



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Succession Cause 186 of 2003

M'MUGWIKI M'TURUCHIU.....DECEASED

V E R S U S

NTEERE M'MUGWIKI OBJECTOR/APPLICANT

Law of Succession

Ø Setting aside of orders in Succession Cause

Ø Be preceded by annulment/revocation of will

R U L I N G

By an Application dated 14th April 2009 the Objector herein seeks prayers:-

- (a) that the court do set aside its order of 13.03.2009.**
- (b) that the applicant be allowed to file a reply to the application dated 27/10/2008.**
- (c) that the court do make such orders as would meet the interests of justice in this cause.**

The Application was supported by the Objector's Affidavit sworn on 14th April 2009 and the grounds set out on the face of the application.

The Objectors concern is the Petitioner's application dated 27.10.2008 in which the Petitioner applied for the confirmation of the Probate made to him on 18.12.2006. That application was served upon the Objector's Advocates B.G. Kariuki & Co. Advocates on 30.10.2008 at 2.50 p.m. In addition, a Hearing Notice was served on the Objector on 23.02.2009 but he declined to sign it, and directed the Process Server to serve it on his Advocates. This the Process Server did while in the company of the Objector. That is what the Process Server says on oath in his Affidavit of Service filed on 9/03/2009.

So when the application came before me on 13.03.2009 the Petitioner was represented by Mr. Mwirigi while Mr. B. G. Kariuki represented the Objector. After some argument about compensation to the Objector by the beneficiary Diocese of Meru Registered Trustees I proceeded to make the following order:

“Court: The Application dated 27.10.2008 is confirmed in terms of prayers 1 & 2 thereof”.

13.03.2009

Anyara Emukule

Judge.

Subsequent to that order a Certificate of Confirmation of a Grant was issued in terms of Section 71(1) and (2) of the Law of Succession Act

- and was signed by me.

The Objector's Application is based upon the court's inherent powers under Rule 73 of the Probate and Administration rules which reads:-

"73 Nothing in these Rules shall limit or otherwise affect the 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."

This Rule invests the Court with unfettered discretion **to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.** The court's discretion must however be exercised **judiciously**. This means that the discretion must be based on some material before the court for the court's consideration so that when the discretion is exercised, the outcome of that exercise is both well considered, and wisely circumspect.

In this application the applicant says in paragraph 3 of his Supporting Affidavit:

3. "That I have serious objection to the said application but before I could reply, I was called by Bishop SILAS MUGAMBI of the Catholic Diocese of Meru and his lawyer Mr. Kiautha Arithi who dissuaded me from replying to the application as they would settle my problem later."

To this averment Mr. Kiautha Arithi has filed a Replying Affidavit sworn on 20th May 2009 in which counsel for the Petitioner (the Diocese of Meru Registered Trustees are not parties to this cause), has given in paragraphs 10 – 23 a chronology of the events in this Cause since 5th June 2003 to the events of 12th March 2009 prior to the court's orders confirming the Grant of Probate on 13.03.2009.

The essence of the Objector's case is that outside the Cause in court, the Diocese Meru Registered Trustees, had offered to buy him a plot in Isiolo Town and to have it constructed, that the plot had been bought but no building had been erected or built on it. Mr. Arithi states that neither his Lordship the Bishop nor the Father in Charge Rev. Andrew Mbiko was aware of the arrangements made sometime in 1998. Mr. Arithi further depones at paragraphs 20 and 21 of his Affidavit that Rev Fr. Andrew Mbiko said he would look into the records and see whether there existed such discussions or minutes thereof.

Most important of all and in direct answer to the Objector's averment in paragraph 3 of his Supporting Affidavit, Mr. Arithi avers in paragraph 22 of his Replying Affidavit that the discussion of 12th March 2009 **"had nothing to do with the matters in court and at least, to the best of his knowledge neither did the Bishop tell the Applicant, leave alone mislead him not to file a reply to the summons for confirmation of the grant"**.

Mr. Arithi also avers in paragraph 23 of his Replying Affidavit that the Applicant deliberately failed to explain why he chose to go and see the Bishop on 11th March after being served on 23rd February 2009 instead of giving instructions to his Advocate. I have already made reference to the Process Server's Affidavit of Service filed in court on 9th March 2009 where at paragraph 3 thereof it clearly shows that the Applicant declined to accept service unless in the presence of his Advocate and the Process Server had to accompany him to his Advocates Offices where Mr. B. G. Kariuki personally accepted service, signed and stamped on the same.

There was no protest filed against the Summons for Confirmation. On 9th December 2008, the matter was stood over generally to enable the Petitioner serve the Objector.

Considering all the above averments, and the fact that the deceased made a Will which has not been challenged at all, it is difficult to understand the Objector's driving force or motive. He has not responded to the Kiautha Arithi's Replying Affidavit. There is consequently no material at all upon which this court may exercise its discretion, and make the orders which the Objector/Applicant prays the court to make. One aspect is clear in my mind in the absence of any challenge to the Will and any grounds therefor, any orders made in this matter under Rule 73 of the Probate and Administration Rules, would neither be in the interests of justice nor for the prevention of the abuse of the process of court.

For those reasons, the Objectors/Applicant's Summons in Chambers dated 14.04.2009 lacks merit and the same is dismissed with costs to the Petitioner.

Dated, Delivered and Signed at Meru this 3rd day of July 2009.

M. J. ANYARA EMUKULE

JUDGE.