



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 3436 OF 2005
IN THE MATTER OF THE ESTATE OF ALBERT OGINGA (DECEASED)
BEATRICE OWINO OGINGA.....APPLICANT/OBJECTOR
VERSUS
ANNE BUORE OGINGA.....RESPONDENT/ADMINISTRATOR

RULING

1. Albert Oginga died intestate on 21st June 2005. The respondent petitioned this court for a grant of letters of administration intestate in her capacity as the widow of the deceased. She stated that the deceased was survived by herself and five adult children. The grant was issued to her on 27th March 2006.
2. The applicant filed summons dated 29th January 2007 seeking the revocation or alteration to include herself and her child as equal beneficiaries of the estate of the deceased. It was her case that she was lawfully married to the deceased under Luo customary law in 1996 and together they were blessed with one child, facts which the respondent failed to disclose to the court in her petition for grant. On 7th April 2014 this court dismissed the applicant's summons of revocation dated 29th January 2007 for want of prosecution. The court proceeded to confirm the grant on 16th June 2014.
3. The applicant filed the current application dated 11th December 2014 under certificate of urgency seeking orders that pending the hearing and determination of the application the court does issue an order restraining the respondent and/or her servants from demanding rent, levying distress, harassing or in any manner interfering with or evicting the tenant from the premises in BuruBuru Phase One Block 74/202. She also asked that the court be pleased to set aside orders issued on 7th April 2014 dismissing the objector's application dated 29th January 2007 and to reinstate the said summons and to set aside and/or revoke the grant issued on 27th March 2006 and the certificate of confirmation of grant dated 16th June 2014.
4. Her application was premised on grounds that the respondent through her advocates had issued notice to vacate to the tenant of the suit premises within 14 days from 3rd December 2014; that although her advocate on record was issued with hearing notices for her application dated 29th

January 2007 the said advocate did not appear in court and neither did he send a representative for reasons that the hearing dates were not entered in their diary. It was her case that she did not appear in court personally as the notices were not communicated to her and was thus not aware of the hearing of her summons for revocation. The applicant argued that the mistake of her advocate should not be visited upon her and that it was in the interest of justice and in the interest of all parties that the matter be concluded in a just and fair manner.

5. The respondent opposed the application through her replying affidavit dated 22nd February 2016. She stated that the application was not brought under the proper law and should thus be dismissed on that ground alone. She further stated that setting aside a valid order of the court was a judicial discretion which the applicant did not deserve as her advocate on record was duly served with hearing notices but the said advocate failed to show up in court in all the three instances. The applicant's objection was dismissed as it had been unprosecuted for five and a half years. There was laxity on the part of the applicant and her advocates. The respondent averred that despite filing the objection in 2007, no attempt was made to fix it for hearing and hence no useful purpose would be served by reinstating the matter. Anything else would be a delay of justice. She, lastly, stated that the administration of the estate and distribution of property of the estate have been completed subsequent to the confirmation of the grant issued to her, hence the estate of the deceased was no more as the beneficiaries had already legally appropriated their respective shares.
6. The parties agreed to file written submissions in support of their cases. I have duly considered the submissions. I have also considered the authorities cited by either side.
7. **Order 12 rule 7** of the **Civil Procedure Rules** provides for the setting aside of judgment or dismissal in default of appearance, and provides that the court, on application, may set aside or vary the judgment or order upon such terms as may be just. The applicant filed her objection dated 29th January 2007. The same remained unprosecuted for a long time. The respondent set it down for hearing on 25th February 2014. Neither the applicant nor her advocate was in attendance despite proper service. The court adjourned the matter to allow them to attend. Another hearing notice for 7th April 2014 was duly served on the applicant's advocate on record and again neither the applicant nor her advocate attended court that day. The respondent's advocate moved the court to have the objection dismissed for want of prosecution. The court allowed the application and dismissed the objection.
8. In the case of **National Bank of Kenya Ltd –v- Joseph Philip Onyango & Another (Kisumu Civil Case No. 489 of 1994)** it was stated that:-

“It is the plaintiff who filed the suit and the responsibility to prosecute the suit for hearing and determination squarely lies on the shoulders of the plaintiff or his advocates.”

9. I agree with the submissions by counsel for the applicant that when a court is faced with this kind of application it should consider the following factors:-
 - a. the best interests of the parties to the suit;
 - b. whether there was inordinate and inexcusable delay on the part of the applicant;
 - c. whether it is in the interests of justice for the court to exercise its discretion in favour of the applicant; and, lastly,
 - d. the court has to consider the circumstances prior and after the delivery of the ruling or judgment that is sought to be set aside.

To add to the factors, the court should consider the nature of the case, the circumstances that led to the delay and/or order sought to be set aside, whether prejudice will be suffered by the setting aside or reinstatement of the matter, and whether costs should compensate for that prejudice. It should always be borne in mind that justice is best served when a dispute is heard and determined on merits. The competing principle, however, is that litigation must come to an end.

10. Let me acknowledge that, depending on the circumstances by the case, as applicant may successfully rely on the failures of his advocates to set aside the dismissal of his application for non-attendance when the advocates had been duly served. Advocates do sometimes get served and do not pass the information to their clients, and do not attend the hearing, which may lead to the hearing or dismissal of the matter in the absence of, or without the knowledge, of the client. Even where this happens, it should be borne in mind that a case belongs to the litigant and not his advocate, and it is therefore expected that the litigant constantly checks with his advocate to be informed about the happenings of the case (**J.G. Builders –v- Plan International (2015)eKLR and Savings and Loans Ltd –v- Susan Wanjiru Muritu HCCC NO. 397 of 2002**).
11. In **Susan Gachambi Kamiri & Another –v- British Insurance Co. Ltd [2014] eKLR**, the High Court was dealing with an application to reinstate a dismissed suit. The case of **Allen –v- Alfred Mcalphine & Sons [1968]I ALL ER 543** was cited in which the following was observed:-
- “.....that where the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or both, the court may in discretion dismiss the action straightaway. On the other hand this power should not be exercised unless the court is satisfied..... that there has been inordinate delay and inexcusable delay on the part of the plaintiff or his lawyers and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action or is such as is likely to course or to have caused serious prejudice to the defendant either as between themselves and the plaintiff or between each other or between them and a third party.”**
12. The deceased herein died on 21st June 2005. The petition was filed by the respondent on 9th December 2005. The grant was issued on 27th March 2006. The application to revoke the grant was filed by the applicant on 30th January 2007, and the same was dismissed for non-attendance to prosecute on 7th April 2014. On 11th December 2014 the applicant filed the present application seeking to reinstate the application for revocation.
13. The factual position is that the deceased left a widow (the respondent) and five adult children. In the application to revoke the grant, the applicant stated that she got married to the deceased on or about 2000 under Luo customary law as a second wife and they got a daughter, and that the petitioner had not disclosed their existence at the time of filing the petition. She stated that they were living with the deceased at his property in Buru Buru Estate No. Nairobi/Block 74/202 between 2000 and 2005 when he died; that during that period the deceased and the respondent had separated. Her case was that she and her daughter were beneficiaries of the estate of the deceased who ought to have been included in the petition. She stated that she had equal right to the grant of letters of administration.
14. The respondent filed a replying affidavit to state that she got married to the deceased in 1963 under customary law and the marriage was formalized on 13th November 1996, and therefore that the deceased had no capacity to enter into any other marriage as he died while this one was still subsisting. She denied that the deceased had married the applicant, or that the two had the daughter. Her case was that the applicant was married to one Noah Nyabwa (who had sworn an affidavit ('AB01') to that effect). She stated that she was not guilty of any non-disclosure as she was the only widow to the deceased who was entitled to petition for the grant.
15. There is HCCC No. 982 of 2005 in Nairobi which the applicant had filed against the respondent and her son seeking an injunction to restrain them from interfering with her possession and/or receiving rent over Nairobi/Block 74/202. It does not appear to be in dispute that this was one of the deceased's properties. The deceased and the respondent were living on it when the former allegedly married the applicant. When the application for revocation was dismissed the respondent got the grant to be confirmed. This and the rest of the properties of the estate were shared between her and her children.

16. It has been indicated in the foregoing that the application for revocation remained unprosecuted for over seven years. The facts leading to the dismissal were that directions had been given that the application be heard on the basis of oral evidence. The record shows that on 29th October 2012 the parties came for hearing but the matter was adjourned because the applicant was absent. She was said to be unwell. The matter came up for hearing on 25th February 2014. The date had been taken by the respondent. The applicant was served but failed to attend. Same for her counsel. The matter was adjourned to 7th April 2014. The date was served but, again, neither the applicant nor her counsel attended. The application was dismissed for want of prosecution. Both on 29th October 2012 and on 25th February 2014 the applicant had been ordered to pay Kshs.5,000/= in costs before the next hearing date. It is apparent that there was no payment. The grant was confirmed on 16th June 2014. The present application was brought on 11th December 2016. The applicant concedes that on the occasions when her application for revocation came for hearing both she and her advocate were absent, although the advocate had been served with the hearing notice. Her explanation was that on each occasion when her advocate was served he did not communicate the information to her and therefore she did not know that the matter was coming up for hearing. On the part of the advocate, she stated that although the hearing notices had been received the same were not brought to his attention and neither were they diarised, and therefore that he did not on each occasion know that the matter was coming up. It is notable that the advocate did not swear an affidavit to confirm the claim by the applicant. The respondent, quite expectedly, doubted that failure to diarise the matter would have happened on both occasions. There was no rebuttal of the averment by the applicant that she was not informed by her advocate of the hearing dates. However, she had no explanation for the fact that since June 2013 she had not moved to have her application heard, and that on both the occasions in question it was the respondent who was pushing to have her application heard. Added to the fact that she had not paid the costs that had been ordered against her on two occasions, I do not find that she was diligent in pursuing her application. She is not deserving of the exercise of discretion in her favour.

17. There is another reason why it is difficult to grant this application. The respondent had sworn that the applicant was not the deceased's wife but that she was the wife of one Noah Nyabwa who had sworn an affidavit to confirm that position. The respondent's case was that the daughter of the applicant was fathered by this man. The applicant challenged this and asked for DNA test to be conducted to determine the paternity of the daughter. An order was granted to have DNA test done. Whereas Noah Nyabwa was ready and willing to undertake the test the applicant was unwilling to avail the daughter for the same. She dilly-dallied until Noah Nyabwa died on 12th August 2011, and was buried. The respondent is saying that with the death and burial of Noah Nyabwa the opportunity to confirm that he was the husband of the applicant and the father of her daughter has been lost. It would therefore be prejudicial to the respondent to re-open the case. This material point was not challenged by the applicant.

18. In conclusion, I find that, after considering the facts of the case against the principles outlined in the foregoing, the applicant's application dated 11th December 2014 cannot be allowed. It is consequently dismissed with costs.

DATED and SIGNED at NAIROBI this 6TH day of JUNE 2016

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 7TH day of JUNE 2016

W. MUSYOKA

JUDGE