



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO. 377 OF 2010

IN THE MATTER OF THE ESTATE OF MBAWA WA MBINU alias MBAWA MBINU (DECEASED)

RULING

1 The deceased herein died intestate on 10th July, 1968 while domiciled in Kwale. He was survived by three wives namely; Mauwa Mbawa, Maku Mbawa Luvuno Mbawa, and twelve sons named as; Mbinu Mbawa, Tsuma Mbawa, Ndosho Mbawa, Mutoi Mbawa, Chiringa Mbawa, Julius Mbawa, Said Mbawa Abdalla Mbawa, Dio Mbawa, Nixon D Mbawa, Hamisi Mbawa, Nyando Mbawa Mbaji Mbawa. Among the assets listed as comprising the estate is parcel No 224.VI/MN.

2 On 23rd November, 2010, Julius Kea Mbawa and Hamisi Mbawa petitioned for a grant of representation. Subsequently, a grant of representation was issued on 21st July, 2011 and later confirmed on 18th February, 2013.

3 On 12th February, 2014, one Stephen Mboga Katana Mbinu filed a summons for revocation of grant claiming that the grant was obtained by fraudulent means and concealment of material information to the court. In response, the petitioners /respondents filed a relying affidavit sworn on 21st March, 2014 and filed on 25th March, 2014.

4 Consequently, the matter came up for directions on 1st December 2015 when the court directed the applicant to file and serve his submission within 21 days. Upon service, the respondents were to file their submissions. The matter was then to be fixed by parties at the registry for highlighting of submissions.

5 Unfortunately, parties went to sleep and none of them filed submissions as directed. Consequently, on 12th May, 2017 the court dismissed the application for want of prosecution after the applicant failed to turn up to show cause why the application could not be dismissed for want of prosecution.

6 Later, on 30th June, 2017, Julius Kea Mbawa and his co-petitioner filed a notice of motion dated 29th June, 2017 seeking the summons for revocation of grant of "probate" dated 11th February, 2014 dismissed or struck out for want of prosecution. The application is anchored on grounds stated on the face of it and an affidavit in support sworn on 20th June, 2017 by the applicant.

7 Basically, the applicants averred that the matter had remained dormant for over one and half years without any action being taken.

8 In response, Wallace Kiprop Cheruiyot counsel appearing for the respondents filed a replying affidavit sworn by himself on 27th September, 2019. He acknowledged that there has been delay but the same was occasioned by his law firm which misplaced their client's file. That his client was desirous of prosecuting the application by filing submissions as directed. That counsel's mistake should not visited on his client. That there was no prejudice to be suffered as the respondents will have an opportunity to ventilate their case.

9 When the application came up for hearing, both counsel adopted the content contained in the respective affidavits either in support or in opposition to the application.

10 Mr Borona for the applicant submitted that the respondent had not attached any proof to indicate disappearance of their file.

11 On his part, Mr Cheruiyot urged the court to dismiss the application and allow them to file their submissions. He contended that the mess was occasioned by misplacement of their client's file when they shifted office.

Analysis and Determination

12 I have considered the application herein and the response thereto. I have also considered oral submissions by both counsel. As stated above, the court on its motion issued notice to show cause dated 5th April, 2017 to the applicants. The file was subsequently closed on 12th May 2017 as nobody appeared to show cause why the revocation application could not be dismissed for want of prosecution. From the

record, this orders have not been set aside. However, by an oversight, I believe, the court gave directions on the application dated 29th June 2017 thus reopening the proceedings. Technically, the court by conduct impliedly reopened the file thus rendering its closure on 1st December 2017 inoperative. With that clarification, I will continue to determine the application herein on merit.

13 The only issue for determination is whether the application for revocation should be dismissed for want of prosecution. Basically, the application is anchored under Order 17 of the Civil Procedure Rules which empowers a court to dismiss a suit for want of prosecution either on its own motion or upon being prompted by a party if proved that a matter had remained dormant for over one year.

14 From the onset, I wish to state that, Order 17 of the Civil Procedure Rules is not among the Civil Procedure Rules applicable under rule 63 of the P&A rules of the Law of Succession. To my knowledge, there is no express provision provided under the Law of Succession for dismissal of suits for want of prosecution.

15 However, under Rule 73 of the P&A Rules, the court has inherent powers to make such orders as are necessary for the ends of justice to be met or to prevent abuse of the process of the court.

16 Further, rule 49 of the P&A Rules of the Law of Succession does mandate any person desiring to make an application to court relating to the estate of a deceased person for which no provision is provided in the rules to file such application supported by an affidavit under this rule.

17 Accordingly, the court can aptly apply its powers under the two rules to determine the application at hand. The crux of the matter is delay which is described as inordinate. It is not in dispute that the court made directions on 1st December, 2015 for the applicant to file summons in disposition of its revocation application of 11th February, 2014. No action was taken until the responds moved the court by its application dated 29th June, 2017 seeking to dismiss the suit. Indeed, under the oxygen principles and Article 50 (2) as well as Article 159 (2) (b) of the Constitution, courts should determine matters expeditiously and without undue delay.

18 The purpose for filing a suit is determination within the most affordable resources and timely manner. Courts are not parking bays for suits. Where a litigant opts not to prosecute his case for 1 ½ years after receiving due directions to comply within 21 days is an act of disobedience and or indolence. Unfortunately, equity does not come to the aid of the indolent.

19 It is trite that where courts issue directions with specific time lines, parties should be bound and where reasonable explanation is not given, a court should not hesitate to dismiss a suit. See **Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission and 6 others eKLR 2013**

‘This court, indeed all courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines service to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned’.

20 In this case, counsel tried to justify the delay in complying with the misplaced client’s file. However, there is no proof of such misplacement. In any event, he had the option of perusing the court file and photocopy pleadings. To take 1 ½ years in order to comply with an order of the court is indeed an unreasonable period.

21 Assuming that counsel misplaced the file, how come that his clients never followed up their case. Cases do not belong to Advocates. Litigants are duty bound to follow their cases. For the applicants to have gone mute for all that time, is a clear indication that they were not interested in prosecuting their case. Courts cannot bear responsibility on delayed justice on behalf of litigants.

22 I do not find any reasonable excuse for delayed prosecution of the application for revocation. Time comes when advocates should share blame with litigants and perhaps indemnify a litigant.

23 To that extent, it is my finding that litigation must come to an end. See **Patrick Gathenya Vs Esther Njoki Rurigi and another (2008) eKLR**. The application dated 29th June, 2017 is allowed and the application for revocation dated 11th February, 2014 dismissed for want of prosecution. The administrators shall be at liberty to administer the estate to completion.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 15TH DAY OF JUNE, 2021.

J. N. ONYIEGO

JUDGE