



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 515 OF 2005

IN THE MATTER OF THE ESTATE OF MONICA WANJIRU MUSASIA (DECEASED)

VICTOR KELONYE MUSASIA PETITIONER/APPLICANT

VERSUS

MAULDING AMBUGA MUSASIAOBJECTOR/RESPONDENT

RULING

1. The Petitioner/Applicant has filed an application dated 25th July, 2019 seeking for orders that the application by the Objector/Respondent for revocation of grant dated 26th June, 2014 be dismissed for want of prosecution. The application is premised on the grounds on the face of the application and supported by the affidavit of the applicant. The applicant contends that the respondent has never prosecuted the said application since the year 2016. That more than one year has passed without setting down the application for hearing. That the applicant is unable to administer the estate of the deceased due to the pending application. That the pendency of the application is causing suffering to other beneficiaries of the estate. That it is in the interest of justice that the orders sought be allowed.

2. The application was opposed by the respondent through his replying affidavit sworn on 17th October, 2019. The respondent depones that he has not in any way delayed the hearing and determination of the said application. That it is the applicant and his witnesses who have caused all the previous adjournments. That after the 2017 General Elections a notice was put up at the Court Registry that the court was giving priority to election petitions. That it was not possible for the matter to be heard that time. That dismissal of the case will greatly prejudice the family of the deceased.

3. The applicant made written submissions and urged that there has been inordinate delay in the prosecution of the application. That no action had been taken for more than one year before the current application was filed. That the explanation by the respondent for failure to take action on the matter is flimsy as election petitions are long gone. That his actions indicate that he has lost interest in the matter. That the delay is not excusable. That the delay is causing prejudice to him as he is unable to administer the estate according to law. That the beneficiaries in the succession cause are anxious to get their share of the estate. That due to inaction by the respondent he has lost contact with witnesses.

4. I have considered the application and the objection thereto. The application is made under Rule 73 of the Probate and Administration Rules and under Order 17 Rule 3 of the Civil Procedure Act. Rule 73 grants this court inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

5. I have perused the court file. I have noted that the last hearing date was taken by the parties on 14/3/2017 for hearing on 5th and 6th November, 2017. When the case came up for hearing on those two dates parties were not present in court and an order was made for a hearing date to be taken at the registry. No action was taken on the matter from that date till when the applicant filed the application dated 25/7/2019 seeking to have the suit dismissed.

6. In **Argan Wekesa Okumu –V- Dima College Limited & 2 Others (2015) eKLR** the Court considered the principles for dismissal of a suit for want of prosecution and held that:-

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant in this case must meet the burden of proof in seeking the dismissal of the plaintiff’s case for want of prosecution see the case of Ivita –Vs- Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

7. In **Mwangi S. Kimenyi –Vs. Attorney General & Another, Civil Suit Misc. No. 720 of 2009** it was held that:-

“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the act straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties – the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

8. The court takes judicial notice after the August, 2017 General Elections the court was giving priority to hearings on election petitions. That went on until March, 2018. The respondent should then explain for the delay after March, 2018. There was a delay of about 14 months from that date till when the application was filed in July, 2019.

9. There is no explanation why the respondent did not fix the case for hearing after March, 2018. I consider an inaction for 14 months to be inordinate delay. The delay was inexcusable.

10. It is the discretion of the court to dismiss a matter for want of prosecution. The court has to consider whether there is any prejudice to be occasioned to any of the parties. The matter herein involves distribution of family property. The applicant has not shown the prejudice occasioned to him by the delay. It will not be appropriate to dismiss the suit. Justice in the case requires that the respondent be given another opportunity to prosecute his application.

11. In the premises the application dated 25/7/2019 is declined. However since the respondent is to blame for the delay he is condemned to pay the costs of the application to the applicant. The respondent to take a hearing date at the registry for the hearing of the application on priority basis.

Delivered, dated and signed at Kakamega this 29th day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for the Objector/Respondent

Petitioner/Applicant - Absent

Objector/Respondent - Absent

Court Assistant - Polycap

30 days right of appeal.