



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 2191 of 1999

IN THE MATTER OF THE ESTATE OF MICHAEL MUTHEE KIGUNDU ...DECEASED

RULING

The application before the Court is dated 27th November 2007 and seeks the dismissal of an earlier application dated 18th December, 2000 brought by the Respondent herein. Respondent claims to be a dependant of the deceased Michael Muthee Kigundu.

The said earlier application, apart from seeking certain restraining orders for purposes stated therein, majorly sought that the proceeds of the deceased's estate including gratuity and co-operative shares, be placed in an interest-earning joint bank account until the dispute in the Succession cause pending before court, be determined. The main pending issue in the Succession cause, is whether or not the Respondent was one of the wives of the deceased and whether her four children were the children of the deceased as a result of the alleged cohabitation between the deceased and the Respondent.

The record confirms that this court gave directions on 17th May 2000 that the impugned application dated 18th December 2000, be fixed for a hearing for determination. However, by 30th November 2007 when this application now before the court was filed with a view to dismiss the earlier application for want of prosecution, no hearing date had been secured by the Respondent.

The main ground, upon which this application is based, apart from the legal ground that no action had been taken within the prescribed three months to fix the hearing date, is that no action in pursuance of the administration of the estate can be taken until the pending application for provision to a dependant is decisively dealt with. The applicant thus argued that his hands are tied and distribution is accordingly prevented.

The applicant also argued that the period since the Respondent took any action in the matter is long and not only inexplicable but also unreasonable.

On those bases, the applicants seeks that the application of 18th December 2000 be dismissed for want of prosecution.

In reply the Respondent argued that the only reason for delay was that the court file could not be traced between 18th December 2000 and November 2007 when the applicant went to file his/her application. She could not explain how the file could miss when and each time she wanted it while it was found when the applicant went to file this application in November 2007.

Furthermore Respondent argued that she did not think of applying for the reconstruction of the file

since reconstruction is a complicated and weighty process and since most of the documents she would rely on were in the misplaced file. She otherwise stated that the suit was important to her as what was the main claim in the application was a share in the estate of the deceased who she claimed was her husband and on whom she and her four children were dependants.

I have carefully perused the material upon which this application is based. I also perused the circumstances of the whole succession cause. Having also considered the arguments advanced by Dr. Kuria for the applicant and Miss Owino for the Respondent, I am of the view that the said application of 18th December, 2000 merely seeks orders to preserve and protect the estate until there is determination of the marital and family status of the Respondent and her four children. There is no doubt in the mind of this court that the Respondent has indeed taken long to prosecute her application. However, she stated that the court file could not be found. She said that she was surprised that the Applicant was able to find the file when she filed this application. She explained that she did not apply for the reconstruction of the file mainly because the documents she was relying on were in the main file.

The court has considered this argument and is prepared to give her the benefit of the doubt. Indeed, the court does not see the delay on her part as a deliberate misuse of the legal machinery. On the other hand the court holds the view that the applicant was at liberty to move and fix the application for hearing if she thought the Respondent was for some reason dragging her feet. This the applicant had failed to do and should be prepared to bear part of the blame in the delay.

Furthermore, the issue at stake between the parties is not a light one. The parties should allow the court to decide whether the Respondent was wife to the deceased and whether her four children are the deceased's children so as to determine whether or not they should participate in the distribution of the estate. This is an issue of great substance and importance.

In the circumstances, this court is of the view that the Respondent should be given a chance to prosecute her application dated 18th December 2000.

This application is accordingly to fail with the following orders: -

ORDERS

1. The applicant's application dated 27th November 2007 is hereby dismissed.
2. No order as to costs.
3. The Respondent is to fix her application dated 18th December 2000 for a hearing on a priority basis.

Dated and delivered at Nairobi this 21st day of April 2008.

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JUDGE