

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2941 OF 1995

IN THE MATTER OF THE ESTATE OF NJIHIA MONI - (DECEASED)

RULING

1. The application that I am asked to determine is dated 10th October 2012. It seeks several orders, among them stay of further proceedings or dealings in Dagoretti/Waithaka/T.74 and a temporary injunction with regard to the same property, pending hearing and determination of the application. There is also prayers for the setting aside of orders granted on 28th February 2012 pertaining to Dagoretti/Waithaka/T.74 and for the reinstatement of an application dated 29th March 2007.
2. The grounds upon which the application is premised are set out on the face of the application and on the two affidavits sworn in support of the application. Both affidavits were sworn on 10th October 2012, one by the advocate handling the matter, Monica Muthani, and the other by the applicant, Karanja Moni.
3. The orders are sought in respect of an application dated 29th March 2007, which was dismissed on 28th February 2012 for non-attendance and want of prosecution by the person who had filed it in court. The applicant concedes that a hearing notice for 28th February 2012 had been served on the applicant's counsel, but states that his advocates misdiarised it and therefore did not attend court on the appointed date. He pleads that he should not be punished for the sins of his advocate. He would like the application reinstated.
4. The respondents have filed a reply to the application through the affidavit sworn on 5th November 2012 by the second respondent, David G. Moni Njihia. His states that the applicant has not come to court with clean hands. In the first place, there had been proper notification of the hearing scheduled for 28th February 2012. Secondly, the application dated 10th October 2012 was brought after an inordinate delay for the although the dismissal was on 28th February 2012, the applicant did not move the court until 11th October 2012. Finally, the applicant was never keen on prosecuting the application dated 29th March 2007, which does not in any event raise any weighty issues.
5. Directions were given that the application dated 10th October 2012 be disposed of by way of written submissions. The applicant's submissions were filed on 9th July 2014 while those by the respondents were filed on 23rd July 2014. The applicant's submissions largely summarise the two affidavits filed in support of the application, while the respondents' mainly submit that the application dated 10th October 2012 is entirely founded on provisions of the Civil Procedure Rules which do not apply in probate causes.
6. The principal prayers in the application dated 10th October 2012 is for the setting aside of the orders made on 28th February 2012 and the reinstatement of the application dated 29th March 2007. The other prayers all largely incidental or ancillary to this main prayers. Indeed, prayers 1, 2 and 3 have been spent.
7. The application sought to be reinstated is dated 30th March 2007, and not 29th March 2007 as pleaded in the application dated 10th October 2012. The same was filed in court on 20th April

2007. The respondents replied to the application vide the affidavit sworn on 24th July 2007 by David Moni Njihia. The record reflects that counsel for the respondents, invited counsel for the applicant to fix dates for the hearing of the application dated 30th March 2007. The invitations are by letters dated 8th May 2008, 30th March 2009, 28th October 2009, 10th August 2010 and 22nd November 2011. The latter invitation culminated in the fixing of the date of 28th February 2012. The date was fixed *ex-parte* by a clerk from the office of the respondent's advocates. A hearing notice dated 11th January 2012 was duly served on counsel for the applicant, who received it on 12th January 2012. receipt of service was acknowledged by affixing the official stamp of M. Muthami advocate and the signature of the receiving officer. The said hearing notice is attached to the affidavit of service filed herein on 28th February 2012, sworn on 27th February 2012.
8. There is also on record a notice dated 17th January 2012 of a call over scheduled for 26th January 2012. The advocate for the respondents attended the callover, the applicant was not represented. The matter was confirmed for hearing on 28th February 2012.
 9. The handwritten record shows that on 23rd July 2007, the court directed the applicant to obtain a date for the hearing of the application dated 30th March 2007 at the registry. A clerk from the respondents' advocates attended the court registry on 14th May 2008, 8th April; 2009, 16th November 2009, 1st September 2010 and 13th December 2011 to fix dates for the hearing of the applicant's application of 30th March 2007. On all these occasions the applicant's advocate's representatives did not attend court.
 10. The applicant concedes that his advocates were served with notice for the hearing on 28th February 2012, but they inadvertently misdiarised the date. The erroneous date indicated in the alleged misdiarisation has not been disclosed nor is there annexed to the affidavits in support evidence of such misdiarisation. There is no proof that there was any such misdiarisation.
 11. The history of the application dated 30th March 2007 from the date of its filing to its dismissal, reveal that the applicant was less than enthusiastic about its prosecution. He was all through indolent about it and left it to the respondents to pursue its prosecution.
 12. I do not find any justification for grant of the orders sought in the application dated 10th October 2012. In any event it seeks to reinstate an application which does not exist. The application dated 10th October 2012 is without merit. I hereby dismiss it and award costs thereof to the respondents.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd DAY OF January 2015.

W. MUSYOKA

JUDGE