



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
SUCCESSION CAUSE NO. 157 OF 1997
IN THE MATTER OF THE ESTATE OF THE LATE WASILWA WERUNGA
KHISA WERUNGA.....PETITIONER
VERSUS
FLORENCE WEKESA NDAULA.....1ST OBJECTOR
RODGERS SIMIYU WENENGA.....2ND OBJECTOR
AND
MAURICE BARASA SIMIYU.....APPLICANT

RULING

By a Chamber Summons dated 6th October, 2020, the petitioner seeks orders that;

1. The objectors' objection be dismissed for want of prosecution.
2. The costs of the suit and the application be awarded to the petitioner.

The application is supported by the petitioners' affidavit where he depones that the objectors filed an objection in court on 25/4/2019 wherein the court directed the parties to try an out of court settlement. Pursuant to the orders; a consent between the petitioner and the 2nd objector was reached on 28/8/2019 settling the objection.

He depones that the 1st objector died on 11/8/2019 and none of her family members has shown interest in having her name substituted thus the application.

The application is opposed by one Valerie Lubonga, Counsel for Maurice Barasa. She depones that upon demise of the 1st objector, an application to substitute her was filed and that if the objection is dismissed, some of the beneficiaries will be discriminated against.

In another application dated 25th January, 2021, Maurice Barasa Simiyu sought orders that he be substituted in place of the 1st objector for purposes of prosecuting the summons for revocation of grant

The application is grounded on the fact that the 1st objector has since died and that being the son of the 1st objector, he is a grandson to the deceased Wasilwa Werunga.

He depones that his late mother filed summons for the revocation of grant but she unfortunately passed on before the matter could be finalized and therefore seeks substitution so the application can proceed.

The application is opposed by the petitioner who depones inter alia that the suit abated by operation of the law on 12/8/2020, that the applicant lacks legal capacity to make such an application since the deceased was survived by a widower and 4 sons namely; Ronald Sikuku, Maurice Wabwile, David Wafula and Joseph Barasa.

He depones that the applicant not being a beneficiary of the estate of the deceased Florence Nekesa, he is not recognized by law to substitute

her when the widower and the children are still alive and that the applicant having not disclosed the interest he intends to safeguard, his application must fail.

By directions of the court, both applications were heard together and parties directed to file written submissions. Both parties complied and this court having read and considered the respective submissions, the view of the court is that the issue arising for determination is whether the applications have merit.

It is common ground that the deceased Florence Nekesa Ndalila filed summons for revocation of grant on 25th April, 2019 on the grounds inter alia that the petitioner had left out some of the lawful beneficiaries of the deceased Wasilwa Werunga. It is evident that she died 4 months later. The petitioner and the 2nd objector arrived at a settlement which was duly executed on 28th August, 2019.

What is before the court in the first application is a prayer to dismiss an application for want of prosecution under Order 24 of the Civil Procedure Rules. The court notes that this Order of the Civil Procedure Rules is not applicable to the Law of Succession Act. The specific Orders imported into the LSA are provided for under Rule 63 of the Probate and Administration Rules. Order 24 is not one of them.

On whether the cause abated on the death of the 1st objector and there being no substitution, the court notes that Section 76 of the Law of Succession Act does not make any provisions on the time frame within which one may take out summons for revocation of grant. In ***Estate of Charles Ngotho Gachunga (deceased) (2015)eKLR***, the court held;

In other words the same was filed after an inordinate delay which has had the effect of rendering it time barred due to effluxion of time, the answer to this submission is that the office of the administrator is for life. He can be called upon to account at any time so long as he is still alive.

This court therefore finds and holds that an application for dismissal of a cause under the Law of Succession Act cannot be granted in the circumstances.

The other contention by the petitioner is that the applicant has not demonstrated any interest in the estate he stands to safeguard. The court notes that the application by Maurice Barasa is one seeking to substitute his late mother. His evidence has not been taken on strength of his application for revocation. The petitioner still has a chance to put the applicant to test on his specific interest in the estate when the appropriate time comes.

The gist of the application for revocation of grant is that the deceased Florence Nekesa was left out by the petitioner and it was therefore her contention that the grant made to him be revoked for purposes of proper distribution.

This court therefore finds that in the interest of justice, the applicant Maurice Barasa Simiyu be accorded a chance to advance his case. I direct as follows;

1. The application dated 6th October, 2020 is hereby dismissed for lacking in merit.
2. The application dated 25th January, is hereby allowed.
3. The applicant, Maurice Barasa Simiyu is hereby ordered to set down the matter for hearing within **60 days** from the date hereof failure of which the application for revocation of grant shall stand dismissed.
4. Each party to bear own costs.

It is so ordered.

DATED AT BUNGOMA THIS 11TH DAY OF NOVEMBER, 2021

S. N. RIECHI

JUDGE