court also notes that the second process server's claims of familiarity with the Applicant and several visits to her home were not proved as she did not provide the particulars of any such visits.

21. It is true as submitted by Mr. King'ara for the Applicant that the time of service is not indicated in the two affidavits of service which is a violation of **Order 5 Rule 15** which makes it mandatory to indicate in the affidavit of service the time of service. The court also observes that both affidavits of service relate to service of the hearing notices and not to service of the substantive summons and there is no evidence that the original summons was served upon the Respondent.

22. In the two decisions referred to by Mr. King'ara, the Court of Appeal held in **Kipruto -vs- Attorney General [2010] 2EA 226**, that:

**“The court's discretion to set aside ex-parte judgment is intended to avoid injustice or hardship.”**

and in **Remco Limited vs Mistry Jadva Parbat & Co. Limited & Others [2002] 1-EA-233** that:

**“if there is no proper service of summons to enter appearance resulting in ex-parte judgment then the court must set aside such judgement.”**

23. In this case the statement of service indicates that the process servers did not find the Applicant to

effect service and for that reasons the process was affixed to the door. There is however an affidavit of the Applicant denying any service at all. In such a situation **Order 5 rule 16** of the **Civil Procedure Rules** provides that:

**“On any allegation that a summon has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court touching on his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.”**

24. In the instant case however, the court did not have the benefit of the presence of the process servers in court to be examined on oath to establish the veracity of their averments. It may very well be that the Respondent received the process and chose to ignore it. However the court notes gaps in the statements of the process servers in the manner that the service was effected. Such as service purporting to have been effected, on a dead man.

25. To prefer the affidavit of the process servers over that of the Applicant therefore, would not be in my view, a judicious exercise of the discretion of the court, as it has not been demonstrated that service herein was proper or sufficient. In the premise the application dated 16<sup>th</sup> March 2016 is hereby allowed with the following orders:

- (i) The orders granted on 27<sup>th</sup> July 2015 are hereby vacated and set aside in their entirety;
- (ii) The Respondent shall serve the Applicants with Summons for revocation of grants within 21 days of this ruling;
- (iii) The summons dated 28<sup>th</sup> August 2014 is ordered to be heard interpartes and determined on merit.

**SIGNED DATED and DELIVERED** in open court this **6<sup>th</sup> day of September, 2016**

.....

**L. A. ACHODE**

**JUDGE**

In the presence of .....advocate for the Applicant

In the presence of .....advocate for the Respondents