



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCCESSION CAUSE NO. 133 OF 2006**

**JOSEPH MAINA MUMBUCI.....PETITIONER/RESPONDENT**

**VERSUS**

**SUSAN NGIMA MUMBUCI.....PROTESTOR/APPLICANT**

**RULING**

By a summons in general form dated 29<sup>th</sup> May, 2015 and filed in court on 20<sup>th</sup> May, 2015 the applicant sought in the main to have the orders made by this Honourable Court on 17<sup>th</sup> December, 2014 dismissing her affidavit of protest and on 21<sup>st</sup> May, 2015 confirming the grant issued in this cause set aside or vacated. She also sought for an order that the costs of the summons be in the cause.

The application was supported by the affidavit sworn by counsel for the applicant on 26<sup>th</sup> June, 2015 and filed in Court on the same date.

The genesis of the applicant's application is the dismissal of her protest on 17<sup>th</sup> December, 2014 when it was listed for hearing. On that date, only counsel for the petitioner was present in Court and he was ready to proceed with the hearing of the protest; in the absence of the protester or his counsel, counsel for the petitioner applied to have the protest dismissed.

The Court noted that the protester's firm of advocates had not only been duly served with the hearing notice but also there was an affidavit of service on record in proof of service. In the absence of any explanation as to why the protester or his counsel was not in Court, the Court acceded to the petitioner's counsel's application and dismissed the protest.

The respondent's summons for confirmation of grant dated 28<sup>th</sup> February, 2005 was subsequently fixed for hearing on 21<sup>st</sup> May, 2015.

On that day, Ms Mwangi holding brief for Mr Warima for the protester informed the Court that she had been instructed that the matter was coming for directions and therefore prayed for leave to file a formal protest. Mr Wachira objected to adjournment of the matter on the basis that this was an old case. In any event the applicant's protest had been dismissed for want of prosecution.

The Court rejected the applicant's application for adjournment and proceeded to confirm the grant as prayed having noted that there was no valid reason given why the protester was not in Court when her previous protest came up for hearing.

According to the affidavit in support of the current application, Mr Warima for the applicant

acknowledged that indeed the hearing notice for the hearing of his client's protest on 17<sup>th</sup> December, 2014, was served on his firm on 24<sup>th</sup> March, 2014. On the eve of the hearing date, he got information that his client was unwell and therefore rather than attend Court on 17<sup>th</sup> December, 2014 he sent his court clerk to Court with instructions to find an advocate to hold his brief and apply for the adjournment of the case on the ground that his client was unwell.

The said court clerk, whom counsel identified as Julius Ngewa, informed him later on that day that he had attended Court as directed but that the Court was not sitting; counsel swore that at the time of swearing his affidavit the said court clerk was no longer in the employment of his firm. Thereafter, so the counsel swore, this matter came up for hearing on several occasions and on each of these occasions the petitioner's counsel served him with the requisite hearing notice.

Counsel deposed that it is only on 21<sup>st</sup> May, 2015 when he came to learn that his client's protest had been dismissed in December, 2014. He swore that had he been aware that the protest was dismissed he would have moved to Court to remedy the situation. He also swore that the issue at hand involved land and it was only fair and just that the protest be reinstated and it be heard on merits lest his client suffers irreparable loss. Counsel admitted his mistakes but contented that these mistakes should not be visited upon his client. He therefore asked this Court to allow the application and vacate the orders dismissing the protest and confirming the grant.

The petitioner opposed the application and to that extent filed a replying affidavit sworn by himself on 26<sup>th</sup> June, 2015. He contended that since the protester filed his affidavit of protest in the year 2005, she never took any other steps to have it heard. Again after the protest had been dismissed, the applicant did not take any action until the grant was confirmed more than five months later. According to him the protestor had employed her pending protest as a means of delaying the confirmation of grant and distribution of the estate.

Both counsel for the applicant and the respondent filed written submissions in support of and in opposition to the applicant's summons respectively. The applicant's counsel, did not say anything more than rehash what he had deposed in his affidavit in support of the application. The learned counsel for the respondent, on the other hand, also reiterated what his client had sworn in his affidavit in opposition to the application but also made some reference to the law that, in his view, applies to the issue at hand. According to him **Order 45 Rule 1 Civil Procedure Rules** applies in succession causes by virtue of **rule 63** of the **Probate and Administration Rules** and that in order for the Court to exercise its discretion in favour of the applicant under this rule, the applicant must demonstrate that there was some mistake or error apparent on the face of record or that there is a discovery of a new evidence or for any other sufficient reason; the applicant, according to the learned counsel, had not demonstrated any of these things and therefore his application falls below the threshold set by this particular rule.

Relying on the decisions in **Nyeri High Court Succession Cause No. 290 of 2006, In the Matter of the Estate of Mugo Mengo (deceased) 2009 eKLR** and in **Nakuru High Court Succession Cause No. 83 of 2006, In the Matter of the Estate of Stephen Mbau Giticha (deceased), 2011 eKLR**, counsel submitted that an order confirming the grant cannot be vacated or set aside; citing Makhandia, J (as he then was) in the Matter of the Estate of Mugo Mengo( supra) counsel submitted that once a grant has been confirmed it can only be revoked or annulled in accordance with **section 76** of the **Law of Succession Act** and **Rule 44** of the **Probate and Administration Rules**.

The applicant's application was brought to Court under **Rules 59, 63 and 73** of the **Probate and Administration Rules**; **Rule 59** is mainly procedural in nature and prescribes the manner or form an application in a succession cause takes. **Rule 63** imports specific rules of civil procedure rules that may be applicable in applications filed in a succession cause while **rule 73** proclaims the inherent jurisdiction of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

**Rule 63** is of particular importance to the extent that it invokes certain procedures in the Civil Procedure

Rules which ordinarily are available to a party who may wish to apply for review of a judgement or an order of court whenever he considers himself aggrieved by the decision of the court. Although the applicant did not specify which of the several rules of the **Civil Procedure Rules** set out in rule 63 as applicable in succession causes applies to her own application, I reckon that it is **order 44** that she had in mind; that rule has now been renumbered as **order 45(1)** in the **Civil Procedure Rules, 2010** and it provides as follows:-

*(1) Any person considering himself aggrieved—*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.*

I take it that the applicant is aggrieved by the order of the Court made on 17<sup>th</sup> December, 2014 dismissing her affidavit of protest and subsequently the order of 21<sup>st</sup> May, 2015 confirming the grant and although she has not stated so in specific terms, she is seeking for a review of those orders and wants them set aside or vacated. If I proceed on that assumption, and I see no reason why I shouldn't, then the answer which the applicant ought to have provided and which I will proceed to interrogate is whether the application merits an order for review under **order 45** of the **Civil Procedure Rules**; in other words, does the application satisfy the criteria for an order for review?

Before I proceed in this direction, I am inclined to say something about the argument by the learned counsel for the respondent that the Law of Succession Act does not provide for any procedure under which an order confirming the grant can either be vacated or set aside and therefore the only avenue open to a party aggrieved by such an order is the application for revocation or annulment of grant **under 76** of the **Law of Succession Act**. The learned counsel's argument was, no doubt rooted in the decisions **in the Matter of the Estate of Mugo Mengo (supra)** and **in the Matter of the Estate of Stephen Mbau Giticha (supra)** where this notion appears to have been articulated.

My appreciation of **section 76** of the **Law of Succession Act** is that it provides specific and statutory grounds for revocation or annulment of a grant. It does not provide the grounds for review of or setting aside an order confirming the grant. An applicant seeking for review of an order confirming the grant may not have any issue with the validity of a grant particularly where it is not shown that it is vitiated by any of the grounds set forth in **section 76** of the **Act**; such an applicant will not necessarily be interested in the revocation or annulment of that grant. He or she, as is the case here, may only be concerned with the subsequent order or orders that have ensued after the grant has been made. Where one is aggrieved with such order or orders, I see no reason why he or she cannot apply to Court for review of those orders to have them vacated or set aside. The only means of dealing with such orders cannot be, as counsel appears to suggest, by revocation or annulment of a grant that is otherwise valid in every material respect.

A careful consideration of section 76 shows that the only time a grant can be revoked or annulled after it has been made is in two broad instances; first, whenever there is inaction or dereliction on the part of the person to whom the grant has been made and, second, when the grant has otherwise become useless and inoperative as a result of subsequent events.

In particular, when the person to whom a grant was made has, without any reasonable cause after he has been given due notice, failed to apply for its confirmation within one year from the date of issue or such a longer period as the Court has ordered; or such a person has failed to proceed diligently with the administration of the estate; or, he has failed to produce to Court within the time prescribed, any such

inventory or account of administration as is required under **section 83** of the Act or has produced the inventory or account which is false in any material particular, the grant will be revoked or annulled. The only other time when such an action can be taken is where, as noted, the grant has become useless or inoperative through subsequent circumstances. **(See section 76 (d) and (e) of the Act).**

It is clear from these provisions that one cannot seek for revocation of grant because, for instance, a beneficiary was not present during the confirmation proceedings. Such a party can apply to have the order reviewed, vacated or set aside if it is apparent that the order is prejudicial to the aggrieved party or is otherwise inimical to justice or is in some way perpetuating the abuse of the process of the Court. I cannot think of any other instances why Rules Committee should have thought it wise to incorporate, as amongst these rules, such rules of the Civil Procedure Rules as order 45; if it were not for such occasions that order 45 of the Civil Procedure Rules was meant to address, then its assimilation into the Probate and Administration Rules would be of little or of no consequence.

It would of course be a different case altogether if, for instance, one was omitted from a petition in which he ought to have been enlisted either as a deceased's heir or a survivor or in such other legally acknowledged capacity; in such a case, the appropriate application would be that made under **section 76** of the Act where the omission of the applicant from the succession proceedings would certainly constitute one of the grounds statutorily prescribed for revocation or annulment of grant.

It follows therefore that the applicant was perfectly in order to **invoke order 45** of the **Civil Procedure Rules** and in essence apply to this Court to review its orders dismissing her protest for want of prosecution and subsequently confirming the grant. The only question which this Court ought to be concerned with and which I will now consider is whether the application is merited or not.

The grounds upon which an application for review may be made and succeed are not left to speculation; they are specifically provided for in **order 45(1) (b)** of the **Civil Procedure Rules**. An applicant for such an order must demonstrate first, a discovery of a new and important matter or evidence has been made and it is a matter of evidence which even after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order or decree was made; second, there is some mistake or error apparent on the face of the record; or, finally, there is some other sufficient reason. Once all or any of the foregoing grounds have been proved to exist the application for review must be made without unreasonable delay.

As far as the applicant's application is concerned, it is quite obvious that it is not based on discovery of any new matter or evidence which could not be produced at the time the two orders were made. It is also obvious that there is no mistake or error apparent on the face of the record. The only ground upon which the application seems to have been made is that of some "other sufficient reason".

The sufficient reason which I understand counsel for the applicant to have offered is this: he sent his clerk to Court on 17<sup>th</sup> December, 2014 to look for an advocate to hold his brief and apply for the adjournment of hearing of the protest on the ground that the protestor was unwell. His court clerk misled him later on that day that in fact this Court had not been in session.

With due respect to the learned counsel for the applicant, I am not convinced that this explanation is viable. First, counsel has not given any reason why he did not attend Court himself considering that it was his own client's protest that was scheduled to be heard on the material day. Having been served with the hearing notice early enough I presume that he must have created time to attend Court for the hearing of his client's case. The fact that his client is alleged to have been unwell does not mean that he could not attend Court; I need not remind the learned counsel that one of the reasons why he was appointed to act for this particular person was to represent him and convey to Court such information as to the state of her disposition whenever such information was warranted.

Secondly, it is the duty of counsel to instruct his learned colleague to hold his brief in any matter before Court whenever he cannot attend Court for one reason or another. It is his duty to find to counsel and once he finds him, he must give him a full brief not only to apply for an adjournment but to take full

charge of the matter including its prosecution should it become necessary. This is not a duty that can be delegated to the counsel's office clerk who, for reasons which I think are now obvious to the learned counsel, is ill-equipped to give instructions on any brief counsel is entrusted with. I need not enumerate the dangers of committing this sort of responsibility to unqualified persons but it must now be obvious to counsel that one such danger is the clerk going on frolics of his own and ignoring the important task that has been assigned to him, albeit erroneously.

Thirdly, there is no proof that the applicant was unwell when she was supposed to be in Court. I need not belabour this point but suffice it to say, that if the applicant was so sick as not to attend Court for the hearing of her protest then some sort of medical evidence was necessary to demonstrate that she was in indisposed.

I am not persuaded that the applicant has given any reason sufficient enough to convince me to review and set aside or vacate the order I made in this cause on 17<sup>th</sup> December, 2014 dismissing the applicant's protest for want of prosecution. If there is no basis of vacating or setting aside that order I also find no basis of disturbing the order confirming the grant on 21<sup>st</sup> May, 2015

If I have to say anything more, I have noted from the record that the protest in question was filed in Court in April, 2005. The directions on the hearing of the protest were given way back on 25<sup>th</sup> June, 2007. Since then the protester who is the applicant herein never took any step to have the protest heard. All I gather from the record is that it is the respondent's firm of advocates that has always taken the initiative to fix the protest for hearing. Counsel for the protester admitted in his own affidavit in support of the application that it is the respondent's firm of advocates that has always served him with the hearing notice. The conclusion that one can logically make from the protester's conduct is that she has been lethargic and her lack of interest in prosecution of her protest gives some credence to the learned counsel for the respondent's submission that the protest was only meant to frustrate the conclusion of this cause. To employ Court processes in this manner is what is known as the abuse of the process of the Court.

For reasons I have given it is inevitable that the only order I can make in this application is that it should be dismissed with costs. It is so dismissed.

**Signed, dated and delivered in open Court this 4<sup>th</sup> day of November, 2016.**

**Ngaah Jairus**

**JUDGE**