

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 362 OF 2014

IN THE MATTER OF THE ESTATE OF NABUTETE OBBUYI (DECEASED)

RULING

1. What I am tasked with determining is the Summons, dated 11th October 2019. It seeks dismissal of a summons for revocation of grant, dated 9th May 2014, for want of prosecution. Although a response was filed to the application, vide an affidavit filed on 2nd October 2014, the summons for revocation has remained unprosecuted, something which has hindered completion of administration. I shall refer to the administratrix as the applicant, for the purpose of the application dated 11th October 2019.

2. The applicant in the summons for revocation of grant, who I shall refer hereto as the respondent, for the purpose of the instant application, filed a response to the application. It is dated 1st October 2019. It is averred that the respondent had, on numerous occasions, taken hearing dates, but the matter never took off for failure on the part of the applicant to attend court. It is contested that 5 years have elapsed as a hearing date had been taken on 17th October 2019. It is further averred that the applicant had not responded to the revocation application, and that there was no provision for dismissal of applications in probate proceedings for want of prosecution, and that the only option would be for the court to order closure of the file.

3. Directions were given for disposal of the application by way of written submissions. Those submissions have been filed, I have read through them and noted the arguments made.

4. The cause herein was initiated on 9th May 2014, by way of a summons for revocation of grant. The grant sought to be revoked was not made in this cause, but in Maseno PMSC No. 42 of 2011, on 29th September 2011. The said grant was confirmed on 7th June 2012, on an application dated 5th June 2012, and a certificate of confirmation of grant was duly issued, dated 12th June 2012. It should be stated that the instant cause exists solely for the purpose of revocation of the grant in Maseno PMSC No. 42 of 2011, which is the principal suit, and which has not been consolidated with the instant one.

5. Has the respondent been diligent in getting his summons for revocation prosecuted? After the summons was lodged at the registry herein on 9th May 2014, the respondent attended the court registry on 7th August 2014, to obtain a date for directions on its disposal. He was given the 7th October 2014. Come 7th October 2014, directions were given, for *viva voce* evidence, with dates for hearing to be given at the registry. On 5th November 2014, the respondent obtained a date at the registry for hearing, on 10th March 2015. Come 10th March 2015, the matter was stood over generally, as the parties, including the respondent, did not attend court. Fresh dates were obtained at the registry on 23rd February 2016, for hearing on 20th July 2016. Come 20th July 2016, the matter was taken out of the cause list by the respondent. Another date was obtained at the registry on 21st February 2017, for hearing, on 21st February 2017. Come 21st February 2017, the respondent asked for the file to be placed aside. That was done, but the advocate did not show up thereafter to prosecute the matter, and the same was stood over generally. Another date was taken at the registry on 22nd February 2017, for hearing, on 4th July 2017. The court did not sit on 4th July 2017, and the matter was allocated 30th December 2017 as the next hearing date. There was no hearing on 30th December 2017, and it is no clear what happened on that day. No step was taken in the course of 2018 with regard to the matter. The next action was on 20th February 2019, when the respondent obtained 15th May 2019 as the next hearing date. For some reason, the matter was not heard on that day, and another date was given, at the registry, for hearing on 17th October 2019. The matter did not proceed, the respondent was arguing that the application was unopposed.

6. As will be seen from the record, the respondent did not take any serious steps to have the matter prosecuted. It was adjourned on several occasions due to absence of the parties, and in particular the applicant, or his advocate. If there was any seriousness on the part of the respondent, the matter, no doubt would have been prosecuted between 7th October 2014, when directions were given, and 17th October 2019, when the matter last came up for hearing. There was no diligence or keenness to proceed. It would appear that the respondent was happy to fix dates for hearing, but took no step to ensure that the matter would proceed on the dates appointed for hearing.

7. The respondent has argued that the application was unopposed. Yet, the record reflects that the applicant had filed a replying affidavit on 2nd October 2014. So, the application was not unopposed. In any event, even if there was no reply, that would be no excuse for the respondent failing to prosecute his application. The court gave directions for *viva voce* hearing, all that the respondent needed to do was to take the witness stand and give evidence, and call his witnesses, the absence of the applicant notwithstanding, so long as there was evidence of proper service.

8. He also argues that there is no provision in probate practice for dismissal of interlocutory applications for want of prosecution. It is true that no such provisions exist, in both the Law of Succession Act, Cap 160, Laws of Kenya, and the Probate and Administration Rules, on that. That, however, does not give leeway to parties to be indolent, secure in the knowledge that no action can be taken, and that once they file applications, the same can remain hanging over the heads of the other parties *ad infinitum*. That cannot be the true or correct position. The principle of reasonableness applies. The applications must be prosecuted within reasonable time. I agree that 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 eons would amount to abuse of court process, and Rule 73 can properly be invoked in such a scenario. I agree with the decision, in *Kipkoech Chumo Serem & another vs. Kiprotich Ng'eno* [2016] eKLR (Githua J), that, although the law governing probate process does not provide

for dismissal of probate causes, or any of their processes, for want of prosecution, the court can still invoke inherent powers to dismiss such processes.

9. It has been argued that the best course of action should be to close the file, leaving room for its reopening once the parties get their act together. I believe that approach should only apply to a succession cause, commenced by a petition, where a grant has been made. For as long as the grant has not been confirmed, the court ought not dismiss the petition, instead the file should be closed. The instant cause was not initiated by way of a petition, and no grant was issued herein. The cause commenced by way of a summons for revocation of grant. The grant was made in Maseno PMCSC No. 42 of 2011, and that is the cause which can only be closed rather than being dismissed. The instant cause is available for dismissal, since it is a mere application.

10. I find that the respondent has been indolent, and has not been keen enough to prosecute his summons for revocation of grant, dated 9th May 2014. The same should not hang over the head of the applicant herein forever. I am persuaded that a case has been made out for its dismissal for want of prosecution, and I hereby dismiss the same. The application dated 11th October 2019, is disposed of in those terms. The instant file, that is to say Kakamega HCSC No. 362 of 2014, shall be closed. The file in Maseno PMCSC No. 42 of 2011 shall be returned to the appropriate registry for finalization of administration. Any party aggrieved by the orders made herein has leave of 28 days to move the Court of Appeal appropriately. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6TH DAY OF AUGUST, 2021

W MUSYOKA

JUDGE