



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

SUCCESSION NO. 24 OF 1995.

**IN THE MATTER OF THE ESTATE OF JOSEPH LISABUSHILA
ITAMBO ::::::::::::::::::::::::::::::::::::::: DECEASED.**

AND

WILBRODA SHIKANGA)

AGRIPINA KHAHUMBI) ::::::::::::::: APPLICANTS/PETITIONERS.

AND

PETER LITONDE LISABUSHILA ::::::: OBJECTOR/RESPONDENT.

VINCENT SHILAHU LISABUSHILA ::::: THIRD PARTY/APPLICANT.

R U L I N G.

1. The 2nd petitioner/applicant, Agripina Khahumbi filed the application dated 23rd January, 2015 brought under the provisions of sections 45 and 47 of the Law of Succession Act and rules 49 and 73 of the Probate and Administration Rules.
2. The applicant seeks the following orders:-
 - i. *spent*
 - ii. *That the objector/respondents (sic) objection proceedings dated 22nd April, 1996 be dismissed for want of prosecution, this being an abuse of this courts (sic) process and thereafter letters of grant of administration intestate be issued to the 2nd petitioner/applicant only as the 1st petitioner/applicant is now deceased.*
 - iii. *That prior to grant of prayer 2 above the court to fix the matter down for confirmation as this is a very old for (sic) matter.;*
 - iv. *That costs of this application be in the causes (sic).*
3. The application is based on the following grounds -
 - i. The objector/ respondent instituted objection proceedings vide an applicant (sic) dated 22nd April, 1996;
 - ii. That after setting the matter down for hearing several times the objector/respondent never attended court on any occasion while the petitioner applicant was ever present;
 - iii. That the matter was last in court the court registry (sic) on 20th September, 2005 and the objector/respondent never made any further attempt to set it down for hearing;

- iv. That the objector/respondent has no interest in prosecuting these objection proceedings;
 - v. That the objection proceedings are therefore an abuse of the courts (sic) process and ought to be dismissed;
 - vi. That this application has been brought in good faith, without prejudice, in the interest of justice and that's (sic) the objector/respondent will suffer no prejudice if the application is allowed as prayed.
4. Mr. Vadanga, learned counsel for the applicant submitted that the application is supported by the affidavit of Agripinah Khahumbi, the 2nd petitioner/applicant dated 23rd January, 2015. She deposes that it is close to ten (10) years since the objection proceedings were set down for hearing but the same have never commenced due to non-attendance on the part of the objector/respondent. The objection proceedings were filed on 22nd April, 1996. She further deposes that the objector has never shown any interest in prosecuting the objection proceedings. She adds that the 1st petitioner/applicant has since passed on as shown by a copy of her death certificate attached to her affidavit as “**AK 1**”.
 5. The applicant avers that the objection proceedings are therefore an abuse of the court process. In view of the foregoing she wants the objection proceedings struck out for want of prosecution and that she be allowed to proceed with the succession proceedings. She avers that she is the only surviving beneficiary as shown in the copy of the chief’s letter dated 21/1/2015 attached to her affidavit and marked as “**AK 2**”.

The respondent’s response

6. Vincent Shilaho Lisabushila, the 3rd party objector, filed a replying affidavit dated 3rd July, 2015, opposing the application. He deposes that his father Peter Litonde Lisabushila had objected to the making of grant in this cause to the applicants/petitioners. His father however died before the hearing of the application. He further deposes that the petitioners had colluded with the area chief who gave them the letter stating that they petitioners were children of the late Lisabushila while in the real sense they are not.
7. The respondent listed the names of the children of Lisabushila as follows:-
 - i. Peter Litonde Lisabushila (deceased)
 - ii. Clement Shivachi.
 - iii. Alphonse Shivachi.
 - iv. Francis Mudi (deceased)
 - v. Atnas Isialamule.
 - vi. Josina Tsiyeli - daughter.
8. He further avers that the petitioners are grand children of the deceased herein and they do not qualify to administer the estate. He deposes that the objection proceedings are not an abuse of the court process and that the objector never refused to attend court. He avers that the suit land is family land.
9. The issue for determination in this application is -
 - i. ***Whether the objection proceedings dated 22nd April, 1996 should be dismissed for want of prosecution***

Determination of the application -

10. The objection proceedings herein were filed on 22nd April, 1996, which is 9 years and 9 months ago. No proper reason has been advanced by the third party/respondent as to why the objector never attended court or fixed the matter for hearing. The claim by Vincent Shilaho Lisabushila

that his father passed away is not supported by evidence of a death certificate.

11. This court also notes that contrary to what the respondent submitted in court, the court record of 13th May, 2015, does not show that the court granted orders for substitution of the original objector Peter Litonde Lisabushila. On the said date, Justice Mrima gave the following orders -

"In order to give room for the intended substitution of the alleged deceased objector, this matter shall be stood over generally".

12. Succession matters are emotive matters that should not be dismissed lightly. It is clear that the respondent's father made no effort to prosecute the objection proceedings for a long time. His son has however showed interest in doing so.

13. In the case of **Esther Muthoni Kuria Vs. Francis Kimani Kuria and Another** [2006] eKLR, Justice B.P. Kubo when faced with an application seeking dismissal of an application for revocation of grant for want of prosecution declined to issue the orders sought and held that the respondents had raised grave issues which should not be swept under the carpet and that the issues raised should go to full trial. He found that the inconvenience caused thereby could be compensated through an award of costs arising from the application for dismissal.

14. Although a grant has not been issued in this case, this court applies the same principles applied by Justice Kubo in the **Esther Muthoni case** (supra). The respondent herein in his affidavit raises weighty issues and alleges that the applicant herein is not a beneficiary of the deceased's estate and lists six (6) persons in his affidavit whom he claims to be beneficially entitled to the deceased's estate. Such a matter cannot be treated lightly. This court would be perpetrating injustice by shutting its eyes to such an allegation.

15. It will be in the interest of justice to give the respondent an opportunity to litigate this matter. This court therefore invokes the powers vested on it under the provisions of rule 73 of the Probate and Administration rules, which allows this court to make such orders as may be necessary to meet the ends of justice and to prevent abuse of the process of the court. I therefore make the following orders –

- i. The application dated 23rd January, 2015, seeking orders for dismissal of the objection proceedings for want of prosecution is hereby dismissed;
- ii. The respondent is granted leave to file a supplementary affidavit within sixty (60) days from today's date attaching a certified copy of the death certificate of his late father Peter Litonde Lisabushila;
- iii. The respondent's application dated 16th March, 2015 will be listed for hearing on a date to be fixed at the registry on a priority basis after compliance with order (ii) above; and
- iv. If the respondent fails to comply with order (ii) above within the time stipulated herein, the applicant will be at liberty to file summons for confirmation of the grant issued on 12th February, 1996; and
- v. Costs in the cause.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this28TH day of**JANUARY**.....2016.

NJOKI MWANGI

JUDGE

In the presence of:-

..... the applicant

..... the respondent

.....Court Assistant