



**REPUBLIC OF KENYA**

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

**PROBATE AND ADMINISTRATION DIVISION**

**SUCCESSION CAUSE NO. 1118 OF 2010**

**IN THE MATTER OF THE ESTATE OF WILLIAM NJUNGE NGUGI (DECEASED)**

JANE WANJIKU NGUGI .....APPLICANT

VERUS

VERONICA MBUTU NJUNGE .....RESPONDENT

**RULING**

1. The application before this court has been brought by way of Summons dated 28<sup>th</sup> July 2014 in which the Applicant, Jane Wanjiku Ngugi prays that this court be pleased to reinstate summons for revocation of grant dated 3<sup>rd</sup> February 2010 for hearing interpartes on merit, and issue conservatory orders to preserve the Estate of the deceased, specifically L.R. No. Muguga/Gitaru/2108, L.R. No. Muguga/Gitaru/2109 and L.R. No. Muguga/Gitaru/2110 which originates from L.R. Muguga/Gitaru/297.
2. The Applicant also prays for an order staying the withdrawal or transfer of the funds deposited in Bank Account No. *[particulars withheld]* at Equity Bank, Kikuyu Branch being approximated at Kenya shillings Ten Million Four Hundred and Twenty One Thousand Sixty Eight Shillings and Forty cents (Kshs.10,421,40/=), held in the joint account of the deceased and one Elizabeth Wambui Ngugi. Further that O.C.S., Kikuyu Police Station be directed to supervise enforcement of the orders of this court.
3. This application is supported by the affidavit sworn by the Applicant on 28<sup>th</sup> July 2014, in which she deponed that her summons for revocation of grant dated 3<sup>rd</sup> February 2012 was dismissed on 7<sup>th</sup> July 2010 for non-attendance, when her advocate inadvertently failed to attend court because the matter did not appear on the Kenya Law Report website. That she herself did not attend court on the stated date because she was indisposed.
4. In the Replying Affidavit, the Respondent has acknowledged that the matter was not listed on the electronic cause list, but when she and her Advocates checked on the Notice Board outside the Registry, they found the matter listed before Justice A. O. Muchelule. Upon the application for Revocation of the Confirmed Grant being dismissed, the Respondent proceeded to apply for the Certificate of Confirmation of the Letters of Administration. It is her opinion that the orders sought by the Applicant are not merited.

5. In my view the issues for determination are, whether the Applicant is entitled to the orders seeking the reinstatement of the Summons for revocation of grant which was dismissed on 7<sup>th</sup> July 2014 and whether conservatory orders in respect of the Estate of the Deceased should issue, until the summons for revocation is heard and determined on merit.
6. The Applicant was represented by Wamalwa Abdi & Co. Advocates while the Respondent was represented by Lawrence Mungai & Co. Advocates.
7. On whether the Applicant is entitled to the prayer for reinstatement of the summons for revocation of grant dated 3<sup>rd</sup> February 2012 dismissed for a non attendance on 7<sup>th</sup> July 2014, Mr. Wamalwa submitted that the Applicant had demonstrated to the court that her previous Advocate's failure to attend court was inadvertent, as the matter was not on the daily cause list on the Kenya Law Report website and his efforts to trace the court file from the registry was futile on the morning of 7<sup>th</sup> July 2014. That unknown to the Advocate the file had been cause listed manually on the Nairobi High Court cause list and placed before Honourable Justice A. O. Muchelule, where it was dismissed for non-attendance.
8. Mr. Wamalwa further submitted that the Applicant had also demonstrated that her own failure to attend court was due to reasons beyond her control, as she was indisposed on that particular day and had to seek medical treatment at Kinoo Medical Clinic. That therefore, failure to attend court was for reasons beyond the Applicant's control and/or genuine mistake on the part of the Advocate. Mr. Wamalwa contended that immediately the Applicant discovered that her Advocate had not attended court, she quickly appointed another advocate and brought the Application to reinstate her summons for revocation of grant without undue delay.
9. Mr. Wamalwa urged that the orders sought are discretionary and referred me to the decision in **High Court Miscellaneous Application No.699 of 2007 page 3** at Nairobi, in which Justice G. V. Odunga, while referring to the case of **CMCC Holdings Ltd vs Nzioki (2004) 1 KLR 173**, held that:

**“The discretion must be exercised upon reasons and must be exercised judiciously ...in law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error.....”**
10. Mr. Mungai contended for the Respondent that even if the Applicant was not in court, her Advocate should have attended court and the reasons given for non-attendance, which are that they were unable to trace the court file at the registry on the material day and it was not listed on the electronic cause list, were not good enough since the Respondent and her Advocate found the matter on the Notice Board's Cause list.
11. Mr. Mungai also argued that the absence of the matter from the Kenya Law electronic cause list should have prompted the Advocate to check on the Notice Board outside the court Registry, especially since the matter was not listed as **“Taken out from the Day's Cause List.”** In his view the Applicant has not demonstrated that her legal representative had a credible reason for not appearing in court.
12. Mr. Mungai further argued that the Applicant took an inordinately long period of time to file this application, and no explanation had been given by the Applicant as to why it took her 21 days to seek to reinstate her own application.
13. I have considered the rival arguments presented by the parties on this issue and I am satisfied that the mistake on the part of the Applicant's lawyer was genuine in view of the error in cause listing. I also find that the Applicant's absence was due to reasons beyond her control since it was on account of illness. I find that she moved with alacrity to file the application for reinstatement of the Summons for Revocation within 21 days and cannot therefore be accused of being indolent in

the circumstances.

14. On whether the Applicant is entitled to the conservatory orders with respect to the parcel of land listed in prayer number two (2) of the Application and stay of withdrawal of the sum of Kshs.10,421.40/= in terms of prayer number five (5) of the application, the Applicant avers that the Summons for Revocation filed herein has high chances of success because the Deceased was her brother who was also the Administrator in Succession Cause No. 1312 of 1990 filed at High Court Nairobi, in respect of the Estate of Ngugi Irari their late father. That land parcel No. Muguga/Gitaru/297 which is now registered in the following parcels of land:

- a. Land parcels No. Muguga/Gitaru/2108
- b. Land parcels No. Muguga/Gitaru/2109
- c. Land parcels No. Muguga/Gitaru/2110

was part of the Estate of her late father.

15. The Applicant deponed that despite being listed as beneficiaries to their late father's Estate in Succession Cause No. 1312 of 1990, the Estate was fraudulently transferred into the names of her brother, now deceased William Njunge Ngugi and her sister Elizabeth Wambui Ngugi. That they were not informed of the hearing date for confirmation of grant nor did they appear on the date of confirmation.

16. The Applicant further states that she subsequently filed summons for revocation of grant in respect of both succession causes, dated 14<sup>th</sup> June 2011 and 3<sup>rd</sup> February 2012 respectively, all of which are yet to be heard and determined and that she is likely to be deprived of the interest in the Estate of her Deceased father as the administrator obtained orders of rectification of the grant on 7<sup>th</sup> July 2014, yet the handwritten proceedings of the judge on the said date did not authorize such rectification, rendering the grant in question fraudulent.

17. The Applicant is apprehensive that unless the orders sought are granted the Administrator herein may use the unlawfully acquired grant to sell or transfer the disputed land. Further that she may withdraw and misuse the sum of Kshs.10,000,000/= deposited in the joint account at Equity Bank, Kikuyu Branch in the names of the deceased and her sister who was a Co-Administrator in their father's Estate, the said money having been paid as compensation after part of the land which forms the Estate of her late father was compulsorily acquired by government for construction of a road within Kiambu County. In her view, the Estate of the deceased is at risk of being fraudulently sold, transferred or wasted to the detriment of the beneficiaries.

18. Mr. Mungai in response submitted that the Applicant herein has failed to demonstrate that she has a prima facie case with a high chance of success against her deceased brother's estate. That although she avers that she has an interest in her late father's estate and as such, she will have an interest in her brother's Estate, she has failed to indicate why she did not make known her interest when her brother was alive. That the Applicant made no attempt to obtain a share of her father's Estate despite having an opportunity to do so and that a claim at this time that she is pursuing summons for revocation of the Grant issued in her late father's Estate, is a misuse of the court process.

19. I have considered the facts of this cause and the opposing submissions of both counsels on record and find that at this stage the Applicant needed only to establish that she has a prima facie case with a probability of success and that she would suffer irreparable loss if this orders do not issue. I find that the Applicant has established such a prima facie case which deserves to be given a chance to be ventilated and to be determined on merit. Even considering the balance of convenience it would not be in the interest of justice to deny her the chance to argue her application, if there is a chance that she and other beneficiaries may be disinherited in the process.

20. For the foregoing reasons I order that:

1. The summons for revocation dated 3<sup>rd</sup> February 2010 is hereby reinstated to be heard inter partes on merit.
2. That conservatory orders do issue in terms of prayer No.5 (five) of the summons dated 28<sup>th</sup> July 2014.
3. Costs be in the cause.

It is so ordered.

**SIGNED DATED and DELIVERED** in open court this **3<sup>rd</sup> day of March 2015.**

.....

**L. A. ACHODE**

**JUDGE**