

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

SUCCESSION CAUSE NO.1004 OF 2005

IN THE MATTER OF THE ESTATE OF JOSPHAT GATIA MUCHIRI-(DECEASED)

MARY GATIAAPPLICANT

VERSUS

FRANCIS NDUNGU GATIARESPONDENT

PETER NYOIKE GATIARESPONDENT

RULING

1. The application coming for determination before this court is the summons dated 29th February 2015, brought under rule 73 of the Probate and administration rules. The applicant seeks orders for the dismissal of the above succession cause for want of succession on grounds that the application dated 25th April 2007 for revocation and annulment of the grant issued by Thika senior principal magistrate in succession cause no. 32 of 1994, which was heard and struck out on 27th June 2007. The respondents filed an application on 3rd July 2007 seeking extension of time on 10th July 2007. The same was heard and allowed on 28th October 2011 and the respondents were allowed to file a fresh application for Revocation and Annulment of grant within 45 days. 3 years on the respondents are yet to file the said application and it is only fair that the application is dismissed to pave way for distribution of the deceased's estate in accordance with mode of distribution as per the confirmation by Thika Court in Succession cause no. 32 of 1994.
2. In his affidavit in support of the said application, he avers that her husband died on 28th November 1992 after which she filed succession cause no. 32 of 1994 at Resident Magistrates Court at Thika for grant of probate with written will, she was issued with the same, and it was subsequently confirmed. Further that her stepson Paul Muchiri Gatia filed succession cause no. 1721 of 2000 and filed an application seeking revocation and annulment of the said grant on his behalf and that of his brother brothers and sisters. Later on 1st February 2005 the applicant withdrew the said application her advocate expressed his concerned as he viewed it as a delay tactic for the succession cause and the court ordered that anyone with an objection to raise it within 30 days. Much later and after the lapse of the said 30 days, the respondents filed an application for revocation and annulment of the said grant. This prompted her advocate to file a preliminary objection pointing out that the said application was filed late without leave of court. The court upheld the application and struck out the said application. On 10th July 2007, Francis Ndungu Ngatia and Peter Nyoike Ngatia filed an application in Succession cause no. 1721 of 2000 seeking an extension of time to file another application for Revocation and Annulment of the Thika Grant. The said application was heard and allowed by Justice Kimaru in his ruling of 28th October 2011 on condition that the respondents file their application within 45 days, since the date of the said the respondent have not filed any application for revocation and annulment. She avers that the applications have been brought by the applicants in aim to derail the succession cause and perpetuate the status quo of the applicants who are in occupation of her parcel of land **Number Loc. 7/Gakoigo/817**. That the way the applicants have been handling the matter it appears that they are not interested in the determination of the same and it is only just and fair that the said

succession cause no. 1004 of 2005 be dismissed for want of prosecution.

3. The respondent, Francis Ndungu Gatia in his replying affidavit dated 27th July 2015 avers that Paul failed to prosecute the application in succession cause no. 1721 of 2000 due to family disputes forcing the advocate to withdraw the same. Their second attempt was vide application dated 22nd April 2005 the respondent filed an application for revocation of grant in succession cause no. 1004 of 2005 but the same was struck out by Justice Aluoch for being file out of time. Further, they filed an application dated 3rd July 2007 in succession cause no. 1721 of 2000 and the same was allowed by Justice Kimaru on condition that the same was filed within 45 days. He avers that the applicant's application is fatally defective having been filed in succession cause no. 1004 of 2005. He avers that the said ruling was to be read on notice but his advocate was never served with the said notice and the said ruling was delivered on 28th February 2014 and owing to the failure of being served with the said ruling his advocate was unable to file the summons for revocation. On learning of the said ruling his advocate filed application dated 31st March 2014 in succession cause no. 792 of 2014 instead of the applicant filing a reply to the said application she filed the current application. The respondent then went on and on to argue the application for revocation which I will not consider at this point.

4. When the application came up for hearing parties made oral submissions reiterating the averments of their affidavits. The application for revocation of grant dated 15th August 2000 in succession cause 1721 of 2000 was heard and determined by Lady Justice Aluoch on 1st February 2005. The learned Judge ordered that the said application be withdrawn with any other party intending to file an objection being given 30 days to do so. From the said court order, no follow up was made on the said application. The applicants later on filed summons for revocation of grant vide the application dated 25th April 2005 in Succession cause no. 1004 of 2005. The said application was heard and determined by Justice Onyancha in his ruling of 27th June 2007. After the said ruling, the applicants then moved back to succession cause no. 1721 of 2000 and vide their application dated 3rd July 2007 sought to be given more time to file summons for revocation. The same was heard before Justice Kimaru who allowed the same vide his ruling dated 28th October 2011 the said leave was granted on condition that the applicants filed the said application for revocation within 45 days. It appears the applicants went into slumber only to be awakened by this application. I have perused Succession cause no 1721 of 2000, 1004 of 2005 and Succession cause no 792 of 2014 which all relate to the estate of the deceased and are made by the same parties. No of the said cases have been finalised in any way. The applicants here appear desirous to conclude this matter but appear to be playing a cat and mouse game by filing applications interchangeably between the three succession causes. However, I note that it would be in the interest of justice to deal with the issue of revocation between the parties and hence I decline to grant the orders sought by the applicant to dismiss the succession cause no 1004 of 2005. I therefore invoke the power vested on this court under Section 73 of the Probate and Administration Rules, which allows this court to make such orders as may be necessary to meet the ends of justice and to prevent abuse of the process of the court by ordering the consolidation of the three Succession causes. I order the consolidation of the three causes namely; Succession cause no. 792 of 2014, Succession cause no. 1004 of 2005 and succession cause no. 1721 of 2000, the proceedings shall henceforth proceed in Succession cause no 1721 of 2000. Parties shall take a mention date to obtain directions in regards to the applications pending in the files consolidation. Costs in the cause. It is so ordered.

Dated, signed and delivered this **9th** day of **October** 2015.

R. E. OUGO

JUDGE

In the presence of;

.....**For the Applicant**

..... **...For the Respondents**

Ms. Charity

Court

Clerk