



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.19 OF 2000

IN THE MATTER OF THE ESTATE OF TERESA NYABATE ASANGO – DECEASED

ASKAH MOCHACHE MOMANYI.....PETITIONER/APPLICANT

VERSUS

MONICAH NYABOKE JOHNRESPONDENT

RULING

1. THE SECOND APPLICATION by **Askah Mocheche Momanyi** is dated 12th September 2013 by the Petitioner-Applicant.

The application seeks orders:

- a. *Spent*
- b. *That there be stay of hearing and determination of the Respondent's Notice of Motion dated 17th May 2013, pending hearing and determination of this application for REVIEW or further orders of this Honourable Court.*
- c. *That this Honourable Court do vary/discharge and or set aside it's orders given on the 16th May 2011 and issued on 24th May 2011, subsequent, incidental and consequential thereto.*
- d. *That the court does make such incidental and or ancillary relief(s) it deems fit to grant in the interest of justice.*
- e. *That the costs of the application be provided for.*

2. This is based on the following grounds:

- i. *The Respondent is the daughter of one Bathseba Bosibori – deceased who is alleged to have been married to Teresia Nyabate Asango – deceased, in a woman to woman marriage, whose Estate is in dispute.*
- ii. *However, the marriage of Bathseba Bosibori – deceased to Teresia Nyabate Asango – deceased was challenged in CMCC No.55 of 2008 at Kisii and the Court made a finding that Bathseba Bosibori was never a wife of the deceased Teresia Nyabate. Consequently her mortal remains were enjoined from being buried on the parcel of Land **NYARIBARI CHACHE/BB/5054**, the only earthly belonging of the deceased Teresia Nyabate Asango.*

- iii. That (therefore) the Respondent **MONICAH NYABOKE JOHN (ORONGO)** cannot purpose to be a heir to an Estate of the deceased – Teresia Nyabate Asango, under her mother first was married to the deceased, unless there is a travesty of justice.
- iv. The elder brother to the Respondent are Wilfred Mongare Orina who was party to CMCC No.55 of 2008 is settled at their father's Land at Nyamira County. While the sister – the Respondent herein by the same father and the same mother is claiming interests in parcel of Land known as **NYARIBARI CHACHE/BB/5054**.
- v. The said Wilfred Mong'are Orina has filed HCCA No.146 of 2008 at Kisii High Court from the judgment and decree of CMCC No.55 of 2008 at Kisii.
- vi. The Petitioner-Applicant herein had filed HCCC No.83 of 2009 and the judgment entered in her favour.

3. The applicant' supporting affidavit is sworn on 12th September 2013. In her affidavit she states as follows:

1. The grant herein was confirmed on 6th February 2000, see "AMM-1"
2. I filed a Civil Suit No.111 of 2002 against one **Bethseba Bosibori** – deceased. Judgment obtained in default despite being duly served, see "AMM-2" (a), (c) and (d).
3. Upon the death of **Bethseba Bosibori** I filed Civil Suit CMCC No.55 of 2008 at Kisii, against one **Alfred Mongare**, the eldest son of Bethseba Bosibori, barring him from burring the deceased in parcel of land known as **NYARIBARI CHACHE/BB/5054**, see "AMM-3" (a) & (b).
4. The defendant herein in CMCC No.55 of 2008, Kisii appealed against the decision and filed Appeal No.146 of 2008 which is still pending before this court, see AMM-4.
5. At this time the Respondent, **Monicah Nyaboke John** applied for revocation of the grant herein under application dated 26th May 2008, see AMM-5.
6. At the same time the Respondent filed an application dated 24th September 2008 for injunction amongst other prayers which was dismissed by an order of this Honourable Court. Ruling was on 6th June 2009, see AMM-6(a) and (b).
7. The Court granted a stay of execution of orders on 16th May 2011.
8. The said court ordered for fresh grant in the joint names of the applicant and the Respondent, either of them or jointly who may apply for confirmation.
9. The said stay was granted pending the hearing and determination of the intended appeal.
10. The notice of the intended appeal was issued and served on 27th May 2011.
11. The record of appeal ought to have been filed within 60 days of filing of notice.
12. To-date no record of the intended appeal has been filed and therefore there is no appeal pending hearing and determination.
13. The Respondent herein appears to have abandoned the intended appeal.
14. Therefore, the order issued on 16th May 2011 be discharged, to set and set a stage for confirmation.

4. THE RESPONDENT'S REPLYING AFFIDAVIT,

The Respondent states as follows:

1. *The confirmed grant of letters of administration issued on 6th February 2000 to the Applicant, Askah Mocheche Momanyi, were duly revoked on 16th May 2011 and a fresh grant issued in joint names of the applicant and Respondent.*
2. *I state that my late mother did not have knowledge of the matter referred to in para.3 of the supporting affidavit.*
3. *Interlocutory judgment relating to land matter is inapplicable. This Kisii Case No.117 of 2002 must be taken have abetted.*
4. *Allegations in para.8 are that:*
 - a. *No evidence of duly stamped copy thereof.*
 - b. *No evidence of service of the reply affidavit.*
 - c. *Only grounds of opposition were filed and served.*
5. *Paragraphs 11, 12 & 13 are strange to me.*
6. *There was no agreement between my advocate and the applicant that they rely on the affidavit to the applicant dated 24th September 2008.*
7. *I submit that what is stated in paragraphs 15, 16 and 17 of the supporting affidavit is at variance with the relief sought in the application.*
8. (a) *I believed that No relevant material facts have been placed before court to enable it exercise its judicial discretion to set aside, vary and/or discharge its orders given on 16th May 2011.*

(b) The application is therefore, frivolous, vexatious and otherwise an abuse of the Court Process.
9. *The application be rejected with costs.*

5. THE RESPONDENT'S SUBMISSION FOR APPLICATION DATED 12TH SEPTEMBER 2013

It is instructive to note that the applicant herein did not file submissions in support of his application the one dated 12th September 2013. However, the Respondent filed her submissions which submissions I have read and understood.

6. ANALYSIS AND FINDING.

The court orders made on 23rd May, 2011 – which orders the applicant endeavours to discharge, vary and set-aside, were that a fresh grant be issued in the joint names of the applicant and the Respondent and either of them or jointly do apply for confirmation of grant.

By the application dated 23rd May 2011 the applicant sought a stay order pending the hearing and determination of the intended Appeal which application was granted in terms that the Status quo be maintained pending the hearing and determination of the intended Appeal.

The appeal was never pursued, as the record of Appeal was not filed within 60 days of filing of the Notice of Appeal.

Not only 60 day within which the record of Appeal ought to have been filed elapsed, two long years

elapsed. The maintenance of the Status quo, in my view, was what the applicant herein wanted and obtained.

Against the maintenance of this mute status quo, the Respondent filed application dated 17th May 2013 to have the orders issued on 23rd May 2013, set-aside, varied and or discharged, this being the first application herein.

Kisii HCCC No.111 of 2002 between **Askah Mocheche Momanyi vs Bethseba Bosibori** abated and has never been heard. It ought to be fixed for hearing afresh.

The application dated 12th September 2013 is but diversionary. It is not different from the appeal that never was.

The allegations of plucking affidavits from court records are not persuasive enough, it does not take long years to resuscitate this matter and bring it to conclusion.

For reasons above stated, the court finds the application dated **12th September 2013** is yet another delaying tactic, and must therefore not be allowed.

7. CONCLUSION.

The application dated 12th September be and is hereby dismissed with costs.

It is so ordered.

Dated, signed and delivered at Kisii this 19th day of June, 2015

HON. C. B. NAGILLAH

JUDGE

In the presence of:

- M/S Gichore Bwomwancho (**absent**) for Petitioner/Applicant
- M/S Nyawencha holding brief for M/S Bosire Gichana for Respondent
- Samuel Omuga: Court clerk