

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO. 274 OF 2000

IN THE MATTER OF THE ESTATE OF M'MURUNGI M'MAITAMA DECEASED

M'INTONGA M'MURUNGI PETITIONER

VERSUS

M'IKIRIMA MUGAINE OBJECTOR

RULING

This is an application by way of Notice of Motion dated 23rd December 2003 brought under order XLIX Rule 5 of the Civil Procedure Rules, Section 67 of the Law of Succession Act and Rule 73 of the Probate and administration Rules. The applicant seeks leave of this court to file a cross-petition out of time and such other orders as would meet the ends of justice.

The application is premised on the grounds that appear on the face of the said application namely that the applicant is the rightful owner of land parcel No. Abogeta/Kithangari/3, and that he filed HCCC No. 26 of 1991 challenging the defendant's registration. Further the applicant contends that he inadvertently failed to file a cross-petition together with the objection and that unless he is granted the orders he now seeks, he will suffer irreparable loss.

The application is also supported by the affidavit sworn by one M'Ikirima Mugaine on the 23.12.2003 and filed along with the Notice of Motion on 9th January 2004. The applicant's counsel Mr. Ondieki submitted that the applicant filed his objection on 4.1.2001 but that due to an error of inadvertence on the part of the advocate appearing for the applicant, the crosspetition was not filed as required by law. He further stated that the objection filed in court on 4.1.2001 is still pending and that the applicant now requires the orders he now seeks to enable him proceed with the prosecution of the objection filed in court on 4.1.2001.

It is conceded by the applicant that he indeed filed HCCC No. 26 of 1991 in which he claimed ownership of the suit land. The applicant admits at paragraph 5 of his supporting affidavit that the said HCCC No. 26 of 1991 was dismissed on 31.5.2001 but added that the dismissal of his suit was done without his knowledge. The applicant also conceded that the dismissal orders of 31.5.2001 have not been set aside. The applicant prays that the above matters notwithstanding, the court should exercise its discretion in his favour and grant him the orders sought.

The application is very much strongly opposed. Mr. Arithi for the respondent submitted that because the relief sought by the applicant is an equitable relief, the applicant must show sufficient reasons to persuade the court to exercise the discretion in his favour. The respondent argued that following the gazette of the cause on 8.12.2000 the applicant had 30 days within which to file his objections, which the applicant did by 4.1.2001. The respondent contended that from 4.1.2001 the applicant went to sleep and took no further action in the matter for a long time and in the meantime, the original petitioner died. Subsequently, the respondent was appointed in place of the original petitioner. That the substitution of the original petitioner was made in the full view and with the full knowledge of the applicant. That in spite of that knowledge, the applicant slept on until 23.12.2003 when the present application was filed, a whole 34 months down the line.

The respondent contended that from the conduct of the applicant, there is no reason why the court should exercise its discretion in favour of the applicant. Further that since the applicant did not comply with the provisions of section 68(1) of the Law of Succession Act, the respondent should be allowed to

proceed to have the grant of Letters of Administration issued to him on 7.4.2003 confirmed in accordance with section 69(1) of the Law of Succession Act. The respondent further contended that since HCCC No. 26 of 1991 was dismissed, the applicant has no ground upon which to stand in this matter. That even if HCCC No. 26 of 1991 had not been dismissed, the applicant's claim on land known as ABOGETA/UPPPER KITHANGARI/3 would not be maintainable since the said land did not exist .

The respondent also argued that by the operation of Order 23 Rule 4 of the Civil Procedure Rules, HCCC No. 26 of 1991 automatically abated a year after 28.7.98 when the original petitioner herein died, unless substitution was made within that year. The respondent submitted that no such substitution was made during the year. It was also the contention of the respondent that there has been inordinate delay by the applicant in bringing the present application and that the court should therefore not exercise its discretion in favour of the applicant.

The issue for determination by the court is whether the applicant has shown sufficient cause, either on the face of the application or from reasons given in the supporting affidavit to warrant the exercise of the court's discretion in his favour. There is no dispute that the applicant has taken a whole 34 months before bringing this application to the court. It is also a fact that the applicant did not comply with the provisions of section 68 (a) of the Law of Succession Act when he 'inadvertently' failed to file a cross-petition together with his objection on 4.1.2001. There is also no dispute that HCCC No. 26 of 1991 was dismissed on 31.5.2001 for want of prosecution and that since then, admittedly, the applicant has made no effort to reinstate the said suit. The suit also automatically abated a year after 25th July 1998 because no substitution was made therein under Order 23 Rule 4 of the Civil Procedure Rules.

Taking all the circumstances of the case into account, the submissions of learned counsels for the parties and the affidavits in support and in opposition of the application and the relevant sections of the law of Succession Act and the provisions of Order 23 Rule 4 of the Civil Procedure Rules, the court has reached the conclusion that the applicant is not entitled to the orders sought.

The court finds that the applicant has been indolent not only with regard to the filing of the present application but also with regard to his conduct in HCCC No. 26 of 1991 which was dismissed for want of prosecution. Although learned counsel for the applicant has admitted that the error of inadvertence was his, the court finds that the applicant has not had nor does he have any beneficial interest in the deceased's estate that would compel this court to grant him more time to regularize his pleadings. The court is convinced that litigation in this case must come to an end, for justice delayed is justice denied.

For the reasons given above the court finds that the application is not merited and is accordingly dismissed with costs to the respondent. The letters of administration intestate issued to the respondent may now be confirmed in accordance with Section 69(1) of the Law of Succession Act.

Dated and delivered at Meru this 8th day of June 2004

RUTH N. SITATI

JUDGE

8.6.2004