

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 1014 of 1993

IN THE MATTER OF THE ESTATE OF THE LATE NJUGUNA KIBUTHU

(DECEASED)

RULING

The applicant, Peter Kamau Njuguna has sought for the following orders byway of a Summons brought under Rule 49 and 73 of the P & A rules:

- 1) The 'exparte' order confirming the grant herein be set aside.
- 2) Consequent upon the issuance of the order (1) above, the proceedings for confirmation of grant in respect of the deceased estate be stayed pending the hearing and determination of the Nairobi Court of Appeal Civil Appeal Number 186 of 2003.

This application is premised on the grounds that the order confirming the grant was obtained when the applicant's counsel was appointed a superior court judge and hence he was not present to oppose the said application for confirmation.

Secondly, there exists an unresolved dispute in the Court of Appeal regarding the determination of the subject matter.

The above grounds are reiterated in the Supporting Affidavit and expounded in a Supplementary Affidavit by the applicant that was sworn on 9th February 2005.

This application was opposed by counsel for the respondent. He relied on the grounds of opposition and the Replying Affidavit sworn on 28th January 2001.

Firstly, counsel for the respondent argued that this application is an abuse of the court process it is belated as the grant was confirmed on 11th June 2003 and there is no explanation for the delay. Furthermore the issue of the suit premises Githunguri/Ikinu/3230 was determined on 3rd December 1998 and the applicant has not been able to present and prosecute the appeal.

Indeed the appeal was struck out three times. The respondent was not aware of the fact that the counsel for the applicant was appointed in the High Court Bench as no such notice was given to him nor was any adjournment sought. Counsel therefore urged the court to dismiss the application as the applicant is the only member of the deceased family who is blocking the finalization of this matter.

I have considered the application and the submission by both counsel for applicant and the respondent. I have also given due consideration to rules 49 and 73 of the P & A rules upon which this application is brought.

This application is brought under the inherent powers of this court whereby this court is empowered to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.

In my respectful view, these inherent powers should be exercised responsibly and judiciously. The

judgment that the applicant wishes to challenge was made about five (5) years ago.

The applicant has taken inordinately too long to prosecute the appeal.

Secondly this matter involves members of the same family, the children of the deceased, and there is no provision in the Law of Succession for an application and orders of stay of execution.

In this regard, I am of the humble view that if it was the intention of the P & A rules to provide for orders of stay of execution, this should have been by setting out the provisions and the tests to be applied in granting orders of stay of execution. In the absence of such provisions and with the material that was placed before me, I am not satisfied that the application deserves the exercise of my judicial discretion under rule 73 of the P & A rules.

I therefore decline to grant the orders and dismiss the application with costs to the respondent.

It is so ordered.

Ruling read and signed on 16th March 2005.

MARTHA KOOME

JUDGE