



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
SUCCESSION CAUSE NO. 224 OF 1991

IN THE MATTER OF THE ESTATE OF NJIHIA KIHICO HIKA

TABITHA WANJIRU.....APPLICANT

VERSUS

JOTHAM KIHICO HIKA.....1ST PETITIONER/RESPONDENT

JAMES NG'ANG'A HIKA.....2ND PETITIONER/RESPONDENT

AND

RAKERI WANJIRA.....OBJECTOR

RULING

1. By her summons filed in this court on the 30th October, 2012 the Applicant Tabitha Wanjiru seeks that the grant of letters of administration intestate for the estate of the late Njihia Kihiko Hika issued to Jotham Kihiko Hika and James Ng'ang'a Hika and confirmed on the 30th March, 1993 be revoked on the following grounds:

(1) that the grant of the Letters of Administration intestate were obtained by means of untrue allegations of fact essential in points of law to justify the grant.

(2) that the persons to whom the Grant was made left some beneficiaries and they did not consult/or obtain consent from the other beneficiary as required under the law.

(3) that the Grant was obtained secretly without knowledge, permission, consent, involvement and/or consultation with all beneficiaries entitled thereof.

(4) that the grant was obtained fraudulently by concealment of material particulars of the case.

2. The application is opposed, the Respondents upon service filed their joint replying affidavit through their Advocates Wambua & Maseno Co. Advocates on the 17th December, 2012.

3. Several hearing dates were taken by Advocates for the Applicant. Of interest and concern here is the hearing date taken by Mr. Kimani Advocate for the Applicant on the 13th November, 2014 as shown by an entry and endorsement in the court file for hearing on the 5th February, 2015. Upon perusal of the court file, I find no invitation by the applicants Advocates send to the Respondents Advocates to invite

them to the court registry to take the hearing date.

4. On the 5th February, 2015 when the matter came before me for hearing of the application dated 30th October 2012, Advocate for the Applicant Ms. Omwenyo informed the court that the hearing notice had been served upon the Respondents Advocates and an affidavit of service filed on the same day that is the 5th February, 2015. She told the court that service of the hearing notice was effected on the 23rd October, 2014. Indeed an affidavit of service was filed and on the face of the said affidavit of service, it was clearly indicated that it was served on the 23rd October, 2014 and that the Respondents Advocates, Wambua & Maseno Advocates accepted service but declined to sign and stamp with their official stamp and an explanation given.

5. This court, by an honest mistake and invertecy did not interrogate the said affidavit of service adequately, and took it at its face value, and concluded that service was indeed effected. The court allowed the Applicant to proceed with the hearing of her application ex parte to conclusion and a ruling date was set for the 14th May, 2015.

6. On the 17th March, 2015 when this court was preparing to write the ruling, and upon perusing the affidavit of service filed on the 5th February 2015, I became curious and doubtful about the service of the hearing notice. On perusing the endorsement in the court file by the court registry staff, my doubts were confirmed that:

- (1) That the hearing date was taken by Mr. Kimani Advocate on the 13th November, 2014.
- (2) That the affidavit of service filed on the 5th February 2015 indicated that the process server served a hearing notice upon the Respondents Advocates and Objector on the 23rd October, 2014.
- (3) That no hearing notice was attached to the affidavit of service as filed, nor is there any in the court file.
- (4) That it is purported that the hearing notice was served on the 23rd October, 2014 before such hearing date was taken at the registry.
- (5) That it is not possible to have served a hearing notice before the hearing date was taken at the registry.
- (6) That no copy of the hearing notice was exhibited at all.

7. That due to the above and obvious misrepresentation, deliberately or otherwise by counsel for the Applicant to the court, the court allowed the Applicant to present her case ex parte to conclusion.

This court regrets its omission to interrogate the affidavit of service adequately as it would have found that the affidavit of service was defective, and indeed it is defective.

8. In view of the above, this court, under its inherent powers donated through Section 3 and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya: Section 3A reads:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

shall invoke the provisions of the above sections of the law, and to prevent abuse of the court process and for justice to be done, make the following orders:

- (1) That the proceedings before this court on the 5th February, 2015 are hereby recalled and

withdrawn, and they shall be of no effect.

(2) That the Applicant hereof shall proceed to invite the Respondents Advocates and the Objector to this Succession Cause to attend the court registry to take a suitable hearing date for the application dated 30th October, 2012.

It is so ordered.

Dated, signed and delivered at Nakuru this 14th day of May 2015

JANET MULWA

JUDGE

In the presence of:

Ruth Wanjiru - Applicant in person

No appearance - for Respondents

Court clerk: - Lina