



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO. 254 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE MURINDA JANGAYO (DECEASED)

AND

JOSEPH MUBASA MURINDA.....PETITIONER

VERSUS

PETER MALOBA MURINDA.....OBJECTOR

RULING

1. On 10th October 2013, This Court heard the Objector's case in the absence of the Petitioner and on 23rd January 2014 allowed the Objection Dated 18th August 2011. Before Court is Summons styled as "Summons For Review" dated 26th September 2014. In it the Petitioner seeks as follows:-
 - i. THAT the proceedings and/or orders of this Honorable Court dated 23rd January 2014 be reviewed, set aside and/or vacated.
 - ii. THAT, costs of this application be provided for.
2. Substantially, the Petitioner is requesting for a chance to present his side of the story. In an Affidavit filed in support of the Application and sworn on 26th September 2014, the Petitioner avers that upon being served with the Application for Revocation and/or Annulment of Grant, he instructed the firm of Wanyonyi Ronoh and Associates to act for him. That he did not hear anything from the said advocates and was therefore astonished to receive a message through telephone notifying him to attend Court for Judgment on 23rd January 2014.
3. That when he visited the said firm of Advocates, they were not aware of the message. The Petitioner said that he attended Court on 23rd January 2014 but his advocate was not in Court. That he was given a copy of The Court Decision by a Court clerk. The Petitioner beseeches this Court to give him an opportunity of being heard as he says that he never sold any part of the Suitland to one Francis Odhiambo Obondo. Further that, the signature on the affidavit in support of the Petition of Letters of Administration dated 16th October 1994 is not his. He argues that he has a good answer to the claim.
4. Through a replying affidavit sworn by him on 20th November 2014, the Objector opposes the said Application. A substantial part of the affidavit raises issues of law which this Court shall consider in this Ruling. On the facts, the Petitioner is accused of seeking to delay the finalization of this cause. The Objector also states that the Application was only brought after the Objector filed an Application dated 12th February 2014 for Confirmation of Grant.

5. At the hearing of the Summons, Mr. Kasamani appearing for the Applicant sought to expand the scope of the Application by arguing that the Court overreached by deciding on Confirmation of Grant when it had not been asked to do so. Whilst this is not an idle argument I must point out that it was not one of the issues raised in the grounds to the Application and the affidavit in support. For that reason this Court shall not consider that argument and only confine itself to the issues specifically raised in the Application.
6. Although, as correctly pointed out by the Objector, the Application does not demonstrate the grounds for Review contemplated by Order 45 (which is expressly saved for Application in Probate and Administration Proceeding by virtue of Rule 63 of The Probate and Administration Rules), I propose to consider whether the Application reveals any grounds for setting aside the Ruling which was consequent upon the Petitioner's non-attendance. I do so conscious of the latitude given to the Court, by Rule 73 of The Probate and Administration Rules which provides:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

7. From the record of Court, the Petitioner opposed the Application for Revocation by filing a Replying Affidavit sworn on 2nd December 2011. That affidavit was drawn by his advocates then Wanyonyi, Ronoh and Associates. Thereafter, on 30th August 2011, the firm of Elizabeth Change for the Objector attended the Court registry and took a mention date for 6th November 2011. On 6th November 2011 both parties were represented when this matter was called out before Justice Muchemi and a consent recorded that the parties would adduce viva voce evidence. The Judge then fixed the matter for mention on 19th March 2013. Although it is not clear why the file was not before the Judge on the mention date the record shows that a representative of the firm of Wanyonyi Ronoh Associates attended the registry and fixed the matter for mention on 26th June 2012. Before that date, on 19th April 2012, a consent was entered between the said Advocates and the Advocates for the Objector, in which it was agreed that the Application for Revocation was to be disposed of by way of viva voce evidence and the mention date of 27th June 2012 changed to a main hearing. Thereafter this matter was mentioned in the registry on 27th June 2012, 15th January 2014 and on 12th June 2013. It was on the last day of 12th June 2013, that the office of the Advocate for the Objector fixed the matter for hearing on 10th October 2013.
8. The matter proceeded to hearing on 10th October 2013 as neither the Petitioner nor his Advocate attended Court notwithstanding that the firm of Change had served the Petitioner's Advocate with a hearing notice on 28th June 2014. An affidavit of service sworn by Elizabeth Change Advocate on 10th October 2013 was filed on the same day as proof of service. Noteworthy is that this was the first time that the Summons for Revocation was due for substantive hearing.
9. This Court has given this history of the attendances both before the registry and Court to demonstrate that at least upto the date of hearing, the conduct of the Petitioner did not suggest any motive to delay the matter. There may, therefore, be no reason to be unduly harsh on the Petitioner for failing to attend that first hearing. I say so bearing in mind that what is at stake is Land and the Court should lean towards hearing matters on merit in as far as it is possible and just.
10. That said, has the Application before Court being made after undue delay so as to disentitle the Applicant from a favourable exercise of discretion? The position of the Objector is that the Application was only brought in reaction to the Application for Confirmation dated 12th February 2014.
11. On the Petitioner's own admission he came to learn of the Court Ruling on the very same day it was delivered on 23rd January 2014, while this Application was filed on 30th September 2014. This would be about nine months after the Petitioner had learnt of a decision which he says has aggrieved him. Yet the delay of nine months was not explained by the Petitioner. However, the Court Record may do what The Petitioner had failed to do!
12. The Petitioner had promptly on 27th January 2014, just four days after the delivery of the Court Decision, filed a summons in which he sought that this Court rectifies it's Ruling. In that Application the Petitioner complained that the matter proceeded in his absence. The Petitioner

does not seem to have pursued that Application and instead filed the present Application. Naturally, there was passage of time and that may explain the lateness of the current Application. It may also demonstrate that the Petitioner was keen to challenge the Decision right from the moment he learnt of it (hence the Summons of 27th January 2014). For this reason this Court is inclined to grant to the Petitioner an opportunity to give his side of the story. In reaching this Decision I have also considered that the Objector has not obtained any further orders towards the implementing the Decision of 23rd January 2014. Any loss that may be caused by re-opening the Hearing can be mitigated, somewhat, by an order of costs.

13. I allow the Application dated 26th September 2014. The proceedings of 10th October 2013 and Ruling of 23rd January 2014 are hereby set aside. However, the Objector shall have the costs of this Application and of the Court Attendances of 10th October 2013 and 25th January 2014, in any event.

Dated, signed and delivered at Busia this 15th day of December 2015.

F. TUIYOTT

J U D G E

In the presence of :-

Oile- C/Assistant

.....for the Petitioner

.....for the Objector