



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Succession Cause 209 of 1994**

**IN THE MATTER OF THE ESTATE OF DANDSON MACHARIA MWANGI (DECEASED)**

**PHYLLIS WANJIKU MACHARIA ..... 1<sup>ST</sup> PETITIONER**

**GIDEON MUNGAI ..... 2<sup>ND</sup> PETITIONER**

**versus**

**KEZIA WANJA MWANGI ..... PROTESTER**

**RULING**

When Mr. Karanja appeared before me on 14/10/2008, he proceeded to urge ‘an application’ dated 13.11.2001, on behalf of the protester, and he thereby made submission in support thereof.

‘The application’ was vehemently opposed by Mr. Gathara on behalf of the petitioners.

I have considered the ‘application’ as well as the submissions of both counsel. I have also perused this file with a view to establishing what the real dispute between the parties is. I bear in mind the fact this a court of record.

I do note that on 24/2/2003, Mr. Kamwendwa who was then holding brief for Mr. Mwangi for the protester/ applicant and Mr. Gathara who appeared for the petitioners/respondents, appeared before Waweru J. and recorded the following order:-

‘By consent,

1. *The application by summons dated 13<sup>th</sup> November 2001 be and is hereby withdrawn with no order as to costs.*
2. *The application for confirmation of grant by summons dated 24.10.1995 is hereby fixed for hearing upon submissions and the affidavits already filed on 18.3.2003. Any beneficiary now not represented by counsel shall be entitled to be heard’.*

In my humble opinion, having recorded the above consent order, which remains valid to date as it has not been set aside, it is but an abuse of the process for the applicants counsel to prosecute an application which is no longer on record.

It is for that reason that I decline to rule on a non existent application. The ‘applicant’ who would be well advised to file a relevant application to protect whatever rights she claims against the estate.

It is important that I reiterate Justice Khamoni’s sentiments when he declined to handle this matter on 13/2/2002, and stated that “unless the parties are consistent, especially their advocates, and are out to create more problems and complicate this simple matter instead of solving and settling the few problems that are there presently, I do not see the propriety of my handling this matter.”

In view of the above, each party shall bear its own costs, for had the petitioners and their counsel been vigilant, the

withdrawn application would not have been 'prosecuted' and the matter would not have proceeded on 14/10/2008 and 6/5/2009.

Dated and delivered at Nairobi this 2<sup>nd</sup> day of June 2009.

**JEANNE GACHECHE**

**Judge**

Delivered in the presence of:

For the protester/applicant – Mr. Karanja

For the petitioners/respondents – Mr. Gathara