



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**MISC. APPL. NO. 287 OF 2013**

**IN THE MATTER OF THE ESTATE OF DINAH MUTHONI MBUTHIA alias DINA MUTHONI MBUTHIA DECEASED)**

1. JUNE WANJUGU KOINANGE
2. JANE NJERI NGURE
3. SAMUEL GITAU MBUTHIA

**(Suing as the administrators of the estate of**

**DINA MUTHONI MBUTHIA.....APPLICANTS**

**VERSUS**

1. FRANCIS KIRIMA M'KUNYUA
2. PETER KIOKO NDIKU
3. DAVID MURIGI MWANGI (the officials of

**MWIHOTI SELF HELP GROUP.....PETITIONERS/RESPONDENTS**

**RULING**

1. On 30<sup>th</sup> April 2013 this court issued a grant of letters of administration intestate to the petitioners JANE WANJUGU KOINANGE, JANE NJERI NGURE and SAMUEL GITAU MBUTHIA in regard to the estate of the deceased DINAH MUTHONI MBUTHIA alias DINA MUTHONI MBUTHIA. The deceased died on 28<sup>th</sup> July 2012 at Kenyatta National Hospital. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners were her daughters and the 3<sup>rd</sup> petitioner was her son. On 11<sup>th</sup> September 2013 the applicants FRANCIS KIRIMA M'KUNYUA, PETER KIOKO NDIKU and DAVID MURIGI MWANGI (suing as the officials of MWIHOTI SELF HELP GROUP) applied, by way of originating summons, to have the grant revoked on the ground that their members were unaware of the Cause and grant when they have been all the time in actual control and possession of land parcel LR No. 3811/6 within Githurai in Nairobi which forms part of the estate. They stated that they were in continuous exclusive and uninterrupted possession of the land on which they have constructed permanent and semi-permanent structures and otherwise developed extensively for over twelve years and were therefore beneficiaries. The petitioners were being accused of material non-disclosure.

2. The application was stated to be brought under **section 76** of the **Law of Succession Act (Cap 160)** and **rule 44(1)** of the **Probate and Administration Rules**.
3. On 27<sup>th</sup> February 2014, the petitioners filed the present summons under **rule 73** of the **Probate and Administration Rules** seeking that the applicants' application be struck out for being incurably defective because it had been initiated by way of "originating summons." The applicants were required to take out summons under **rule 44 (1)** of the **Probate and Administration Rules**. The petitioners asked that the petition be allowed to proceed for confirmation.
4. The summons to strike out was served but did not elicit any response. A hearing date was taken and served. The applicants did not attend. MR MBAABU for the petitioners prosecuted the matter.
5. The substance of the applicants' application was that, although the property was in the name of the deceased, they were in actual control and possession of the same, and had extensively developed the same to the knowledge of the deceased to the extent that they had become beneficiaries to the estate. Their case was that they ought to have been made aware of the proceedings and the subsequent grant. **Section 76(b)** of the **Act** allows such applicant to seek the revocation of the grant if material information was concealed from the court at the time of the grant. What is clear is that the form of the application is what the petitioners have a problem with. The application is headed "originating summons" instead of "summons." It is true that originating summons is in itself a suit, and such suit cannot be filed within another suit (in this case, Succession Cause).
6. The summons to strike out was brought under **rule 73** of the **Probate and Administration Rules** which provides as follows:

**"73. Nothing in these Rules 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."**

In my view, the ends of justice can only be best served if the substance of the applicants' application is allowed to be heard and decided on merits. This is why I make an order that the application shall be listed for hearing on the substance. That means that the petitioners' summons to strike out fails, but they will have costs of the same.

**DATED and DELIVERED at NAIROBI this 15<sup>th</sup> July, 2014**

**A.O. MUCHELULE**

**JUDGE**