REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. SUCC. APPL. NO. 61 OF 2006

IN THE MATTER OF ESTATE OF KIPKOECH AKWA BARGUTWA - DECEASED

STEPHEN KIMELI KOECH ……. 1ST APPLICANT

NATHAN KIBET KOECH …….2ND APPLICANT

VERSUS

WILLIAM KIPLAGAT KOECH …….....RESPONDENT

RULING

1. The application for determination before the court is the Notice of Motion dated 3rd October, 2014. The substantive prayer in the application is that the "suit" filed on 10th March, 2006 be dismissed for want of prosecution and that the costs of the suit and the application be awarded to the applicant.

2. The application is predicated upon the grounds stated on its face which are by and large replicated in the supporting affidavit sworn on 6th October, 2014 by the respondent in the main succession cause **Mr. *William Kiplagat Koech*** (the applicant).

3. In his depositions in the supporting affidavit, the applicant clarified that what he described as a "suit" in the application is the summons for revocation or annulment of grant filed on 11th March, 2006.

The applicant contends that the delay of four years in taking a date for the hearing of the summons since 31st December, 2010 was inordinate and inexcusable; that the respondents for no good reason failed to take advantage of the opportunity created for them by the court in a ruling delivered on 31st December 2010 when the court dismissed the applicant's earlier application dated 20th October, 2009 in which similar orders had been sought and lastly, that the pendency of the suit was occasioning prejudice to the applicant.

4. The application is opposed. The 1st Respondent ***Mr. Stephen Kimeli Koech*** swore a replying affidavit on 10th December, 2014. In the main, the 1st respondent denied that the delay in prosecuting the summons was inexcusable and maintained that the delay was caused by the demise of their previous advocate the late ***Mr. Salim Wanyonyi Machio*** the proprietor of ***Machio & Company Advocates;*** that their advocate passed on in the year 2011 but he was unaware of his demise until the date he was served with the instant application; that together with the 2nd applicant, they had fully entrusted their late advocate with the task of prosecuting the summons on their behalf. He asserted that they were ready and willing to fix the summons for hearing if given a chance.

5. The application was argued before me on 25th March, 2013. Learned counsel ***Mr. Aseso*** appeared for the applicant while learned counsel ***Mr. Kagunza*** held brief for ***Mr. Mwinamo*** , Counsel on record for the respondents.

Mr. Aseso in his submissions expounded on the grounds supporting the application and added that the respondents have failed to fix the summons for hearing nine years after it was filed; that the respondents ought to have been following up the progress of their case instead of waiting to receive letters from their advocate; that the delay was inordinate and was hampering the hearing of another civil suit involving both parties namely Eldoret High Court Civil Case Number 102 of 2006. Learned Counsel further submitted that the pendency of the summons was occasioning prejudice to the applicant and urged the court to allow the application.

6. Learned Counsel ***Mr. Kagunza*** in opposing the application

re-iterated the depositions in the Replying affidavit. In addition, he contended that the respondents cannot be faulted for the failures of their previous late advocate who had been fully in charge of their case; that the mere fact that the application is opposed is sufficient demonstration of the respondent's interest in prosecuting the summons; that one of the assets in the grant sought to be revoked is a parcel of land measuring about 43 acres; that substantive justice which is emphasized under ***Article 159*** of the ***Constitution*** requires that the dispute between the parties be heard on merit.

Finally, Counsel urged the court to exercise its discretion in allowing the respondents to prosecute their summons as in his view, no prejudice would be caused to the respondent that cannot be compensated by way of costs if the application was dismissed.

7. I have fully reflected on the application, the affidavits filed by the parties, the submissions made by learned counsel for both parties and the two persuasive authorities cited by the applicant in support of the application.

As correctly submitted by the respondents' counsel, those authorities namely ***Duncan Waithaka Ndegwa V Joseph Maina Wangombe [2013] eKLR*** and ***Gideon Sitelo Konchella vs Daima Rank Ltd [2013] eKLR*** dealt with applications for reinstatement of cases which had previously been dismissed for want of prosecution. They are not therefore directly relevant to the instant application.

8. Having said that, it is clear from the submissions made on behalf of the parties that it is not disputed that there has been a delay of about 9 years in the prosecution of the summons for revocation of grant filed by the respondents on 10th March 2006. It is also not contested that this court excused the failure of the respondents to prosecute the summons from 26th January, 2007 to 22nd October, 2009 when the applicant first moved the court to dismiss the summons for want of prosecution.

9. The court record shows that the court in its ruling delivered on 31st December, 2010 found the reasons advanced by the respondent for failure to fix a hearing date for the summons prior to the filing of the application satisfactory and declined to exercise its discretion in the applicant's favour by granting the orders sought in that application.

In view of the above, this court will only deal with the delay in failing to take any step to prosecute the summons from 31st December, 2010 to the date the instant application was filed.

10. In explaining the respondents failure to take steps to facilitate hearing of the summons, the respondents mainly contended that they had entrusted their previous counsel with the conduct of the proceedings and that they were unaware of his passing till they were served with the instant application. In my considered opinion, this explanation is not entirely convincing or satisfactory because as correctly submitted by ***Mr. Aseso,*** the respondents were the applicants in the summons not their advocates. They ought to have taken a personal interest in their case and followed up the matter with their advocate to ensure that steps were being taken to progress the hearing of the summons. Instead of doing so, the

respondents went to sleep and only woke up when they were served with the application under consideration.

In ***Habo Agencies Limited v Wilfred Odhiambo Musingo Civil Appeal (Application) No. 124 of 2004 (2015) eKLR*** Waki J (as he then was) was considering an application for leave to file an appeal out of time which was grounded on reasons similar to those being advanced by the respondents in this application. I wholly concur with the learned judge when he stated as follows;

> ***"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel".***

11. In view of the foregoing, I agree with ***Mr. Aseso's*** submission that the reasons advanced by the respondents to explain the prolonged delay in having this matter prosecuted is not satisfactory. If this were an ordinary civil suit, I would not have had any hesitation in ordering its dismissal for want of prosecution. But this is not an ordinary civil suit. It is a summons taken out under ***Section 76*** of the ***law of Succession Act*** arising from a contested succession cause in which the legal validity of the process in which the Estate of the late ***Kipkoech Akwa Bargutwa*** was distributed in the lower court.

It is submitted that the Estate comprises of several assets including land measuring about 43 acres whose ownership apparently depends on the outcome of the summons sought to be dismissed in the instant application.

12. Without condoning the indolence exhibited by the respondents towards ensuring the prosecution of this matter, given that what is at stake in these proceedings is an Estate of a deceased person and the manner in which it was distributed, i think that the dictates of substantive justice dictates that the summons be heard and determined on its merits. But I am also cognizant of the fact that substantive justice also requires that disputes filed in courts must be determined expeditiously.

13. This application undoubtedly exemplifies the dilemma which courts sometimes face in their endeavor to balance the scales of justice and in implementing the requirements of ***Article 159*** of the ***Constitution*** which enjoins courts to administer substantive justice while at the same time ensuring that cases are expeditiously determined.

14. In my view, this application requires this court to balance the competing interests of the disputants in this succession cause namely the interest of the respondents in having the summons heard on merit against the interest of the applicant in having the summons expeditiously determined.

Having taken all the relevant factors into account, I in the interest of justice decline to allow the application to give the respondents a last chance to prosecute their summons but on condition that they will take appropriate steps or action to progress the hearing of the summons within the next three months in default of which the summons dated 10th March, 2006 will stand dismissed for want of prosecution with costs to the applicant. The applicant is also awarded costs of this application.

15. It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET this** 29th day of April 2015.

In the presence of:-

Mr. Mwinamu for the Appellant/Respondent

No appearance for the Respondent/Applicant though duly notified.

Kemboi – court clerk.

C.W GITHUA

JUDGE

29.4.2015