



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 149 OF 1999

IN THE MATTER OF THE ESTATE OF NGARI MURANDI alias LIVISTONE MBARIU(DECEASED)

WILFRED MURANDI MAINGI.....PETITIONER/RESPONDENT

-VERSUS-

SAMWEL MWANGI NJOROGE (DECEASED) SUBSTITUTED BY

STEPHEN MURIMI MWANGI.....PROTESTER/APPLICANT

RULING

On 9th December 2016 the parties, fixed, in the registry, the protest dated 5th March 2010 for hearing on the 4th May 2017.

On that date Mr. Kibira advocate for the protestor, neither the protestor was present in court.

Mr. Gori for the petitioner, and the petitioner, were present. He prayed that the protest be dismissed for non-attendance which he deemed to be due to lack of interest in the matter, and asked the court to fix the summons for confirmation of the grant for hearing

Upon perusal of the record I noted that Mr. Gori's submissions were supported by the above record. I allowed his prayers, dismissed the protest and directed that the SCG dated 25th October 2010 be heard on the 7th September 2017.

For some reason the matter did not proceed on that date and was fixed in the registry for hearing on the 7th November 2016.

On that same day the protestor filed a summons general dated 6th November 2016 under s. 47 of the LOSA and rule 73 of the P&A rules.

He sought orders staying the hearing of the SCG scheduled for the same date, and the setting aside of the orders of 4th May 2017 dismissing the protest for want of prosecution.

The explanation for not attending court was inadvertence on the part of the advocate for failing to diarise the matter. For that reason, the protestor was not aware of the date and did not attend court. These facts are attested in the separate affidavits of Mr. Kibira and the protestor.

The application is vehemently opposed by Mr. Gori for the petitioner. The reason is that the protestor's only interest is to delay the matter as he is not only a stranger to the proceedings but also not a beneficiary of the deceased's estate.

Parties chose to rely on their affidavits.

I have carefully considered the rival affidavits. At the centre of this dispute is the parcel of land no. **Kiini/Ruiru/86** the estate of the deceased which has been the subject of this cause, between the protestor's father, now deceased and the petitioner.

Judges before me have heard the matter, and Makhandia J delivered a ruling on 22nd July 2009 where he determined that the person to whom the grant ought to issue was the petitioner herein as opposed to the father of the protestor herein.

Upon being issued with the grant he filed the SCG dated 25th January 2010 where he depones that the deceased estate ought to devolve to him absolutely. This what the protestor and his father are against as they feel that they too are beneficially entitled.

Section 47 provides:

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Rule 73 in turn provides

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

This court is empowered to determine the issue at hand which is whether the Protester's application is merited, and whether the excuse given for failure to attend court is sufficient to merit the discretion of this court and warrant the prayers sought.

Obviously, a deliberate act or omission to delay the hearing of the matter would definite be an abuse of the court process, but if the failure was as a result of an honest mistake then this court is expected to do only that which will meet the ends of justice.

Counsel for the protester has taken responsibility for failing to inform his client of the date, and omitting to diarise the same, despite sending a representative to fix the matter for hearing at the registry. Mistakes, made in good faith are excusable in the greater good of the interest of justice. If the protester had any designs of delaying this matter any longer now they have a lesson to learn from, it can be dismissed for want of prosecution.

Be that as it may, from the record this matter concerns land. Land matters are in their nature emotive and tend to involve more than just the parties who appear on the pleadings, and more so when they come in the form of succession proceedings. Reading from the period of time this matter has been in this court, I think it is only in order that each party gets to have their day in court, so that the issues before this court can be determined once and for all. Contrary to Mr. Gori's contention, the issue is no longer about who is to be the administrator of the estate, that was determined by Makhandia J as he then was. The issue now is who is beneficially entitled to it.

To meet that end I allow the application in the following terms;

1. The order issued on the 4th May 2017 dismissing the protest dated 5th March 2010 is hereby set aside with costs to the petitioner.
2. The prayer for staying the hearing of the SCG having been overtaken by events is considered as spent
3. That the Protest dated 5th March 2010 and the Summons for confirmation of Grant dated 25th January 2010 be heard together
4. The directions already given by other judges before me that the matter be heard by way of oral evidence are hereby re- issued.
5. The parties to agree on a hearing date.
6. The petitioner to have the costs of this application.

Dated, delivered and signed this 26th Day of January 2017 at Nyeri.

TERESIA M MATHEKA

JUDGE

Mr. Kinuthia holding brief for Gori for petitioner/ respondent

Mwai GK Kibira for protester N/A

Johnson Mwangi present.

By consent hearing of the Summons and the Protest on the 10th April 2018

Judge