REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO. 836 OF 2015

IN THE MATTER OF THE ESTATE OF:

ONANGO ANYANGO ……..……..…….. DECEASED

AND

BENARD OCHIENG AJIGO ……..….. PETITIONER/RESPONDENT

VERSUS

ANYANGO OUYA AWINO ……..……. OBJECTOR/APPLICANT

RULING

[1] The application dated 10th April 2018, is made by the applicant, **ANYANGO OUYA AWINO**, against the respondent, **BERNARD OCHIENG AJIGO**, who was granted letters of administration intestate respecting the late **ONANGO ANYANGO** (deceased) on the 7th July 2009, in his capacity as a step-son of the deceased.

The grant was later confirmed and a certificate of confirmation of grant issued on the 16th February 2010. However, on the 23rd April 2012, the applicant filed summons for revocation of the grant on the basic ground that the proceedings to obtain the grant were defective as no court order was obtained by the applicant on the presumption of the death of the deceased.

[2] Directions were on the 26th October 2012 given by the court for the application to be canvassed by way of affidavit evidence but was on the 8th March 2013, changed to hearing by **"viva voce"** evidence.

Hearing commenced with the applicant's evidence taken before **C.B. NAGILLA, JUDGE**, on an unspecified date, thereafter, the matter was adjourned to 10th March 2015, for further hearing, but the applicant applied for an adjournment to avail witnesses.

The next hearing date was fixed for 10th June 2015, but since the matter could not be reached on that date, it was adjourned to 13th July 2015, when it was further adjourned to 13th November 2015, for reasons which were not specified.

[3] The next hearing date was on 13th October 2015, when the matter was adjourned and fixed for mention on 9th November 2015 to confirm the position of the applicant's legal representation and to consider the proposal to have the matter transferred from Kisii High Court to Homa Bay High Court.

On the 9th November 2015, the matter was transferred to the High court at Homa Bay and was to be mentioned there for directions on the 26th November 2015.

There is no record of what happened on that 26th November 2015, but the matter was later to be mentioned on 25th February 2016, when nothing seems to have occurred.

The next mention for directions was on 5th May 2016, but the matter was adjourned to 9th June 2016.

[4] The court did not sit on that 9th June 2016 thereby prompting an adjournment to 30th June 2016, when matter was fixed for hearing on 14th July 2016, but was adjourned to 7th September 2016, and again adjourned on that date.

It was fixed for hearing on 2nd November 2016, when it was fixed for mention on 1st December 2016, to confirm typing of proceedings for

purposes of further hearing of the matter.

On that 19th December 2016, when the court ordered that the typing of proceedings be done away with and the hearing be commenced **"de-novo"** (afresh) on the 15th February 2017, on which date the matter was adjourned to 10th May 2017, but was again adjourned and later fixed for mention for directions on 6th November 2017, on which date it was fixed for hearing on 15th January 2018.

[5] On the 15th January 2018, the hearing was adjourned to 5th April 2017, with a caution that that was the last adjournment for the applicant/objector.

On that 5th April 2017, both parties appeared through their advocates but the applicant sought for a hearing on another date. The request was declined by the court which went ahead to dismiss the summons for revocation of grant for want of prosecution.

[6] It was that dismissal order which prompted the filing by the applicant of the present application dated 10th April 2018, seeking the main order that the summons for revocation of grant dated 17th August 2012, be reinstated for hearing and disposal.

The grounds in support of the application are in the body of the appropriate notice of motion and in the applicant's supporting affidavit dated 10th April 2018. The respondent is opposed to the application on the basis of the grounds contained in his replying affidavit dated 31st May 2018.

[7] At the hearing of the application, the applicant was represented by learned counsel, **MR. NYAUKE**, while learned counsel, **MR. OGUTTU MBOYA**, appeared for the respondent.

The applicant relied on his supporting grounds and contended that he failed to appear in court on 5th April 2017, due to illness but his advocate appeared and requested for an adjournment which was refused by the court. He requested for a **"second bite at the cherry"** and urged this court to allow his application while promising to comply with any conditions that the court may give.

The respondent in his response, contended that the application is misconceived inasmuch as it is brought under the provisions of the Civil

Procedure Act and Rules rather than the provisions of the Law of Succession Act. As such, this was not a technical mistake to be cured by **Article 159 (2) (a)** of the **Constitution**.

[8] The respondent doubted whether the applicant would comply with conditions given by the court considering that he is yet to pay a sum of Kshs.7000/= as ordered by the court.

The respondent contended that the applicant was given a second **"bite at the cherry"** and cannot now seek a third bite. That, he did not heed the court's warning of a last adjournment and is bent at abusing the court process. That, he did not give any credible reason for this court to discharge the dismissal order. The respondent therefore urged this court to dismiss the application.

[9] This court has given due consideration to the application in the light of the supporting grounds and those in opposition thereto as well as the rival submissions of the parties and may state that indeed the application was made under the wrong provisions of the law. Instead of the **Law of Succession Act**, the applicant sought to rely on the **Civil Procedure Act** and **Rules** to bring the application, contrary to **Rule 63** of the **Probate and Administration Rules, 1980**, which provides for restrictive application of the Civil Procedure Rules in matters of intestate succession. However, contrary to what the respondent contended, this was a procedural error and therefore a technical mistake capable of being cured by **Article 159 (2) (a)** of the **Constitution** and even **Rule 73** of the **Probate and Administration Rules**. It cannot therefore be said that the application is incurably defective and in the interest of justice it must be considered on its substance rather than form or procedural technicality.

[10] The duty of the court is to do justice to all parties who should not be punished or held to account for mistakes made by those they appoint to represent them in court.

Neither should they be punished for mistakes or omissions which are not deliberated or are beyond their control.

Having gone through the history of this matter, it is apparent to this court that there was no intention on the part of any party to deliberately delay the hearing of the impugned summons for revocation of grant.

The application for adjournment were made by both sides and the orders of adjournment were at times made **"suo-moto"** by the court. This matter has passed through a number of judges and this had the effect of creating logistic problems which invariably affected the expeditious disposal of the matter.

[11] In some instances the matter could not proceed due to the absence of their advocates and this could not be blamed on the parties. This is a succession matter and what is at stake is a grant of letters of administration Intestate issued to the respondent in a manner which the applicant believes was improper, and defective. For there to be certainty on the validity of the grant and to put the minds of the parties to rest, it would be fair and justice if the impugned summons for revocation of grant is revived for hearing.

In that regard, the application is hereby allowed. The summons for revocation of grant dated 17th August 2012, is reinstated for hearing on the merits.

However, fresh directions will have to be taken on the mode of hearing or otherwise. Therefore, the matter shall be mentioned for directions on 19th December, 2018.

Ordered accordingly.

J.R. KARANJAH

JUDGE

26.10.2018

[Read and signed this **26th** day of **October, 2018**]