In re Estate of Bernard Kariuki Thoronja (Deceased) (Succession Cause 1234 of 2007) [2022] KEHC 12850 (KLR) (Family) (5 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12850 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 1234 OF 2007

MA ODERO, J

AUGUST 5, 2022

BETWEEN

BENSON MUGO KARIUKI ..... APPLICANT

AND

MARGARET WANGECI ..... 1ST RESPONDENT

BENSON MWANGI KARIUKI ..... 2ND RESPONDENT

JORAM BERNARD KARIUKI ..... 3RD RESPONDENT

JANE WAMBUI KUNGU ..... 4TH RESPONDENT

CHEGE KARIUKI ..... 5TH RESPONDENT

ROBERT KIMEMIA KARIUKI ..... 6TH RESPONDENT

ESTATE OF EVA NJERI ..... 7TH RESPONDENT

KAMAU KARIUKI ..... 8TH RESPONDENT

RULING

1. Before this Court for is the Notice of Motion application dated November 24, 2021 by which the Applicant/Administrator Benson Mugo Kariuki seek the following orders: -

> " 1. Spent.
>
> 2. That the court be pleased to arrest the judgment in the current matter slated for November 26, 2021 pending the hearing and determinations of the application inter-partes.

3. the court be pleased to schedule a date interparties for the physical hearing of this matter and all parties given a chance to fair hearing by giving sworn statements and cross-examination.

4. The court be pleased to issue further or better orders as shall meet the ends of justice."

2. The application was premised upon sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, orders 45 Rule 1, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, Article 159 (2) of *the Constitution* of Kenya 2010, and all enabling provisions of law and was supported by the Affidavit of even date sworn by Benson Mugo Kariuki the Administrator/Applicant.

3. The Objectors/Respondents opposed the application through their joint Replying Affidavit dated February 4, 2022 sworn by Joram Bernard Kariuki the 3rd Objector. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated February 22, 2022, whilst the Respondents relied upon their written submissions dated February 4, 2022.

Background

4. This Succession Cause relates to the estate of Bernard Kariuki Thoronja (hereinafter 'the Deceased') who died intestate on April 14, 2003. Following the demise of the Deceased one of his sons Benson Mugo Kariuki (hereinafter the Administrator) sought and obtained a Grant of letters of Administration Intestate to the estate which Grant was issued on December 20, 2007. The Grant was duly confirmed on February 18, 2013.

5. The Objectors herein then filed a Summons for Revocation of Grant dated July 3, 2014 alleging that the Grant had been obtained fraudulently. Hearing of the Summons for Revocation of Grant commenced before this court on June 15, 2021.

6. At the conclusion of the hearing judgment was scheduled for delivery on November 26, 2021. Whilst the matter was still pending for judgement the Administrator filed this application dated November 24, 2021 seeking to arrest the judgment.

Analysis and Determination

7. I have carefully considered the application filed before this court, the reply filed by the Objectors as well as the written submissions filed by both parties. The only issue for determination is whether the Administrator has advanced sufficient grounds to arrest the judgment in this matter and to have the case re-opened.

8. The Administrator submits that when the matter first came up for hearing on July 27, 2021 his Advocate was not present and the hearing was then re-scheduled to October 11, 2021 which turned out to be a Public holiday. That the matter was then re-scheduled for hearing on November 12, 2021. But instead of the matter being listed as a hearing on that date it was instead listed for delivery of judgment on November 19, 2021. On November 19, 2021 the Administrator appeared online and vehemently opposed the delivery of the judgment.

9. The Administrator submits that he has a constitutional right to be heard. That if the judgment is delivered without a full hearing then his rights to be heard will be violated subjecting him to a miscarriage of justice. The Administrator then filed this application seeking to arrest the judgment and seeking to re-open the case to enable him testify.

10. On their part, the Objectors submit that this application is frivolous and amounts to an abuse of court process. They aver that the Administrator unlawfully obtained letters of Administration to the estate way back in December 2007. That for the past fifteen (15) years the Administrator has been unlawfully disposing of assets belonging to the estate.

11. The objectors deny that the Administrators right to a fair hearing was violated. They assert that the Administrator and his Advocate were at all times fully aware of the dates allocated for hearing but that they failed and/or declined to appear on said dates.

12. The Objectors ask that the court do not accede to the request to re-open the case. They submit that the present application is part of the Administrators agenda to delay, derail and scuttle this case. It is urged that many of the beneficiaries are now elderly and desire to have the case concluded so that they may get what is due to them from the estate. Finally the Objectors urge this court to dismiss this application in it's entirety.

13. I have carefully perused the record in this matter. As stated earlier hearing of the matter commenced on 15th June 2021 on that date counsel for both parties were present in court. However due to problems and interruptions with the virtual system not much headway was made. The hearing aborted and was re-scheduled for July 27, 2021.

14. On July 27, 2021 the Administrator appeared in person and sought an adjournment on the basis that his Advocate had travelled and was not available. Despite strenuous objection from counsel for the Objectors the court reluctantly allowed the adjournment and re-scheduled the matter for 11th August 2021.

15. On August 11, 2021 both the Administrators and his Advocate failed to attend court. The court ruled that since the date had been taken by consent and given that no reason and/or explanation was given for the absence of the Administrator and his Advocate then the hearing would proceed in their absence.

16. The Objectors called two (2) witnesses and closed their case. The court gave directions for the filing of written submissions and the matter was slated for mention on 22nd September 2021.

17. Once again both the Administrator and his Advocate failed to appear in court on September 22, 2021. The court received the written submissions filed by the Objector and set down the matter for judgment on November 12, 2021.

18. On the judgment date the Administrator appeared in court in person and objected to the reading of the judgment. He became rowdy and was shouting on an attempt to prevent the judgment being read. The court advised the Administrator to consult his lawyer and to return on November 26, 2021. On that date counsel for the Administrator appeared in court and revealed that they had filed the summons dated November 24, 2021 seeking to arrest the judgment and re-open the case. The court then gave directions for the hearing of this application.

19. This application has been brought under section 1A and 3A of the *Civil Procedure Act* which provide for the inherent jurisdiction of the court to ensure that justice is done in all cases.

20. *In the matter of the Estate of George M.mboroki* Meru HCSC No. 357 of 2004 Hon Justice William Ouko (as he then was) held as follows:-

> " The law of Succession Act, like section 3A of the *Civil Procedure Act* has a saving provision as to the court's jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic

authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."

21. In appropriate cases and for convincing reason a court may arrest delivery of a judgment and order the re-opening of a case where circumstances warrant that such orders be made.

22. However arresting a judgment is not a power to be exercised lightly. In *Musa Misango – vs – Erica Musigire & other* [1966] EA 390,Hon Sir Udo Udoma chief Justice of Uganda slated as follows:-

> " Now it is unquestionable that, both under the inherent power of the court, and also under a specific rule to that effect under the Judicature Act, the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to the trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think that they will be successful in the end lies a wide region, and the court have properly considered this power of arresting an action and deciding it without trial as one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take place of the old demurrer by which the defendant challenged the validity of the Plaintiff's claims as a matter of law. It is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad." [Emphasis added]

23. Clearly, thereof the powers granted to a court to arrest a decision ought to be used very sparingly and only in order to avoid injustice or hardship to a litigant. Such power ought only be exercised in cases of inadvertence or excusable mistake or error, but not to assist a litigant who is intent on abusing the court process or who is invoking said power merely in an attempt to obstruct and/or delay the course of justice.

24. From the narration given of the sequence of events in this matter it is clear that even where the hearing dates were taken by consent, the Administrator and his Advocate both failed to come to court. They did not even have the courtesy to inform court of the reasons for their absence.

25. I note that the Administrator was fully aware of the allocated hearing date of August 11, 2021 since the date was given in his presence. He had a duty to inform the Advocate of the date. Both failed to attend court on that date. If the Administrator or his Advocate had any difficulty with respect to the allocated date then one of them ought to have come to court to explain that difficulty. Instead, both kept away.

26. Notwithstanding the presence of the Administrator in court when the hearing date was given, counsel for the Objectors took the added precaution of serving a hearing notice upon the Administrators Advocate reminding them of the date of 1August 1, 2021. An Affidavit of service dated August 23, 2021 confirms that on August 2, 2021 an e-mail was sent to the Advocate for the Administrator notifying them of the hearing date.

27. The Administrator alleges that his Advocate was unable to attend court on August 11, 2021 as he had travelled to Malawi. If this was truly the case then why did the Respondent who had notice of the hearing date not attend court to explain the unavailability of his Advocate. Moreover, any Advocate

worth his salt would either notify court in advance of his unavailability or would instruct another Advocate to hold his brief.

28. Further the alleged travel by the Administrators Advocate to Malawi did not clash with the hearing date. According to the annexed documentation the ticket was issued on October 27, 2021, travel took place from October 12, 2021 which was a full twelve (12) weeks After the hearing date of August 11, 2021. Therefore, this trip to Malawi could not have prevented the Advocate from attending court.

29. As a court I do not wish to cast negative aspersions on a member of the Bar. However it is manifest that the averments made by the Administrator to explain his own and his lawyers absence from court are blatant lies. I do agree with the Objectors that the aim was to obstruct, scuttle and/or delay the conclusion of this matter.

30. It is telling that the Application to re-open the case is being made in November 2021 more than three (3) months after the case had been concluded and two (2) days before the judgment was scheduled to be delivered.

31. The Administrator has held the confirmed Grant for the past 15 years. Clearly, it is in his interests to delay the case. The parties (including the Administrator himself) are all elderly. This is an old case which was filed in the year 2007. I find that no sufficient and/or persuasive reasons have been advanced for the court to exercise its discretion in favour of the Administrator. The estate needs to be finalized. Accordingly, I dismiss in its entirety the summons dated 24th November 2021. This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 5TH DAY OF AUGUST, 2022.

MAUREEN A. ODERO

JUDGE