In re Estate of Kipkorir Kongo Too (Succession Cause 214 of 2001) [2023] KEHC 18078 (KLR) (24 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18078 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 214 OF 2001

RN NYAKUNDI, J

MAY 24, 2023

IN THE MATTER OF THE ESTATE OF KIPKORIR KONGO TOO

BETWEEN

JOSHUA KIPLIMO TOO ..... PETITIONER

AND

LEAH JEPCHIRCHIR TOO ..... RESPONDENT

RULING

1. The applicant approached this court vide a summons dated March 6, 2023 seeking the following orders;
    1. That this Honourable court be pleased to dismiss the application for revocation of grant for want of prosecution.
    2. That costs of this application be provided for.
2. The application is premised on the grounds set out therein and the contents of the annexed affidavit of Philemon Cheruiyot Melly.
3. The applicant contends that the respondent has not taken any step to set this suit down for hearing since June 6, 2011. Further, that by her conduct, the respondent appears disinterested in having this matter heard as it has been 10 years and the applicant has never bothered to move the court on the same.

Analysis & Determination

The law:

4. The specific provisions for dismissal of suits for want of prosecution can be traced to order 17 rule 2 of the *Civil Procedure Rules* as read together with rule 73 (1) of the *probate and Administration rules*. The

threshold for considerations for dismissal for want of prosecution are summarised in *Wiegert v. Rogers,* 2019 BCCA 344 " On an application to dismiss for want of prosecution, it must be shown that there has been inordinate delay, that the inordinate delay is inexcusable, and that the delay has caused, or is likely to cause, serious prejudice to the defendant. In addition, the final and decisive question, which encompasses the other three, is whether, on balance, justice requires a dismissal of the action.

5. To make an effective challenge of dismissal of suit for want of prosecution it must be shown that the delay is in ordinate, excessive and out of proportion to the matters in question. Pursuant to the principles in *Saldanha and others v Bhailal and Co and Others*, Nairobi High Court civil case number 555 of 1995(Dalton J on 17 November 1967 (HCK) (1968)EA 28 it was observed: " Public policy demands that the business of the courts should be conducted with expedition and it is of the greatest importance in the interest of justice that these actions be brought to trial with reasonable expedition. The court does not see how a fair trial can be ascertained after a great delay of 12 years after the cause of action arose. (See *Fitzpatrick b Batger and Co. Ltd* (1967) 2 ALL ER 657. Reggentim v Beecholme Bakeries Ltd (1967) 111 sol. Jo 216.

6. The procedural history of this case is with the effect that the Succession Cause No 214 of 2001 was filed at High Court of Kenya at Eldoret seeking a declaration of the deceased survivorship and the residual estate to be distributed to the respective beneficiaries. In court's wisdom and knowledge of the applicable law, processed the Succession Cause intestate which resulted in a certificate of confirmation of grant dated October 24, 2002. The court decree categorically empowered Joshua Kiplimo Too as the legal representative of the deceased to transmit the estate to the respective beneficiaries. That certificate of confirmation of grant has not been challenged until a certificate of revocation was filed on 16th day of December 2002 by Leah Chepchirchir seeking revocation of the grant under section 76 of the *Laws of* Kenya. Undoubtedly no step has been taken by the applicant to prosecute the application on revocation since its filing in court. There is no dispute from the record that there has been inordinate delay by the Applicant to prosecute the claim against the estate. The delay which is inexcusable has occasioned serious prejudice and injustice to the respondents. It is a case only good for dismissal for even if it was to be prosecuted there might be no subject matter for the probate court to exercise jurisdiction.

7. I have considered the application and the affidavit in support of the same and further, I have also perused the record of the court. this matter was last in court actively in the year 2011 and since then there has been no action on the part of the applicant to prosecute the application.

8. I note that there is no provision in probate practice for dismissal of interlocutory applications for want of prosecution. However, this is not an avenue for a party to be indolent and in the process having the litigation remain hanging over the heads of the other parties ad infinitum. Reasonably speaking, applications must be prosecuted within reasonable time. Rule 73 of the Probate and Administration Rules gives the court inherent power to do justice and to prevent abuse of process. Letting a matter lie unprosecuted for as long as this file has been pending would amount to abuse of court process and therefore, rule 73 can properly be invoked in such a scenario. In *Kipkoech Chumo Serem & another vs. Kiprotich Ng'eno* [2016] eKLR Justice Githua held that although the law governing probate process does not provide for dismissal of probate causes, or any of their processes, for want of persecution, the court can still invoke inherent powers to dismiss such processes. Guided by said decision, I hereby dismiss the summons for revocation of grant dated December 16, 2022 is hereby dismissed for want of prosecution. Each party shall bear its own costs.

DELIVERED VIA MAIL DATED AND SIGNED AT ELDORET ON THIS 24TH DAY OF MAY 2023

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R. NYAKUNDI

JUDGE