



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 398 OF 2015**

**(FORMERLY MERU SUCCESSION CAUSE NO. 275 OF 2014)**

**IN THE MATTER OF THE ESTATE OF LATE ERASTUS MURIUNGI NGARUTHI**  
**(DECEASED)**

**GERALD KINOTI NGARUTHI.....1ST APPLICANT**

**FRANCIS RIUNGU NGARUTHI.....2ND APPLICANT**

**VERSUS**

**JANET MWARI ERASTUS MURIUNGI.....PETITIONER**

**R U L I N G**

1. Before me is a summons dated 7th March, 2016 brought under Rule 49 of the Probate and Administration Rules. The application seeks two prayers; firstly, that the orders of confirmation of grant made in favour of one co-administrator ex parte on 8th December, 2015 be reviewed and revised and secondly, that this court does divest itself jurisdiction and forward the file to Meru Court where it had originally been transferred to. The application was supported by the Affidavits of Janet Mwari Muriungi and Mburugu M'Nkanata Kioga both sworn on 7th March, 2016, respectively.

2. In both Affidavits, it was contended by the Applicant (Janet Mwari Erastus Muriungi) that she had originally lodged the succession cause as Chuka PM Succ. Cause No. 79 of 2011 to expedite the succession process and to ease costs; that the matter was thereafter transferred to Meru High Court vide an application made by the Respondents; that **Makau J** erroneously determined the matter instead of deciding the issue of transfer alone; that the Applicant had since applied for leave to appeal against the said decision. That she later learnt that the file was retransferred to Chuka High Court under unclear circumstances and allocated a new No. 398 of 2015. That the Respondents were not beneficiaries and that the file should be retransferred back to Meru High Court for hearing. Mr. Kioga Advocate swore that the Respondents were relying on a bogus decree exhibited as "**GK N2**," he questioned the integrity of the decision of **Makau J** of 23rd April, 2015; that a notice by this court of 9th October, 2015 was received on 12th February 2016. He suspected that the process by which the file was transferred from Meru High Court to this court and ultimately the grant being confirmed ex-parte was riddled with corruption. He denied that his office was served with the hearing notice for 8th December, 2015. To him, the matter proceeded ex-parte and the proceedings of 8/12/15 should be set aside and the file be transferred to Meru High Court.

3. The application was opposed through the Replying Affidavit of Gerald Kinoti Ngaruthi sworn on 29th March, 2016. In the said Affidavit, the Respondents narrated the history of the dispute between them and the deceased. That there was a decree issued in Meru HCCC No. 54 of 1986 dividing the estate property

into four (4) portions; that the Applicant had secretly commenced these succession proceedings at the Chuka P.M Court as Succ. Cause No. 79 of 2011 and had the grant issued therein confirmed and distributed the estate. That on learning of the said proceedings , the Respondents applied for their transfer to Meru High Court and for the revocation of grant. That the High Court at Meru appointed the Respondents to be joint administrators with the Applicant whereby on 3rd August, 2015, the 1st Respondent applied for the confirmation of grant which the Applicant has never opposed. That the Respondent's Advocates received a notice from this court for mention on 3rd November, 2015 when the matter was fixed for hearing on 1st December, 2015. That since the court was not sitting on that day, the matter was fixed for 8th December, 2015 whereby the Respondent's Advocates served a requisite hearing notice upon Ms Kioga & Company Advocates for the Applicant. That the grant was properly confirmed as this court has jurisdiction to hear and determine the matter.

4. Mr. Kariuki learned counsel for the Respondents submitted that the Meru High Court Succession Cause No. 275 of 2014 was properly transferred to this court and no grounds had been advanced for the re-transfer sought by the Applicant. That on the order for review and setting aside, no grounds for review had been advanced. That before confirmation, the court had satisfied itself of the notice given on 1st December, 2015 and the service of the hearing notice. That no prejudice will be suffered by the Applicant even if the confirmation was not set aside as the same was in accordance with a lawful decree of the court in Meru High Court. Counsel urged that the application be dismissed in its entirety.

5. I have considered the Affidavits on record and the submissions of learned counsel. The first prayer was that the order of confirmation made on 8th December, 2015 be reviewed and the entire proceedings be set aside. The grounds for the said prayer were that the court file for these proceedings was irregularly transferred from Meru High Court and that the proceedings of 8th December, 2015 were ex-parte. One issue that was disturbing was that both Mr. Kioga and his client were categorical in their Affidavits that through corruption, the court file left Meru High Court and landed in Chuka High Court. They swore this fact at paragraphs 9 of Janet Mwari Muriungi's Supporting Affidavit and paragraph 13 of Mr. Kioga's Affidavit.

6. Perturbed by the said assertions and in order to ensure that both the dignity of the court and its processes are not abused by those who may want to employ under hand dealings to compromise the legal process, on 30th March, 2016, this court stayed these proceedings and directed the Tharaka Nithi County Criminal Investigations Officer to carry out thorough investigations on those allegations and report back to court on his findings. The court also directed that the said officer do take appropriate action against those found to have engaged in the alleged corrupt acts. By a letter dated 11th May, 2016, the Directorate of Criminal Investigations, Meru South advised this Court that the file was transferred from Meru High Court to this Court vide an order properly made on 18th September, 2015 by Justice R.P.V Wendoh. That being the case, this court directed that the result of the said investigations be availed to the parties which was duly done on 17th May, 2016. Those findings have never challenged by either Mr. Kioga or his client.

7. On my part, I have carefully perused the record. It is clear that the matter was placed before **Wendoh J** on 18th September, 2015 who directed that the matter be transferred to this court. Accordingly, the allegations that the file was irregularly transferred to this court from Meru High Court are unfounded and most unfortunate. Even after availing the outcome of the investigations to Mr. Kioga as aforesaid, counsel did not deem it fit to withdraw the said insinuations of corruption which were unfounded. It was unfortunate that a counsel of long standing could not do so.

8. The second ground was that the proceedings of 8th December, 2015 were exparte. Mr. Kioga submitted that the application for confirmation was never served upon the Applicant; that some notice was left in his office but was not signed for; that the Applicant should have been notified of the date of 8th December, 2015. Mr. Kariuki for the Respondent submitted that contrary to the assertions by Mr. Kioga from the bar, the summons for confirmation and a hearing notice for 8th December, 2015 were properly served upon Mr. Kioga's offices. That there was an Affidavit of Service to that effect on record which the court had relied on to proceed with the hearing of 8th December, 2015.

9. The record shows that, on 23rd April, 2015, **Makau J** delivered a judgment in this matter whereby he revoked the grant made in favour of the Applicant in Chuka SPMCC Succession Cause No. 79 of 2011. He appointed the Respondents as Co-administrators with the Applicant and granted leave that due to the age of the matter, an application for confirmation may be filed before the expiry of six (6) months. On 3rd August, 2015, the Respondents filed a summons for confirmation of the said grant. On 9th October, 2015, the Deputy Registrar of this court wrote a letter to, inter alia, the Advocates of all the parties advising them that the file had been received at Chuka High Court and had been given a new number. On 15th October, 2015, a notice was issued by the court inviting the parties for the mention on 3rd November, 2015. On the said date, the Applicant was not represented while Mr. Thangicia appeared for the Respondents. The matter was then fixed for hearing on 1st December, 2015. On the said date however, the court was not sitting and the matter was rescheduled for 8th December, 2015. An Affidavit of service sworn by Joel Maitethia M'Rukunga was filed which showed that the firm of M.M Kioga & Co. Advocates was served with a hearing notice on 1st December, 2015 for the hearing of the summons for confirmation on 8th December, 2015. On the said date, neither the Applicant nor her Advocate appeared. The matter therefore proceeded once the court satisfied itself that there had been proper service of a hearing notice.

11. From the record, contrary to Mr. Kioga's assertions, both the summons for confirmation and the hearing notice dated 1st December, 2015 were properly served upon his law firm. Indeed, nowhere in his Affidavit in support of the application did he allude to the fact that there was no service of either the summons or the hearing notice. The evidence on record is quite clear that his firm was properly served. That he decided not to attend, that cannot be blamed upon either the court or the Respondents. In any event, he neither challenged the Affidavit of service of Joel M'Rukunga sworn on 7th December, 2015 nor call him for cross-examination. Accordingly, this court makes a finding that the firm of M.M Kioga & Co. Advocates, was properly served with the Summons and hearing notice but for reasons best known to the said Advocates, they chose not to attend court on 8th December, 2015 or send a representative.

12. Be that as it may, I have looked at both the Notice that was issued by the Deputy Registrar rescheduling the cases listed on 1st December, 2015 and the hearing notice issued by the Advocates for the Respondents and served upon Ms Kioga, Advocates. The Notice by the court read, inter alia;

**"NOTICE ! NOTICE! NOTICE!**

**KINDLY BE INFORMED THAT ALL SUCCESSION CAUSES WHICH WERE SCHEDULED TO BE MENTIONED ON 30.11.2015 WILL NOW BE MENTIONED ON 7.12.2015 WHILE THOSE FOR 1.12.2015 WILL BE MENTIONED ON 8.12.2015....."**

On the other hand the hearing notice that was served upon Messrs M.M. Kioga & Co. read, inter alia:-

**"TAKE NOTICE that the above captioned matter is coming up for confirmation of grant on 8th day of December 2015, at 8.00 a.m. or soon thereafter....."**

13. It is clear from the said two notices that they are not in tandem with each other. Whilst the notice by the court was to the effect that the matters were to be mentioned, the hearing notice by the Respondent's Advocates was that the matter was for hearing. There is no minute on record superseding the general notice given by the court that the matters listed for 1st December, 2015 were re-scheduled for mention on 8th December 2015. There being no indication of the matter having been listed for hearing, but only for mention, it was erroneous on the part of this court to have proceeded to deal with the matter substantively on 8th December, 2015. Of course there is no jurisdiction for the court to deal with a substantive matter on a mention date. Accordingly, I find that the proceedings of 8th December, 2015 were erroneously undertaken and I hereby set them aside. The summons for confirmation dated 3rd August, 2015 is to be heard afresh.

14. The second prayer was that this matter should be transferred to Meru High Court. The grounds advanced for this prayer were that the court file was wrongly transferred to this court and that there is a

pending application in Meru High Court against the decision of **Makau J** of 23rd April, 2015. The present proceedings were commenced by the Applicant as Chuka SPMC Succession Cause No. 79 of 2011. In paragraph 2 of her supporting Affidavit, the Applicant deponed:-

***"2. That I filed this case at Chuka to expedite the process and to ease costs since my children are married there and others live nearest that court."***

14. It is the Respondents who caused the file to be transferred to Meru High Court vide Meru H.C. Misc. No. 162 of 2014 on the ground that the Chuka Principal Magistrate's Court lacked both territorial and pecuniary jurisdiction to entertain the Succession Cause. The file was transferred to Meru High Court and allocated a new Succession Cause No. 275 of 2014. That is the file that this court has already made a finding was properly retransferred back to this court administratively on 18th September, 2015 by **Wendoh J**. In this regard, the allegation that the file found its way to this court irregularly is unfounded. Further, the contention that there is another application pending in Meru High Court touching on the Judgment of **Makau J** delivered on 23rd April, 2016 has no basis. If there be such an application, the same is and should be pending in the file that is currently before this court. I find that the reasons that the Applicant gave for originally having filed the succession cause before the Chuka Principal Magistrate's, as being to expedite the process and ease costs, to still be applicable. This court is housed within the premises formerly housing the Chuka Principal Magistrate's Court. Only the territorial and pecuniary jurisdiction that has been enhanced by establishing this court at Chuka. Accordingly, I find that no good reason has been advanced why this court should divest itself of jurisdiction and the prayer for the retransfer of the file to Meru High Court is hereby declined.

15. Accordingly, the application is partially successful. I order as follows:-

- a) the proceedings of 8th December, 2015 are hereby set aside. The summons for confirmation of grant dated 3rd August, 2015 be listed for hearing afresh.
- b) the prayer for retransfer of this file to Meru High Court is hereby declined.
- c) since the deceased in this matter passed on over thirteen (13) years ago, and the matter has taken too long; the parties may be allocated a hearing date on priority .
- d) this being a family dispute, I order that each party do bear own costs.

Orders accordingly,

**DATED and Delivered at Chuka this 1st day of September, 2016.**

**A.MABEYA**

**JUDGE**

**Court:**

Ruling read in open court in the presence of all the parties and Mr. Mugo representing the counsels.

**A. MABEYA**

**JUDGE**

**1/9/2016**