

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 979 OF 1992

IN THE MATTER OF THE ESTATE OF ROMAN KARIUKI KIRU (DECEASED)

RULING

1. I am tasked with determining the summons dated 1st September 2015, taken out under Rule 73 of the Probate and Administration Rules. The applicant seeks an order for the setting aside of the order made on 24th June, 2015, dismissing the suit for want of prosecution. He would like to have the same reinstated and heard on its merits.
2. The application is based on several grounds; which are set out on its face. It is stated that when the matter was listed for notice to show cause the applicant's advocates had not received the requisite notice and therefore they were unaware of the said hearing. The applicant denies that his advocates failed or neglected to pursue the matter, and blames the court's registry for the delay in the finalization of the matter by its failure, on occasion, to avail the court file for fixing of convenient hearing dates of the pending application. It is urged that this is an old matter which should proceed to its logical conclusion to allow the beneficiaries inherit the deceased's estate. It is further stated that the beneficiaries have reached a consensus and are ready to have the grant confirmed. The applicant pleads that he is an innocent party who should not be penalized for the mistakes of his advocates (if any) who are duly bound to list matters for hearing.
3. The affidavit supporting the application was sworn on 1st September 2015 by Moses Gatitu Wang'oo, the advocate acting for the applicant. He avers that on 11th December 2014 his firm filed a Summons for Confirmation of Grant dated 25th August 2014, and that since then his firm has been trying to trace the court file in view of fixing a convenient hearing date of the application. He states their efforts in that behalf have been fruitless and it is apparent that the file could not be traced. He further avers that it is in the interests of justice that the order dismissing the applicant's suit be set aside and that the suit be set down for hearing as the administrators herein are not to blame and are interested in finalizing the case.
4. The applicant has sought the court's discretion to set aside its orders. Explanations have been given as to what occasioned non-prosecution of the said suit. It is explained that the court file was not traced at the court's registry. A letter addressed to the registry in that behalf, dated 9th July 2015 and received on 21st July 2015 at the court registry, is attached.
5. I have scrutinised the record. There is a notice on record, which issued from the court registry on an undocumented date, addressed to Jane Warigia Kariuki. It bears the date of 29th May 2015 on the official stamp of the Family Division Registry. There is no affidavit of service to signify effective service of the notice on the person indicated on the record. The matter was placed before the Judge on 24th June 2015, and as there was no appearance, the grant rectified on 19th September 2011 was revoked. The matter was then marked as closed.
6. The record reveals that Jane Warigia Kariuki had been appointed administrator by a grant made on 14th October 1992. She died on 12th October 1999, and her place as administrator was taken by Josphat Muchiri Kariuki and Hannah Wambui Kuria, vide a rectification of the grant of letters of administration on record on 19th September 2011. As it is, the undated notice ought not to have been addressed to the said Jane Warigia Kariuki, but rather to the current administrators, Josphat Muchiri Kariuki and Hannah Wambui Kuria.

7. I find it curious that the notice was addressed to the administrator personally, yet the administrators on record are represented by counsel. The law firm of Kimani Charagu & Co., Advocates, came on record for the administrators on 9th April 2010, and was replaced by Messrs. Gatitu Wang'oo & Co., Advocates, who came on record on 11th December 2014. Upon coming on record, Messrs. Gatitu Wang'oo & Co., Advocates, lodged in court, on the same date, an application for confirmation of grant, dated 25th August 2014.
8. It is evident that this was not a proper case for closing the matter for the same was still live and active, and in any case there was no proper service of the undated notice.
9. Consequently, I find merit in the application dated 1st September 2015, and I do hereby set aside the orders made on 24th June 2015. I reinstate the grant of letters of administration intestate on record, dated 14th October 1992 and rectified on 16th September 2011. The administrators shall move with speed to prosecute their application for confirmation of grant dated 25th August 2014.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH DAY OF FEBRUARY, 2016.

W. MUSYOKA

JUDGE