



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION MISC CAUSE NO. 198 OF 2010

IN THE MATTER OF THE ESTATE OF ENOCH WARIADHO PUDHA alias

ENOCH WARIADHO (DECEASED)

BETWEEN

ISIAIAH OBATH ODUYU.....1st OBJECTOR/APPLICANT

DEDAN OTIENO PUDHA2nd OBJECTOR/APPLICANT

AND

DALMAS ODHIAMBO E. WARIADHO.....PETITIONER/RESPONDENT

RULING

Introduction

1. ENOCH WARIADHO PUDHA alias ENOCH WARIADHO (*deceased*) died sometimes on 28.07.1973.

2. GAMALIEL ODUYU who described himself as son of the deceased filed **SIAYA MAGISTRATE'S COURT SUCCESSION CAUSE NO. 83 OF 1994** and on 29.04.2020, the grant in respect of deceased's estate was confirmed and **SOUTH GEM/WAGAOI/277** was distributed wholly to him.

3. Subsequently, DALMAS ODHIAMBO E. WARIADHO (*Petitioner/Respondent*) who also described himself as son of the deceased filed **SIAYA MAGISTRATE'S COURT SUCCESSION CAUSE NO. 56 OF 2009** and on 29.04.2010, the grant in respect of deceased's estate was confirmed and the following assets were distributed wholly to the Petitioner/Respondent;

1) SOUTH GEM/WAGAOI/132

2) SOUTH GEM/WAGAOI/150

3) SOUTH GEM/WAGAOI/294

4) SOUTH GEM/WAGAOI/707

4. By summons for revocation dated 27.05.2010 filed on even dated, ISIAIAH OBATH ODUYU and DEDAN OTIENO PUDHA (1st and 2nd Objectors/Applicants) respectively moved the court seeking the following order:

1) Pending the hearing and determination of the application, there be a prohibition order of injunction restraining the Petitioner/Respondent from disposing off, selling and or appropriating the assets of ENOCH WARIADHO PUDHA alias ENOCH WARIADHO (*deceased*) and more particularly LR. Nos. SOUTH GEM/WAGAI/132, 150, 294 and 707 in any manner whatsoever and however

2) Revocation and or Annulment of Grant of Letters of Administration issued to the Petitioner/Respondent on 30.11.2009 and confirmed on 29.04.2010 in respect of the deceased's estate issued in **SIAYA MAGISTRATE'S COURT SUCCESSION CAUSE NO. 56 OF 2009**

3) That the Register in respect of Land Parcel No. SOUTH GE/WAGAI/143 be rectified and the name of the Petitioner/Respondent be rescinded and or deleted therefrom and the same be declared as forming part of the deceased's estate

4) Costs be borne by the Petitioner/Respondent.

5. On 28.05.2010, the court issued a prohibition order of injunction restraining the Petitioner/Respondent from disposing off, selling and or appropriating the assets of ENOCH WARIADHO PUDHA alias ENOCH WARIADHO (**deceased**) and more particularly LR. Nos. **SOUTH GEM/WAGAI/132, 150, 294 and 707** pending the hearing and determination of the application dated 27.05.2010.

6. The summons for revocation dated 27.05.2010 was dismissed for want of prosecution, by the deputy registrar of this court, on 19.05.16.

7. By a notice of motion dated 12.03.2020 filed on 17.03.2020, the Objectors/Applicants have moved the court seeking orders that:

1) The dismissal order made on 19.05.2016 and all consequential orders be varied and or set aside and the interim orders issued on 28.05.2010 be reinstated.

2) Costs be provided for

8. The application is based on the grounds among others that the Objectors/Applicants' former advocate did not inform them of the outcome of the case and that they were not served with a notice to show cause before their application was dismissed.

9. The application is supported by an affidavit jointly sworn by the Objectors/Applicants on 12.03.2020 in which they reiterate the grounds on the face of the application.

10. The Petitioner/Respondent has by his replying affidavit sworn on 05.08.2020 opposed the application on the grounds that the Objectors/Applicants are guilty of inordinate delay and do not deserve an equitable remedy.

Analysis and Determination

11. I have considered the application in the light of the affidavits on record and the submissions filed by counsel for the parties.

12. Order 17 Rule 2(1) gives the court the discretion to dismiss a suit where no application has been made or step taken by either party for one year, upon issuance of 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.

13. It is not disputed that the summons for revocation dated 27.05.2010 was dismissed by the deputy registrar of this court on 19.05.16 which was 6 years after it was filed and there having been no action to prosecute it.

14. The legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of civil suits and can be found in Article 159(2) (b) of the Constitution that justice shall not be delayed.

15. There is no doubt that the Objectors/Applicants and their advocate had a duty to take steps to prosecute their summons for revocation dated 27.05.2010. I have perused the court file and did not find any evidence that either the Objectors/Applicants or their advocates were served with the notice to show cause before the summons for revocation was dismissed.

16. Whereas the Objectors/Applicants are guilty of inordinate delay, natural justice demands that no person should be condemned unheard. **Section 3A** of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met.

17. On the basis that the Objectors/Applicants and their advocate were not given notice before the dismissal order was issued, I find that it would not be prudent to drive the Objectors/Applicants away from the seat of justice yet the summons dated 27.05.2010 for revocation of the grant, *prima facie* discloses a triable issues.

18. Having said that, I also find that it would be in the interest of justice to preserve the estate of the deceased pending the hearing of the summons for revocation.

19. Consequently, notice of motion dated 12.03.2020 filed on 17.03.2020 is considered and found to have merit and it is allowed in the following terms:

1) The dismissal order made on 19.05.2016 and all consequential orders are hereby varied and set aside

2) The summons for revocation dated 27.05.2010 filed on even dated is hereby reinstated for hearing

3) The interim orders issued on 28.05.2010 are hereby reinstated

4) Mention on 07.12.2020 for directions as to the hearing of the pending applications

DATED THIS 12th DAY OF November 2020

T. W. CHERERE

JUDGE

For the Objectors/Applicants - Ms. Owino for Owino & Company Advocates

For the Respondent/Petitioner- Mr. Mungao for Mungáo Rachier Adv.