REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 43 OF 2010

In The Matter Of:

The Estate of the Estate of John M'ikunyuam'Mairanyi- (Deceased)

CHARLES NTIRITUM'IKUNYUA.....1ST PETITIONER/APPLICANT

MARIAM WANJAM'IKUNYUA……..2ND PETITIONER

PROF. JUDITH NJUE…….RESPONDENT

RULING

Incarceration not impediment to pursue case

[1] By a Summons dated 3rd June 2015, the Applicant is seeking this court to:

(1) Set aside the ruling made on 14.3.2013; and

(2) Allow him an opportunity to be heard on the application dated 15.11.2012.

He has founded his said application upon article 159 of the Constitution, section 47 of the Law of Succession Act and Rules 73 of the Probate and Administration Rules. The application is supported by the affidavit of the Applicant and submissions filed in court.

[2] The Applicant averred that, when the application dated 15.11.2012 came up for hearing on 19.2.2013, he was in prison serving sentence in Meru CMCCRC NO 131 OF 2009 and could not, therefore, attend court. Nonetheless, the said application proceeded ex parte and in the ruling delivered on 14.3.2013, property known as L.R NO KIIRUA/NAARI/1179 was removed from the list of the estate property. He argued that, at the time, he was not represented by legal counsel. And, therefore, other than being condemned unheard, the estate in which he is the administrator and sole beneficiary was also deprived of property of great value. He stated that his incarceration explains his absence in the proceedings in question and failure to respond to the impugned application. And for those reasons, he urged the court to set aside the ruling delivered on 14.3.2013.

Application was opposed

[3] The Respondent opposed the application and filed a replying affidavit and submissions to that effect. It was averred that, the Applicant was duly served with the application dated 15.11.2012 and even if he was in custody he should have filed a response in good time. In any event, the Respondent deposed that when the said application came up for hearing on 20th November 2012, the Applicant was present and he

was not opposed to the granting of interim orders; and the court then set the application down for hearing on 19th February 2013- see ruling dated 14th March 2013. But, on 19th February 2013 the Applicant neither attended court for the hearing of nor filed any response to the said application. The hearing then proceeded ex parte. See the record of court for the day. Ultimately, on 14th March 2013 the ruling was delivered. Since that day, the Applicant only filed the current application after two years. The Respondent viewed this application as an afterthought, an abuse of court process and one brought in bad faith. They argued that the Applicant was present when the hearing date was fixed and so he can only have himself to blame for his absence on the date of hearing. She also delved into the proprietorship of the suit land which she said has never belonged to the Applicant and that she has been in possession of and has lived on the land since 1978. Therefore, the inclusion of her property by the Applicant in his father's estate was fraudulent. The land was registered in the name of the Respondent on 9.2.1983 and Title Deed was accordingly issued. She was of the view that this court is *functus officio*in any event. For those reasons, she beseeched the court to dismiss the application.

DETERMINATION

[4] I have carefully considered the facts of this case, the rival submissions and judicial authorities cited and I am of the following orientation. The saviour in this application will be the official record of court. On 20th November, 2012 the court recorded:-,

Respondent/Petitioner-

Mr. Charles TiritoM'Ikunyua- I have no objection

The recording comes after the submissions by Mr. C. Kariuki on the application dated 15th November 2012. And after hearing the parties, the court granted prayer 2 and set down the other prayers for hearing on 19th February 2013. On 19th February, 2013 the Applicant did not attend court; the application was heard and ruling was delivered on 14th March 2013. The Applicant has acknowledged in paragraph 5 of his affidavit in support of his current application that he was served with the application dated 15th November, 2012. He was also present on 20th November 2012 and he had no objection to the application. He did not seek time to file a response. And up to now, he has not explained why he did not file any response after service. Again, the hearing date of 19th February 2013 was taken inter partes. That aside, by the time the Applicant was sentenced on 27th November 2012- see paragraph 1 of the judgment by Lesiit J in MERU HCCRA NO 93 OF 2012-, the Applicant was aware of the hearing date for the application dated 15th November 2012 i.e. 19th February, 2013. And, although incarceration may impose some difficulties or hesitations upon a party, there are clear provisions within the prison regime and the law to facilitate or enable a party to follow through on his cases, whether criminal or civil. Therefore, I think it would be wrong to lay as law that incarceration in Kenya prison equals to absolute prohibition or disablement on a party from following through on his litigation in court. The Applicant has not shown the efforts he undertook to file his response or to attend court on 19th February 2013. He had ample time to do so. Again, the application before court was filed two years after the ruling in question was delivered and is tinctured with laches. Accordingly, even if there was a change of heart to oppose the application, he ought to have acted quickly as a show of good faith. When I take all these things into account, this application is an afterthought and it is guilty of laches; and therefore a candidate for dismissal.

Dispute relates to title to land

[5] But before I close, I wish to point out one other important thing. Upon perusal of the documents annexed to the application and the replies thereto, it is clear that the contest is purely one of title to L.R NO [particulars withheld] between the Applicant as the administrator of the estate of the deceased and the Respondent who is the registered proprietor. Such dispute does not belong to and cannot be determined in a succession cause; it should be determined by the court that is constitutionally mandated to determine disputes relating to title to land: and that court is Environment and Land Court established under article 162(2)(b) and legislation enacted under article 162(3) of the Constitution. Accordingly, subject to

limitation of actions, the Applicant is at liberty to pursue his claim before E&L Court. And, it is only after the claim between the administrator and the Respondentis determined by E & L Courtthat the property belongs to the deceased, that it will form part of the estate and be subject of this succession cause. That jurisdiction should be understood properly to avoid parties clogging succession causes with such disputes.

[6] Now I turn to the application. The upshot of my above analysis is this. The application is attended to by inordinate delay, thus, trapped by laches. According to article 159 of the Constitution…Justice shall be done to all without delay; to all the parties and not only one of the parties in a suit. Therefore, as a matter of constitutional principle under article 159 of the Constitution, the delay herein is not explained and therefore inexcusable; granting such application will be an injustice to the Respondent. Discretion of court in such case shouldonly be exercised within the parameters established in the case of **SHAH v MGOGO& ANOTHER (1976) EA**, in the words of Harris J., discretion of the Court is only:

> **"Exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice"**.

I have also noted that this claim is one of title and should be determined by E&L Court. it is a source Again, the Applicant has not satisfied the court why he did not file a response or attend court on the hearing of the application dated 15th November, 2012. Therefore, his constitutional right to be heard was not violated. Accordingly, the application dated 3rd June 2015 is not meritorious and I dismiss it. However, in view of the findings of the court and the nature of the application I will not condemn the Applicant to costs. Instead, I order that each party shall bear own costs of the application. It is so ordered.

Dated, signed and delivered in court at Meru this 31st day of January 2017

F. GIKONYO

JUDGE

In the presence of:

M/s. Kiome advocate for respondent

Igweta advocate for Mwango advocate for applicant

F. GIKONYO

JUDGE