IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. SUCCESSION NO. 12 OF 2007

IN THE MATTER OF THE ESTATE OF KAGIRI KIHURO KIBUNJA (DECEASED)

DUNCAN WARUINGI KAGIRI.....1ST APPLICANT

MAINA KAGIRI.....2ND APPLICANT

JOHN MWANGI KAGIRI.....3RD APPLICANT

VERSUS

GOERGE MAINA KAGIRI.....RESPONDENT

RULING

The applicants in the notice of motion dated 15/5/2012 are Duncan Waruingi Kagiri, Maina Kagiri and John Mwangi Kagiri against the respondent George Maina Kagiri. The applicants brought this application under **Order 45 Rule 1 & 2**, and **Order 51 Rule 1** of the **Civil Procedure Rules**. They seek a review of this court's order dismissing Miscellaneous Succession Cause No. 12 of 2007 at Nakuru. The grounds upon which the application is brought are inter alia; that when the respondent filed succession proceedings in court, they were not made aware until surveyors visited their land; that the applicants then filed HCC 117/07 at Nakuru, objecting to the filing of the succession case but that on 3/3/2010 it was withdrawn vide a consent order in the said case; that the court dismissed this cause because HCC 117/07 was still pending and that the dismissal of this cause was a mistake; that at the time both counsel knew that HCC 117/07 had been withdrawn and it was inadvertence on the part of counsel that the case was dismissed; that had the court known of the dismissal of HCC 117/07, it would not have dismissed this case. The applicants also deponed that he came to learn of the dismissal of the application dated 2/3/2012, when he instructed the firm of Mirugi Kariuki Advocates to peruse the file and that there has not been inordinate delay in bringing this application.

In opposing the application, Mr. Gachiengo Gitau, who was in conduct of this matter on behalf of the respondent deponed that there has been unexplained inordinate delay in bringing this application; that the grounds relied upon that the court was misinformed about HCC 117/07 is baseless; that the court considered all the issues before it and the applicant is clinging on only one issue in the court's ruling but that he needed to have filed an appeal to challenge the court's ruling on all the issues; that the applicant in his further affidavit (GG2) dated 16/9/2010 had informed the court of the withdrawal of HCC 117/07; that the applicant was represented by counsel when the ruling was read and cannot claim to have been unaware of the court's ruling; that the applicant is abusing the court process by filing several suits over the same estate i.e. NKU Misc.6/07, 12/07 and HCC 117/07.

For the court to review its order under **Order 45 Rules 1 & 2** of the **Criminal Procedure Rules** the

applicant must establish the following:-

> **"That there has been discovery of view and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time of the decree was passed or on account of some mistake or error apparent on the face of the record or for any other sufficient reason".**

I will therefore consider the reason why the trial court dismissed the appliciton dated 7/3/2012 and whether it was dismissed for the reason that HCC 117/07 had not been withdrawn. The first ground that J Ouko considered is whether the magistrate's court at Naivasha had no pecuniary jurisdiction to entertain the succession cause, the value of the estate being Kshs.5,285,800/-. The court found that the applicants had not disclosed how they arrived at the value of Kshs.5,285,800/- and that ground failed.

The second ground raised by the applicants was that they were not involved in the succession cause leading to the distribution of the estate. The court found that Form 38 which was annexed to the application had signatures of all dependants and thumb print of the widow signing the consent to the making of a grant of administration and that where a signature was disputed, it could only be conclusively resolved by subjecting the signatures in question to expert examination which had not been done. The court also found that the applicants had not made any report to the police about forgery of their signatures and the court found that they had not satisifactorily demonstrated that they were not aware of the proceedings leading to issuance of the grant.

The last ground is what touched on HCC 117/2007. The court observed that it was not disputed that HCC 117/07 and HC Misc. Succ. Appl. 12/07 had been filed and that Misc. 12/07 seeks revocation of grant just like the one before the court and orders that the respondent had alleged that such application for revocation was pending, the applicants had denied it but not shown any proof. The court observed that it was not sure of the status of that originating summons but that the bringing of several applications was an abuse of the court process. The court went ahead to dismiss the application based on the 3 grounds that were urged.

The applicant filed this application on t he basis that HCC 117/07 had been withdrawn by consent and that had the court known of its withdrawal, its decision would have been different. The applicant exhibited a record of a proceeding dated 3/3/10 allegedly signed by G.N. Njuguna and Co. Advocates on 29/1/2010 indicating that the suit had been marked as withdrawn under **Order XXIV Rule 2(1)** of the **Civil Procedure Rules**. Firstly, that record does not amount to a consent because there should have been two or more parties present to record the consent. One advocate cannot consent on behalf of two. Secondly, the piece of paper annexed to the application is not a certified extract and one cannot tell from which file it is taken from or which Deputy Register recorded it. It is just a piece of paper with writings on it and has no legal force. There was therefore no evidence that HCC 117/11 had been withdrawn or dismissed.

The ruling sought to be reviewed was delivered on 7/10/2011. Although it seems that the applicant's counsel was absent on 7/10/2011 when it was read, yet he was present when the court reserved the ruling for that date on 30/5/2011. The coram shows both counsel were present. It was the duty of the applicants counsel to ensure that they were present in court on 7/10/2011, for taking of the ruling or send counsel to hold brief and if not, should have perused the court file soon thereafter to take the necessary steps. This application was filed on 15/3/2012 over 5 months after the ruling was read. I do find that 5 months is unreasonable and inordinate delay that was not explained by the applicants.

In the end, I find that the applicants did not meet the threshold for review under **Order 45 Rules (1) & (2)** to warrant a view. The application lacks merit and is hereby dismissed with applicants bearing the costs.

DATED and DELIVERED this 1st day of October, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

N/A for the applicants

N/A for the respondent

Kennedy – Court Assistant