



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

SUCCESSION CAUSE NO. 108 OF 2016

RE ESTATE OF KAINGATI KIGENYA

NANCY WANGARI MBAKI & 3 OTHERS.....PETITIONERS

VERSUS

GRACE NDUTA KAINGATI & ANOTHER.....RESPONDENTS

RULING

1. This is the petitioners' *summons* dated 23rd October 2019 praying that the respondents' *notice of motion* dated 28th July 2015 be dismissed for *want of prosecution*. The impugned notice of motion sought review of the judgment delivered on 2nd December 2014; and, for stay of execution.
2. There is a brief deposition by one of the petitioners, *Nancy Wangari*. She deposes that the respondents have "*not made any efforts to prosecute*" the notice of motion; and, that the delay has "*hampered execution of the judgment despite the same being frivolous, vexatious and an abuse of court process*".
3. The respondents have filed a reply dated 5th February 2020. They contend that they made several attempts to fix the motion for hearing. They also claim that they lodged certificates of urgency to obtain a date on priority. In a synopsis, they argue that the delay was occasioned by reasons beyond their control.
4. At the hearing of the matter on 6th February 2020, the petitioners submitted that the respondents are *disinterested* and seem to have partially complied with the impugned judgment by constructing on the portion awarded to them in the decree.
5. I find that the notice of motion was lodged *more than four years ago*. The *delay* in prosecuting it is self-evident. However, the procrastination *cannot* be wholly attributed to the respondents. This cause was first filed at Nairobi. The impugned judgment was delivered on 2nd December 2014. The file was then transferred to this court on 30th March 2016.
6. The record also shows that on 11th November 2015, the respondents fixed the motion for hearing on 18th January 2016. The court was not sitting. Further dates were taken by consent for 7th March 2016 when the parties appeared before Muigai J at Nairobi. It would appear that the respondents' comments on impartiality of the court led the learned judge to *recuse*.
7. After the cause was transferred there were attempts to fix the matter for hearing on 20th May 2016 and 28th November 2016. However, all the parties failed to appear before the court (Waweru J) on 31st May 2017 and the matter was taken off the cause list. But on the same day, the parties took a new date for 6th December 2017. After hearing some arguments, the cause was adjourned to 17th April 2018.
8. It is also true that the respondents filed certificates of urgency on the motion which came before the court on 28th November 2018 and 10th December 2018. The petitioners themselves lodged the present summons for dismissal by a certificate of urgency filed on 23rd October 2019.
9. Granted those circumstances, it is *not* true that the respondents went into slumber. Verifiable steps were taken at the registries in Nairobi and Murang'a; and, before the court to prosecute the impugned notice of motion. It is not lost on me either that all the parties are lay and acting in person. I cannot assign the entire blame for the delays to the respondents.
10. The test in a matter of this nature is whether *justice* can still be done. See *Ivita v Kyumbu* [1984] KLR 441. The overriding objective is to do justice to the parties. See *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR.

11. At the heart of this matter is succession over the emotive issue of land. I cannot comment on the merits of the application for review at this stage. But it is in the interests of justice that the respondents' *notice of motion* dated 28th July 2015 be heard on *merits*.

12. I thus *dismiss* the petitioners' *summons* dated 23rd October 2019 with *no order on costs*. I will now allocate an early date for hearing of the respondents' *notice of motion* dated 28th July 2015.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 18th day of February 2020.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

The petitioners (in person)

The respondents (in person).

Ms. Dorcas and Ms. Elizabeth, Court Assistants.