



REPUBLIC OF KENYA



In re Estate of Zakayo Khaemba Maosio (Deceased) (Succession Cause 212 of 2007) [2023] KEHC 22901 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22901 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

SUCCESSION CAUSE 212 OF 2007

DK KEMEL, J

SEPTEMBER 29, 2023

IN THE MATTER OF THE ESTATE OF ZAKAYO KHAEMBA MAOSIO

BETWEEN

STEPHEN MAKOKHA KHAEMBA OBJECTOR

AND

ZEBEDEE WAFULA KHAEMBA PETITIONER

RULING

1. The Objector herein filed an application vide summons for revocation of grant dated 15th November 2021 pursuant to section 76 of the *Law of Succession Act*. Directions were taken on 17th November 2022 wherein the same was fixed for hearing on 25th January 2023 and that the hearing notice was duly served upon the Objector. On 25th January 2023 the Objector was a no show in Court and this Court proceeded to dismiss the application dated 15th November 2021 for want of prosecution.
2. Subsequently, on 5th April 2023, the Objector filed an application dated 27th March 2023, pursuant to Order 45 Rule 2(1) and Order 51 Rule 1 of the *Civil Procedure Rules*, 2020 and sections 1A, 1B and 3A of the *Civil Procedure Act*, 2010 seeking orders that this Court review, vary and set aside its orders issued on 25th January 2023 dismissing the Objector's application dated 15th November 2022 and that the same be reinstated and that the same do proceed to hearing and determination. The application is premised on the grounds on the face thereof and the supporting affidavit sworn by the Applicant on even date. The Objector's gravamen is inter alia; that the applicant is ready and willing to prosecute his application dated 15/11/2022 to its logical conclusion within the shortest time possible; that he seeks to have the said application determined on merit; that the failure to attend court when the matter was called out was not deliberate but due to public transport hitches; that the applicant should not be condemned unheard; that the application has been brought without undue delay; that the petitioner will not suffer any prejudice if the application is reinstated.



3. Opposing the application, the Petitioner filed his grounds of opposition dated 9th May 2023 and filed on 15th May 2023 wherein he contended that the application is frivolous and an abuse of the Court process, and that the Objector deliberately failed to attend Court on 25th January 2023. It was further contended that the Applicant sold all his entire portion of land to buyers and has no legal right to start filing applications and counter applications.
4. The application was canvassed by way of written submissions. Both parties filed and exchanged their respective submissions.
5. I have read through the pleadings, the written submissions, the cited authorities and considered the relevant provisions of the law in this matter. I find the issue for determination is whether the application has merit.
6. When a party wishes to set aside an order of dismissal of suit for want of prosecution, they are guided by the provisions of Order 12 Rule 7 of the *Civil Procedure Rules*. It provides that, “Where under this Order judgement has been entered or the suit has been dismissed, the Court on application may set aside or vary the judgement or order upon such terms as may be just.”
7. The Legal substratum for dismissal of suits for want of prosecution is founded on the principles that litigation must be expedited, and concluded by parties who come to court seeking for justice. This is to assist in clearing backlogs in court and the ever increasing over-loads restoring bad public confidence and trust on the judiciary. Upon filing of cases, parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all based on legal maxim “Justice delayed is justice denied” Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should not be inordinate, unreasonable and inexcusable. I say so, as that would be doing grave injustice to one side or the other or both and in such circumstance, the Honorable Court may in its discretion dismiss the action straight away.
8. Additionally, the provisions of Order 17 Rule 2 (3) of the *Civil Procedure Rules* provides, inter alia: -
 - 1). “In any suit in which no application has been made or step taken by either party for one year, the court may give Notice in writing to the parties to show cause why the suit should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit.
 - 2).
 - 3). any party to the suit may apply for its dismissal as provided in Sub-rule 1”.
9. In order for these legal principles to be applicable, the following need to be demonstrated: -
 - a. That no application has been made or step taken by either party for one (1) year from the time of filing the suit and
 - b. That the parties have failed to comply with the clear directions of the Court.
10. Clearly, the powers granted to courts by law are discretionary and have to be exercised judiciously, fairly and not capriciously.
11. In so doing, the test applied by court in applications for dismissal of suits for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. In other words, if the court is satisfied with the Objector’s excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties before Court, and hence the action would not be to dismiss it but direct that it be heard at the earliest time possible and available.



12. This Court on the legal rationale of Order 17 Rule (2) (3) of the *Civil Procedure Rules*, 2010 relies on the decision of *Investment Limited –Versus - G4s Security Services Limited* (2015) eKLR where Court held: -

“This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of the *Constitution* of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “Sword of the Damocles”. But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of the *Constitution* of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff.

13. Therefore, this court shall apply this test in the instant case.
14. As to whether the Applicant is entitled to the relief sought, it is noted that from the facts and the legal principles founded on Order 17 Rule 2 (3) of the *Civil Procedure Rules*, 2010, this court takes Judicial notice of the fact that the old and delayed succession matters still pending before this court are now being addressed so mechanically. These cases seem to have stagnated and stalled at the behest of the estate of the deceased. In the recent past, cognizance will be taken that these category of cases are having notices to show cause under Order 17 Rule 2 (1) of the *Civil Procedure Rules* as a wake-up call being issued and listed in the daily cause list and that the judges service week activity are all intended to clear them from unnecessarily clogging the Judiciary system. The decision is working marvelously and has borne positive robust results. One such cases is that of the estate of the deceased herein.
15. The circumstances that led to the dismissal of the suit is that, the same was filed on 15th November 2021, and one of the key visions under the current Chief Justice of the Judiciary is to expedite the hearing and determination of old succession matter. On 17th November 2022 in the presence of both parties, based on the Court proceedings, this Court issued directions that the application dated 15th November 2022 be served upon the Petitioner and proceeded to schedule the same for hearing on 25th January 2023. On 21st December 2022, the parties were in Court before Justice Ougo who directed that the matter be mentioned before me on 18th January 2023 for directions on hearing and that a Notice was to be issued. On 18th January 2023, only the Petitioner was present in Court and I proceeded to maintain the scheduled date for the hearing as before, 25th January 2023. On 25th January 2023, only the Petitioner was present in Court but the Objector who was the author of the application dated 15th November 2022 was a no show.
16. From then on, nothing took place until 5th April 2023 when the Objector filed the application for setting aside of the orders I issued on 25th January 2023. Despite of the notice for hearing having been served, the Objector did not appear in Court. In the given circumstances the Honorable Court was left with no alternative but to have the suit dismissed for want of prosecution.
17. It is the duty of this Court to do justice between the parties, Section 1B of *Civil Procedure Act*, Cap. 21 provides that there should be just determination, effective and timely disposal of proceedings and effective use of judicial time and resources. It is upon this duty of overriding objective does this Court, take time and puts in resources to dismiss applications that have been unprosecuted in old Succession matters to ensure that other active cases have ample time to be determined and clearing of backlog in



the Succession Court. The Court will not allow applications to be filed and whereby once the parties obtain interim orders then proceed to keep the file idle. This causes the clogging the justice system and is unacceptable in the overall dispensation of justice.

18. The discretion of Court to set aside an order for dismissal ought to be exercised judiciously. An application is dismissed for a want of prosecution as the parties therein failed to aid Court in meeting its overriding objective. The party seeking to reverse this order must explain sufficiently to the Court as to why his application is merited and persuade it to exercise its discretion. The Objector has explained that it was due to transport hick ups that he arrived late in Court only to find that the Court had dismissed his application for want of prosecution.
19. The conduct of the Objector from the day this Court issued him with a hearing date is clear enough that he was not interested in prosecuting his application. During the days the matter was being mentioned in Court, he was a no show and that he has not availed any evidence that he did arrive in Court late but he has simply made allegations. He did not elaborate to this Court on who exactly informed him that his application had been dismissed for want of prosecution. Again, the dismissed application dated 15/11/2022 had sought for revocation of grant on the ground that the Petitioner had failed to administer the estate of the deceased by finalizing on the distribution of the estate to the beneficiaries. According to the Objector, the petitioner was recalcitrant and so sought that he himself be given the power to do so. In such circumstances, the applicant being a beneficiary need not seek to revoke the grant but to have the matter mentioned before court and then inform the court to admonish the petitioner and compel him to perform his duties as administrator. Hence, the said application was not necessary. In any case, if that was the only reason fronted by the Objector he ought to have filed an application seeking to compel the Petitioner to execute the requisite transmission documents and in default the Deputy Registrar of this court to do so on his behalf. It is instructive that the Objector had filed such an application on the 22/2/2023 but for unknown reasons withdrew it on 14/3/2023 and sought to file the present application seeking reinstatement of the dismissed application dated 15/11/2022. From the look of things, the Objector had been on the right track when he filed an application on 22/2/2023 seeking an order that the Deputy Registrar of this court to execute the requisite transmission documents due to the recalcitrance of the Petitioner to perform his duties as administrator of the estate of the deceased. That would have been the prudent thing to do and hence the OObjector's conduct in abandoning an appropriate application which could have yielded better and quick results and seeking to pursue the dismissed application reeks of bad faith which can only be read as out to embarrass the Petitioner yet the court was and is still ready to issue the appropriate directions to the Petitioner regarding his duties as administrator and that in the event of recalcitrance the court has coercive powers to bring the administrator to heel. In the circumstances, iam in agreement with the Petitioner's counsel's submission that the Objector's application dated 27/3/2023 is frivolous and an abuse of the court process.
20. In view of the foregoing observations, it is my finding that the Objector's application dated 27/3/2023 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF SEPTEMBER, 2023

D.Kemei

Judge

In the presence of:

Stephen Makokha Khaemba for the Objector/Applicant



Sabwan for Kassim for the Petitioner/Respondent

Kizito Court Assistant

