



In re Estate of Fredrick Mwaniki Mbogo alias Mwaniki Mbogo (Deceased) (Succession Cause 11 of 2018) [2024] KEHC 14108 (KLR) (13 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 11 OF 2018
LM NJUGUNA, J
NOVEMBER 13, 2024
FORMERLY SENIOR PRINCIPAL MAGISTRATE AT KERUGOYA
SUCCESSION CAUSE NO. 56 OF 2012
IN THE MATTER OF THE ESTATE OF FREDRICK MWANIKI
MBOGO ALIAS MWANIKI MBOGO (DECEASED)**

BETWEEN

CHARITY WARUGURU PETITIONER

AND

ANTHONY MBOGO MUNENE 1ST PROTESTOR

JANET WAGUAMA KAMAU 2ND PROTESTOR

RULING

1. The applicants' summons dated 06th March 2024 is premised on the grounds set out on its face and in the supporting affidavit, seeking orders that:
 - a. Spent;
 - b. The court be pleased to reinstate the protest dated 22nd August 2001;
 - c. Upon reinstating the protest, the court be pleased to extend the time within which to prosecute the said protest; and
 - d. There be no order as to costs.
2. On 28th September 2023, the court ordered that the protest be prosecuted within 90 days failing which the same shall stand dismissed. The applicants deposed that following this order, the earliest date available was 13th November 2023 but it was gazetted as a public holiday. That they had to seek for



- another date before the deputy registrar but by then, the 90 days period had already lapsed and the delay was caused by factors beyond their control. They suggested that the court refers this matter to court annexed mediation since it is a family matter.
3. Through a replying affidavit, the respondent opposed the application stating that the same is frivolous, vexatious and an abuse of the court process. That there is no sufficient reason why the applicants failed to obey the court order to prosecute the application within 90 days. That the matter was mentioned before the Deputy Registrar to confirm compliance with pretrial directions but the applicants failed to enter appearance on that date to fix a hearing date for the protest.
 4. That the Deputy Registrar fixed the matter for hearing before the Judge on 13th February 2024 but the applicants did not move the court for a nearer date in light of the court order to prosecute the matter within 90 days. On the said hearing date, the court confirmed that the protest stood dismissed, a finding that the applicants did not seek to have reviewed or set aside, until now, thus the protest does not exist. She urged the court to dismiss the application.
 5. The applicants filed supplementary affidavit rehashing their averments in the application and stating that they were not aware of the 90-day order by the court. That they learned of the order on 13th February 2024 when the timeline had already elapsed.
 6. The application was canvassed by way of written submissions.
 7. The applicants submitted that on 28th September 2023 when the court ordered that the protest be prosecuted within 90 days, the applicants moved for a nearer date and the matter was fixed for hearing on 13th November 2023, which was gazetted as a public holiday. That by the time the matter was being scheduled for another hearing, the timeline had already elapsed.
 8. They relied on section 47 of the *Law of Succession Act* and rules 43 and 73 of the *Probate and Administration Rules* and the cases of *Burbhani Decorators & Contractors v Morning Foods Ltd & Healthy U 2000 Ltd* [2014] KEHC 656 (KLR) and *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co.Ltd, Esed Becirevic & Adnan Terzic* [2018] KEHC 10153 (KLR). They submitted that the court can bear with their faults and overlook their error in the interest of justice. That if the court does not set aside the order and hear their protest, they will be condemned unheard yet they make a good case. Further reliance was placed on the cases of *Lucy Bosire v Kehancha Div Land Dispute Tribunal, Resident Magistrate Court Kehancha & Martha Jacob Matara* [2013] KEHC 681 (KLR) and the applicants urged the court to exercise its unfettered discretion.
 9. The respondent, in her submissions, relied on the case of *In Re Estate of Gitundu Muchira (Deceased)* [2008] KEHC 180 (KLR) and argued that the applicants should have moved the court to review its orders sooner. That the applicants have been indolent and that the court should let the litigation herein come to an end since the applicants have shown no interest in prosecuting the application. That the 90-day period ended on 28th December 2023 and the applicants could have moved the court for an earlier date any time before then. She cited Article 159(2)(b) of the *Constitution* and stated that justice should not be delayed.
 10. From the foregoing, I am faced with the question of whether or not to review the orders of this court issued on 28th September, 2023.
 11. The applicants are seeking reinstatement of a protest that stood dismissed for their non-compliance with the court's direction to have the protest prosecuted within 90 days. When the court made that order, it was upon the applicants to pursue the same court to prioritize hearing of the protest based on its own order prompting expeditious hearing of the same. However, from the argument made herein,



the applicants slept on their rights and failed to attend to the demands of the court order. Needless to say, equity aids the vigilant and not the indolent, and in this case, there is a great deal of indolence on the part of the applicants. It is trite that court orders are not made in vain, lest the court be the subject of ridicule (see the case of *B vs. Attorney General* [2004] 1 KLR 431).

12. The glaring issue in this application is that the applicants have not asked the court to review its order dismissing the protest for failing to be prosecuted within 90 days. This means that the order is still in force but they want the court to reinstate a protest that stood dismissed through an order of the court that is still valid. It would have been prudent for the applicants to move the court for review of its order dismissing the protest first before seeking reinstatement. The orders sought through this application can be compared to ‘putting the cart before the horse’.
13. The wording of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* makes it mandatory that the court sitting on review, be moved by the aggrieved party. The applicants have extensively explained the reason for their failure to prosecute the protest within the stipulated period. It may well be that the delay was not of their own making but they still needed to move this court to review and/or set aside the order dismissing the protest before seeking reinstatement. The court cannot make an order for review of its own order suo moto.
14. Seeing as the court’s order setting the conditions for dismissal of the protest is still in force, it would be highly unconscionable to grant another order reinstating the protest. On this issue, even the discretion of the court under Article 159 of the *Constitution*, section 47 of the *Law of Succession Act* and Rules 43 and 73 of the *Probate and Administration Rules* cannot remedy. If this court were to grant the orders herein, its orders would be contradictory, a thing that a court should distance itself from.
15. Therefore, I have no choice but to strike out this application in its entirety, with no order as to costs.
16. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

..... **for the Petitioner/Respondent**

.....**for the 1st Protestor/Applicant**

.....**for the 2nd Protestor/Applicant**

