



**REPUBLIC OF KENYA**

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

**SUCCESSION CASE NO. 171 OF 2011**

**PHILLIS WANJIRU KIGUMI.....1<sup>ST</sup> PETITIONER/ADMINISTRATOR**

**DAVID WANJOHI KIGOME..... 2<sup>ND</sup> PETITIONER/ADMINISTRATOR**

**VERSUS**

**FRANCIS KINYANJUI MWANGI..... 1<sup>ST</sup> OBJECTOR**

**SAMUEL KAMAU MWANGI ..... 2<sup>ND</sup> OBJECTOR**

**RULING**

1. This is a ruling in respect of a summons filed on 29<sup>th</sup> May 2014 by the two petitioners who are also the administrators of the deceased's estate. The application is anchored on **Rule 73** of the **Probate and Administration Rules**. It seeks the following substantive orders;
  - (a) That the court be pleased to review, set aside and or vacate the orders granted on 14<sup>th</sup> May 2014.
  - b). In the alternative, that the court vacates the orders relating to leasing and charging of land parcel No Pioneer / Langas Block 1 (Malel) 43 (the suit land) pending the hearing and determination of the summons for revocation of grant dated 13<sup>th</sup> May 2014.
  - c). That the court be pleased to order that all the tenants in all 41 houses in the suit land do remit rent to the administrators (the applicants) or such other account as the court may order opened pending the hearing of the application or further order of the court.
  - d).That costs of the application be borne by the objectors.
2. In order to fully appreciate the facts and issues arising in this summons, I think it is important to set out a brief background against which the summons were filed as far as the same is discernable from the court record.
3. The Applicants are step children to the deceased, the late **Esther Wangare Wanjohi**. They were appointed as administrators to her Estate in grant of letters of administration issued by this court on 23<sup>rd</sup> February, 2012 which grant was confirmed on 20<sup>th</sup> December, 2012. Prior to her death, the late **Esther Wangare** was a co-petitioner in succession cause No. 209 of 2009 in which together with one **Jane Gathoni Wanjohi** and **Phyllis Wanjohi Kigumi** (the 1<sup>st</sup> petitioner in this case), they were seeking grant of probate in respect of the Estate of her late husband **Joseph**

**Wanjohi Kigome.** Part of what was listed as comprising the Estate of the deceased in that cause is land parcel Number Pioneer /Langas block 1(Malel)43.

4. Unfortunately, **Esther Wangari** died before the succession cause was concluded. Upon her demise, the objectors in the instant proceedings namely **Francis Kinyanjui Mwangi** and **Samuel Kamau Mwangi** in an application dated 30<sup>th</sup> March, 2011 applied to be substituted as administrators of the Estate of the late Joseph **Wanjohi Kigome** in place of the late **Esther Wangare**.
5. The application was premised on grounds *inter alia*, that the late Esther was the proprietor of the land known as parcel No. Pioneer/Langas Block 1/Malel/43 which had allegedly been wrongly included in the Estate of **Joseph Wanjohi** and being her brother and nephew, they were proper persons to be substituted in her place.
6. The application was heard and dismissed by Azangalala J (as he then was) in a ruling delivered on 27<sup>th</sup> June 2011. On 23<sup>rd</sup> February 2012, the applicants jointly obtained a grant of representation to the Estate of the late **Esther Wangari**. And after the same was confirmed, the objectors filed a summons on 13<sup>th</sup> May 2014 seeking revocation of the grant issued to the applicants.
7. The summons were placed before my sister Hon. Grace Ngenye –Macharia J on 14<sup>th</sup> May, 2015 who granted interim orders in terms of prayer (2) (referring to prayer (b) of the summons). Prayer (b) sought injunctive orders restraining the petitioners from selling, leasing, transferring, charging and/or disposing off any interest in the suit land pending the hearing and determination of the succession cause.

It is the issuance of the above order that triggered the filing of the instant summons on 29<sup>th</sup> May, 2014.

8. The summons is supported by affidavits sworn by the two petitioners/applicants. Both applicants swore their respective affidavits on 29<sup>th</sup> May, 2014 with **Phylis Wanjiru Kigumi** choosing to adopt the depositions in **David Wanjohi Kigumi's** affidavit save for a few averments relating to alleged non-disclosure of material facts by the objectors. The application is also supported by a supplementary affidavit sworn by the 1<sup>st</sup> applicant on 3<sup>rd</sup> July, 2014.
9. Having read the said affidavits, I find that most of the averments made by the applicants were mainly relevant to the summons for revocation of grant dated 13<sup>th</sup> May, 2014. In my view, what was relevant to the instant summons was their averments that the orders granted by this court on 14<sup>th</sup> May, 2015 should be discharged for two main reasons;-

First, that they were obtained without full disclosure of material facts to the court by the objectors which facts were by then within their knowledge. Second, that if the order was not discharged, it was likely to cause confusion among tenants renting houses developed on the suit land regarding remittance of rent and this may lead to loss of money running into thousands of shillings (whose amount was not disclosed) which would otherwise accrue to the Estate; that the maintenance of the order would also prevent the applicants who are the duly appointed administrators of the Estate from replacing tenants who vacate the said premises with new ones to the detriment of the Estate.

The 2<sup>nd</sup> applicant urged the court to allow them continue collecting rent from the houses in the Estate as they had already appointed an agent to collect the rent on their behalf – See annexure marked DKW5.

10. The application is opposed. The 2<sup>nd</sup> objector **Samuel Kamau Mwangi** swore a replying affidavit on 10<sup>th</sup> June, 2014. In so far as is relevant to the instant application, the 1<sup>st</sup> Respondent deposed that there was no lacuna in the collection of rent from the suit premises as the objectors have been

collecting the said rent on authority of a limited grant ad colligenda bona issued to them on 14<sup>th</sup> April 2011 for the purpose of gathering and preserving the Estate; that the action of the applicant in appointing an agent to collect rent from the suit land and to charge it for a loan of Kshs.20,000,000 was illegal and that it demonstrates that in making this application, the applicants are only intent on wasting the deceased's Estate to the detriment of the Respondents who are also beneficiaries to the Estate. It is the Respondent's prayer that the order sought to be varied or discharged be sustained pending the outcome of the summons for revocation of the grant issued to the applicants.

11. In the supplementary affidavit sworn on 3<sup>rd</sup> July, 2014, the 1<sup>st</sup> applicant denied most of the allegations contained in the 1<sup>st</sup> objectors' affidavits. He also asserted that the Respondent had no right to collect rent from the suit land as the limited grant ad colligenda bona earlier issued to them lapsed by operation of **Section 38(2)** of the **Law of Succession Act** immediately they were issued with a full grant of representation to the deceased's Estate.

12. The summons under consideration were prosecuted by way of written submissions. Those of the applicants were filed on 3<sup>rd</sup> July, 2014 while those of the objectors were filed on 2<sup>nd</sup> October, 2014.

Learned Counsel in their submissions expounded on the respective positions taken by the parties in relation to the issues raised in the instant application.

13. Having carefully considered the summons, the affidavits filed by the parties and the submissions filed by learned counsel, I find that only two key issues arise for determination by this court namely;

- i. Whether the injunctive orders granted by the court on 14<sup>th</sup> May 2014 and issued on 16<sup>th</sup> May 2014 should be reviewed and/or discharged.
- ii. What orders should be made on collection of rent from houses developed on the suit land?

14. Turning to the first issue, it is clear from the court record that the injunctive orders sought to be varied or discharged were made for the sole purpose of preserving the deceased's Estate in light of the fact that the objectors had already filed a summons seeking revocation of the grant issued to the applicants which had already been confirmed. It is evident from the pleadings that by the time the orders were made, the applicants had already had themselves registered as proprietors of the suit land as they were entitled to do on authority of the Certificate of Confirmation of grant issued to them on 20<sup>th</sup> December, 2012. The applicants had also by that time charged the suit land to I&M bank for KShs.20,000,000, a fact which was known to the objectors but which they failed to disclose to the court – See annexure marked "PWK3" to **Phylis Wanjiru's** affidavit.

15. It is also clear from the summons dated 13<sup>th</sup> May, 2014 that the objectors also failed to disclose to the court that there were rental houses on the suit premises. If that information had been brought to the attention of the court, I am of the considered view that the court would not have granted interim injunctive orders restraining the applicants from leasing or charging the suit land.

I say so because the court could not have chosen to act in vain by restraining an act which had already taken place. The court would also not have restrained the applicants from leasing the properties on the suit land because doing so would have gone against its stated objective in issuing the said orders which was to preserve not to waste the Estate.

16. It is trite that a party who approaches a court of law *ex parte* seeking the grant of *ex parte* orders has an obligation to make the fullest disclosure possible of all material facts within his knowledge which would assist the court make a just determination of the matter under consideration. A party who fails to make full disclosure and obtains some advantage as a result will be deprived of that advantage when the facts relating to his non-disclosure are brought to the attention of the court.

17. In addition, I wholly concur with my brothers Hon Musyoka J in the *Estate of Burton Kamau Thuri Succession Cause No. 488 of 2007 (2013) eKLR* and Wakiaga J in the matter of the *Estate of Charles Mwaniki Kamara Nyeri Succ Cause No. 533 of 2012* that this court has discretionary powers to discharge or set aside injunctive or restraining orders issued under the inherent jurisdiction of the court if it is demonstrated that the same were wrongly granted or based on a wrong principle.

18. Hon. Wakiaga J went further to set out additional circumstances in which such orders could be discharged or set aside and in my view, the same circumstances would obtain to warrant review of such orders. These are;

- a. If It is shown that the order was obtained irregularly;
- b. That there was a subsequent change of circumstances or that it was unjust to maintain it in force.
- c. That it is otherwise unjust and irregular to let the order remain.

19. Guided by the above legal principles, I am satisfied that there is need to review the orders issued by this court on 16<sup>th</sup> May, 2014. This is because there are some aspects of the order which need to be maintained in the interest of justice for the purpose of preserving the Estate till the summons for revocation of grant are heard and determined. But the orders restraining the applicants from leasing or charging the suit land must be discharged for three main reasons; First, they were irregularly obtained having been obtained on concealment of material facts to the court. Secondly, the order against charging the suit land does not serve any useful purpose since it had already been overtaken by events by the time it was issued. Thirdly, it would be unjust to maintain the order against the leasing of the suit land because by implication, the orders would also apply to leasing of the rental houses which would be detrimental to the Estate.

In view of the foregoing, I hereby review the orders granted by this court on 14<sup>th</sup> May, 2014 by vacating the orders relating to the charging and leasing of the suit land.

20. I however decline to discharge the other orders restraining the applicants from selling, transferring and/or disposing off any interest in the suit land. This is because as stated earlier, these orders were meant to preserve the Estate. All the parties herein claim to be heirs and/or dependants of the deceased and it is in their interest that the Estate be preserved pending the outcome of the summons for revocation of grant dated 13<sup>th</sup> May 2014.

21. This now brings me to the second issue for determination in this application. The objector's claim that they should be allowed to continue collecting rent from the houses in the suit premises by virtue of the limited grant issued to them on 14<sup>th</sup> April 2011 is to say the least misconceived.

As correctly submitted by the applicants, the limited grant ceased to have any legal effect by operation of **Section 38** of the **Law of Succession Act** immediately a full grant of representation to the deceased's Estate was issued to the petitioners (applicants).

22. The effect of **Section 38 (2)** of the **Law of Succession Act** in the context of this case is that once the full grant of representation to the deceased's Estate was issued to the applicants, they were granted full legal authority to take charge and manage all assets and affairs of the deceased Estate while the right of the objectors to gather and preserve the Estate accruing as a result of grant of the limited grant ad colligenda bona was automatically extinguished. It therefore follows that the objectors no longer have any legal right to deal with the deceased's Estate in any manner or form including the collection of rent from houses in the suit land.

23. It is therefore my finding that unless and until the grant of representation issued to the applicants is revoked, they remain the administrators of the deceased's Estate. Consequently, they are the only ones who have a right to manage the affairs of the Estate including the collection of rent from the houses in the suit land. But since the objectors have sought revocation of the grant issued to the Applicants claiming that they were equally entitled to shares in the Estate and in view of the disclosure that there is a charge on the suit land for a loan of Kshs. 20,000,000, I find that in order

to ensure the preservation of the Estate, all amounts collected as rent should be applied towards payment of the said loan.

24. For all the foregoing reasons and in the interest of justice, I now make the following orders;

i). That the orders dated 14<sup>th</sup> May 2014 and issued by this court on 16<sup>th</sup> May 2014 be and are hereby varied by discharging with immediate effect the order restraining the applicants from leasing or charging the suit land. All the other components of the orders will remain in force pending the hearing and determination of the summons for revocation of grant dated 13<sup>th</sup> May 2014.

ii). That the applicants should hence forth collect all the rent from the houses in the suit land. The rental income must be applied towards payment of the loan with I&M Bank save for expenditure on utilities charged on the rental houses and other legitimate expenses necessary for the maintenance of the Estate.

iii). That the applicants shall render a true and just account of the Estate. They shall file before the Deputy Registrar of this court, a full statement of the Estate's rental income and its expenditure prepared by a recognized certified public accountant of Kenya on a monthly basis. The statements of account shall be filed with effect from 1<sup>st</sup> July, 2015 and on each subsequent month until the summons for revocation of grant is heard and determined.

25. On costs, the order that most commends itself to me given the circumstances of this case is that each party shall bear his/her own costs.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 7th DAY OF May 2015.**

In the presence of:-

Mr.Kagunza holding brief for Mr. Aseso for the Objectors/Respondents

No appearance for the petitioners/Applicants

Mr.Lesinge court clerk