



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NUMBER 31 OF 2014(O.S)

SAMUEL GITONGA MIRUGI.....APPLICANT/PLAINTIFF

VERSUS

NJENGA KIMANI NJEHIA.....RESPONDENT/DEFENDANT

RULING

1. This matter concerns the Estate of the **Late Zacharia Kimani Njehia**, deceased.

Letters of Administration to the estate were granted by this court to his son **Njenga Kimani Njehia** and a Certificate of Confirmation of grant issued on the 2nd December 2010 pursuant to Section 71(1) and (3) of the Law of Succession Act – in **High Court Succession Cause No. 602 of 2009**.

The schedule of distribution of the Estate was appended thereto. Each of the beneficiaries were allocated $\frac{1}{4}$ acre piece of land out of property known as Bahati/Kabatini Block 1/2563.

2. The Applicant herein filed an undated Originating Summons pursuant to the Provisions of Order 37 Rule 1 of the Civil Procedure Rules and Rule 73 of the Probate and Administration Rules. In the summons, he states that he has a purchasers interest in the deceased's Land parcel known as Bahati/Kabatini Block 1/2563 of three plots measuring 25 X 100 feet and two measuring, 50 X 100 feet.

He sought answers to questions that the stated:

1. Whether the applicant is the lawful purchaser of the three plots mentioned above.
2. Whether the said plots should be transferred to him.
3. Whether transfer documents should be executed by the respondent, who is the Administrator of the deceased's estate.

3. The summons is supported by the Applicant's affidavit sworn on the on the 22nd February 2014. Attached as an exhibit is a field sketch map showing the three plots alleged to have been bought by the applicant and other documents, including an affidavit of protest filed in the Succession Cause No. 602 of 2009 in respect of the deceased's estate, where the applicant protested that the Administrator failed to include his interest in the distribution schedule of the Estate.

4. Pursuant to the Affidavit of protest by the applicant, the court record shows that the applicant appeared

before then Justice W. Ouko, Judge, who was seized of the matter on the 2nd February 2010 in the presence of the Applicants counsel and in the absence of the Administrator as it appears, an order was issued by the court, as follows:

1. That the grant is confirmed and the protesters portion be given to him.

The order was issued by the court on the 28th January, 2011.

5. Soon thereafter, on the 11th February, 2011 a Restriction was placed on the property by one of the beneficiaries namely, Phylis Wanjiku Karanja. That Restriction is still in place as confirmed by a certificate of official search dated the 22nd February 2011, attached to his affidavit.

On the Originating Summons brought by the Applicant, it is submitted that the Administrator of the estate, the Respondent herein, was duly served but failed to appear. There is no response to the Originating Summons.

6. I have perused the court file and I have not found any evidence of service of the Originating Summons upon the Respondent. It was filed on the 21st May 2014. The applicant moved the court for directions on the hearing of the originating summons on the 13th March 2015. He prayed and was granted leave to file a Supplementary Affidavit and serve the Respondent for further mention on the 13th May 2015. The purpose of the mention on the 13th May 2015 was to confirm service of the Originating Summons upon the Respondent as it had ordered, and to give directions on the hearing of the Originating Summons. An affidavit of service was filed on the 13th May 2015. It indicated that the process server, one Dismus Musana served a **Mention Notice** upon the Respondent on the 16th March, 2015 but he declined to sign. **There was no Affidavit of Service of the undated Originating Summons filed on the 21st May 2014 upon the Respondent.** Advocate for the Applicant proceeded with the hearing of the Originating Summons and relied on the Supporting affidavit and annexures and urged this court to grant him prayers as sought.

7. I have considered the pleadings in this matter and the few annexures in respect of the High Court Succession Cause Number 602 of 2009 in respect of the deceased's estate. In particular the court order issued by Justice W. Ouko, J. on the 2nd December, 2010 (as he then was) in the presence of the Caveators Counsel Mr. Githui, and presumably in the absence of the administrator and/or the beneficiaries. There is no indication whether they were present or absent court. The order confirmed the Letters of Administration and the protesters portion was given to him.

8. The purpose of the above narration of the events leading to the hearing of the Originating Summons on the 13th May 2015 is to interrogate whether or not the Respondent was given an opportunity to respond to the Originating Summons before final orders are given by this court.

I have perused all available documents as availed by the applicant.

As stated above, this court made an order on the 13th March, 2015 that it wished to see the Affidavit of Service of the Originating Summons upon the Respondent. I now confirm that no affidavit of service was filed at all as none is found in the court file. A Mention Notice for the mention for the 13th May 2015 was filed and I have indicated that it is said that the Respondent declined to sign the same.

9. The matter concerns the Estate of the deceased where the Applicant/plaintiff lays a claim over some three plots out of the property known as Bahati/Kabatini Block 1/2563.

Before the orders sought by the applicant are granted, this court must be satisfied that indeed the Respondent being the Administrator of the Estate was duly served with all the court documents and particularly the Originating Summons and evidence of such service provided and given an opportunity to participate in these proceedings. My finding is that the Respondent was not served with the Originating

Summons. I would be failing in my duty to proceed to give adverse orders or otherwise against the Respondent while doubts linger in my mind as to whether or not the Respondent was served. The court is alive to the fact that service of court process is core to all court proceedings.

10. In view of the above finding and pursuant to provisions of Section 99 of the Civil Procedure Act, the court on its own motion sets aside the proceedings in respect of the Originating Summons on the 13th May 2015 pending proper service of process upon the Respondent.

For those reasons, I make an order that the Respondent be served with the Originating Summons after which the Applicant may move the court to take directions on the Originating Summons as he may deem fit.

It is so ordered.

Delivered, Dated and Signed in open court this 9th day of July 2015

JANET MULWA

JUDGE

In the presence of:

Ms. Alwala holding brief for Githui for Applicant

No appearance for Respondent

Court clerk – Linah.