

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Succession Cause NO.479A of 1989

IN THE MATTER OF THE ESTATE OF GEORGE MWAURA IHIGA MUCHIRI (DECEASED)

LUCY WAITHERA MBUGUA.....APPLICANT

VERSUS

JOHN IHIGA MWAURA.....RESPONDENT

R U L I N G

George Mwaura Ihiga, the deceased to whose estate these proceedings relate died on 21st December 1988. The Respondent herein petitioned the court to be issued with a grant of letters of administration intestate. The Respondent petitioned the court in his capacity as a son of the deceased. In the petition, the Respondent listed the beneficiaries of the estate of the deceased as Leah Wanjiru Mwaura (widow), John Ihiga Mwaura (son) and Lucy Wanjiru Mwaura (daughter). The Respondent was issued with a grant of letters of administration intestate on 27th May 1991. The grant was confirmed on 21st February 1992. On 30th December 1994, the Applicant filed summons for revocation of grant pursuant to **Section 76(b) & (c) of the Law of Succession Act and Rules 44 & 73 of the Probate and Administration Rules**. The Applicant seeks to have the grant issued to the Respondent revoked, *inter alia*, on the grounds that the grant was fraudulently obtained by concealment from the court of material facts relating to the estate of the deceased. In particular, the Applicant explained that the Respondent had failed to disclose the fact that the deceased had other beneficiaries namely; the Applicant and her seven (7) children. It was for the above reasons that the Applicant craved for orders of the court for recognition of herself and her children as the beneficiaries of the estate of the deceased. In response to the application, the Respondent filed a replying affidavit denying the allegation that the Applicant and her children were the beneficiaries of the estate of the deceased. He averred that the Applicant was neither a relative nor a wife to the deceased. For added emphasis, he stated that the Applicant was a total stranger to him.

For reasons apparent from the record, the Applicant did not prosecute the application until the 23rd July 2010 when the Respondent filed an application seeking to have the objection dismissed for want of prosecution. He further prayed for the lifting of the order of inhibition which was granted by this court on 4th July 1995. When the Applicant was served, she filed a replying affidavit explaining the reason for the delay. She stated that her then advocate on record Mr. Ndungi died. After his death, she was unable to access her file until had been she wrote to the Law Society of Kenya. The Society informed her file had been stored at the Law Society of Kenya storage facility at South C. She was able to retrieve the file and had consequently instructed another advocate to act on her behalf in this matter. She therefore urged the court to allow her to ventilate her case on its merits.

Counsel for the parties in this application filed written submission. Mugo J reserved the application for ruling. She however ceased to have jurisdiction in the Family Division before she had delivered her ruling. This ruling is therefore delivered on the basis of the written submissions that were ordered filed by Mugo J. The issue for determination by this court is whether the Respondent made a case for this court to dismiss the Applicant's summons for revocation of grant for want of prosecution. It was common ground that for a period of sixteen (16) years, the Applicant took no action to prosecute the application. She has given reasons for the delay. Her former advocate died. She was unable to trace her file until she instructed another advocate. It was this advocate that was able to retrieve the file from the storage facility of the Law Society of Kenya. In this court's opinion, the reason given by the Applicant is excusable. In any event, the **Law of Succession Act and the Probate and Administration Rules** does not contain

provisions granting this court jurisdiction to dismiss any pleading filed in a succession cause for want of prosecution. In the view of this court, this was deliberate by the drafters of the said **Act** and the **Rules** made thereunder. The Respondent has imported the provisions of the **Civil Procedure Act** into the succession proceedings by filing the application to dismiss the summons for revocation of grant for want of prosecution. That provision of the **Civil Procedure Rules** on dismissal of suits for want of prosecution is not among the **Rules** specifically saved under **Rule 63(1)** of the **Probate and Administration Rules** to be applicable in succession cases. That does not however imply that this court is prohibited from exercising its inherent powers where the interest of justice so demands. In the present application, the Applicant has expressed interest to prosecute her summons for revocation of grant. This court will give her an opportunity to prosecute the same. She is ordered to seek appropriate directions from the court within thirty (30) days from the date of delivery of this Ruling.

The upshot of the above reason is that the Respondent's application dated 12th July 2010 is hereby dismissed but with no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2013.

L. KIMARU

JUDGE