



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

SUCCESSION CAUSE NO. 7 OF 2019

IN THE MATTER OF THE ESTATE OF THE LATE GIOVANNI FORINO (DECEASED)

BETWEEN

GIOIA ANNA.....APPLICANT

VERSUS

ALFONSO FORINO.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Kimeto for applicant

Mr. Binyenya for respondent

RULING

The objection by the respondent through the firm of **Bunyanya Thurinira & Co. Advocates** is directed against the applicant notice of withdrawal of Chamber summons dated 17/4/2019 pursuant to Order 25 Rule 1 & 2 of the Civil Procedure Rules. The reliefs in the foresaid chamber summons was to have the application be heard on a priority during the April court vacation period. Under Rule 3(1) (2) of the High Court practice and procedure rules. The application in question was premised on an original Succession Cause No. 6 of 2019 instituted before the Chief Magistrate. In the matter of the Estate of the Late **Giovanni Forino**. This initial summon dated 29/1/2019 was lodged before the court by the Firm of **Bunyanya Thurinira & Co. Advocates** who were acting for the Petitioner/Applicant. The assertions in the original summons had been that the Estate of the deceased who died on 22/1/2019 was in clear and imminent danger of being intermeddled and wasted and/or some other assets sent to the unclaimed Assets Finance Authority. It was alleged that on account of this the Petitioner be issued with grant of Letters of Administration Ad Colligenda bona.

The Probate and Administration court presided over a Senior Principal Magistrate ordered on 29/1/2019 and the power of the administration of the Estate through a special Grant of Letters of Administration Ad colligenda bona under section 67 (1) of the Succession Act be issued to **Alfonso Forino**.

Thus and until the given the proceedings commenced by the firm of **Kimeto Advocates** under instructions of **Mrs. Gloria Anna** on 17/4/2019 seeking the suspension of the Grant of Letters of Administration Ad Colligenda bona issued in favour of **Alfonso Forino** in Succession Cause No. 6 of 2019 be revoked.

The Chamber summons by **Giola Anna** never proceeded for hearing though the court issued interim orders of stay with regard to specific proposes as particularized in paragraph (c) of the Certificate of Urgency Comprising Diamond Trust Account, Kenya commercial Bank, Imperial bank and NIC Bank Accounts in the names of the estate of **Giovanni Forino**.

The said application where the orders of injunction were issued to the respondent not to intermeddle with the specified part of the Estate was never prosecuted. Its that chamber summons in question which became a subject of withdrawal by **Mrs. Giola Anna** through the firm of Ms. Kimetto Advocate.

The un-contested facts upon perusal of the record reveals the following:

1. That the original petition was filed in Succession Cause No. 6 of 2019 in the matter of the Estate of the Late **Giovanni Forino** was determined and power of administration given to **Alfonso Forino** vide Grant of Letters Ad Colligenda Bona on 29/1/2019 when the grant was in force Giola Anna filed an application as the beneficiary and the dependant of the deceased in the above Estate seeking to be allowed to commence revocation of the grant Ad Colligenda held by **Alfonso Forino**. From the pleadings filed by Alfonso

Forino and Giola Anna its apparent that each has a stake and interest in the Estate of the deceased as heirs in other words the two applicants and or respondents have substantial interest over the Estate by virtue of them being dependants.

As a matter of fact, the initial applicant/administrators **Alfonso Forino** right to prosecute the cause flows out of his status as a son and legal heir to the Estate to the deceased while **Giola Anna**, the latest applicant in chamber summons of 18/4/2019 contest the grant of administration issued to **Alfonso Forino** as a spouse to the deceased.

Whichever way the dispute in the Succession Cause goes any such success would automatically be for the benefits for two applicants.

Legal analysis and Determination

I have considered the affidavits and replying affidavits respectively filed at various points in time by the parties/dependants as presently identified in this pleadings. The circumstances of the case and oral submissions upon which both counsels presented their legal perspectives has also been captured in determination of the applications.

The legal point that will dispose of this current application is whether the applicant **Giola Anna** had a right to bring and file a notice of withdrawal of the summons for revocation as supported by a chamber summons under certificate of urgency dated 17/4/2019.

The law of procedure relating to the parties in civil suits with respect to withdrawal is governed by Order 25 Rule (1) (2) of the Civil Procedure Rules. The Order reads as follows:

“At any time before the setting down of the suit for hearing the Plaintiff may by notice in writing, which shall be served on the parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim and such discontinuance or withdrawal shall not be a defence to any subsequent action. (1) Where a suit has been set down for hearing, it may be discontinued or any part of the claim withdrawn. For hearing, it may be discontinued upon the filing of a written consent signed by all parties. (2) where a suit has been set down for hearing, the court may grant the Plaintiff leave to discontinue his suit or withdraw any part of his claim upon such times as to costs, the filing of any suits and otherwise as are just.”

Section 6 of the Civil Procedure Act also provides that:

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties or between the parties under which they or any of them claim litigating under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant relief claimed.”

On the other hand, the law of procedure in relation to withdrawal of suits or applications is provided for in Order 25 1, 2 and 3 of the Civil Procedure Rules the plaintiff or applicant is to seek permission for withdrawal from the court where such a suit has been filed.

The court in the cases of **Theluji Dry Cleaners Ltd v Muchiri & 3 Others 2002 KLR Church Road Development Company Ltd v Barclays Bank of Kenya Ltd & 2 Others 2006 ECLR** expressed the guiding principles to be applied in context of the application for withdrawal. The object of the rule is to have the notice for withdrawal served to one parties who have an interest in the claim about to be discontinued or wholly or partial withdrawal of any of the claim in the suit.

As per the rule if the parties to the subject matter raise no dispute the notice of withdrawal shall be recorded and endorsed by the Deputy Registrar of the High Court to be adopted as a court order.

The legal proposition under order 25 is to enable the court to examine the circumstances which the plaintiff seems to withdraw the suit and whether there remains any question in dispute to be determined between any of the parties. In the instant notice for withdrawal of the objection was raised by learned counsel **Bunyanya** on behalf of the respondents on two points.

First the notice of withdrawal by the applicant dated 17/4/2019 had not been acted upon and endorsed by the Deputy Registrar.

Secondly, whether the affidavit of **Giola Anna** dated 18/4/2019 with a scanned signature is defective and should be expunged from the record.

On the first issue going by the fundamental principles in the authorities cited of Theluji Dry Cleaners and Church Road Development Company supra as already observed in all classes of withdrawal of suits there must be served to the dependants. Further the notice of withdrawal has to be served upon and endorsed by the court to sustain it as a court order. The issue of costs based upon the provisions of Section 27 of the Civil Procedure Act on the well-known maxim that costs follow the event as a consequence of the withdrawal act ought to be determined in finality at that stage.

The legal effect of the withdrawal notice dated 30/4/2019 to unconditionally withdraw chamber summons application dated 17/4/2019 without an endorsement by the Deputy Registrar is not prima facie offensive to Order 25 Rule 1 & 2 of the Civil Procedure Rules but its final effect is the adoption by the court.

As to the application for withdrawal and objection raised by **Mr. Bunyanya** the point is neatly illustrated by the decision of the court in **Beijing Industrial Designing & Research Institute vs Lagoon Development Ltd [2015] eCLR** where it was held as follows:

“The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the plaintiff is at liberty, any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon all the parties. In that scenario, the plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filling a written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the plaintiff must obtain leave of court to discontinue the suit or withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the plaintiff’s right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the court. That such leave is granted on terms suggests that it is not a mere formality.”

Applying the above principles to the case now under consideration I think the applicant was within his right to withdraw the notice of motion subject to service upon the respondent. This is more so due to the fact that the parties to the transaction were yet to commence the hearing of the suit.

The only issue the court takes offence with is in respect the authenticity of the scanned signature in the supporting affidavit as pointed above by counsel for the respondent. The defect in my opinion although it relates with the cause of action does not go to the root of it and it is an irregularity which is curable by necessary application being made to the court for consideration.

In addition to this ground of withdrawal of summons raised in the Preliminary Objection, some of the affidavit evidence by both parties discloses an already **Succession Cause No. 6 of 2019** involving the same estate of **Giovanni Forino**.

At the core, litigation of this nature is to resolve the issues in the administration and distribution of the intestate Estate of the deceased.

It is important to note that in view of the already filed **Succession Cause No. 6 of 2019** in so far as the subject matter for the cause was concerned to continue with the narration of facts.

Thereafter in **Succession Case No. 7 of 2017** is a breach of section 6 of the Civil Procedure Act. In Succession Case No. 6 of 2019 the trial court made a decision to issue grant of letters of administration colligenda bona under section 67(1) of the Succession Act to **Alfonso Forino**. In as much as the applicant **Giola Anna** is aggrieved with the conduct and acts of intermeddling of the estate she is entitled to file an objection before the Chief Magistrate Court. The argument by the applicant that revocation of a grant is a matter exclusive jurisdiction has no force of law.

That being so, the position to the Preliminary Objection and the application for withdrawal of the chamber summons by the applicant is as follows:

- 1. That the applicant has leave of this court having served the notice of withdrawal to have the same withdrawn with costs to the respondent.*
- 2. That the Preliminary Objection partially succeeds in respect that the affidavit by its endorsement with scanned signature is defective but not fatal to the cause of action.*
- 3. That further the decision by the applicant filing multiplicity of applications on the same cause of action in both the Chief Magistrates Court and the High Court offends the integrity and sanctity of the court process.*

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF OCTOBER, 2019.

.....

R. NYAKUNDI

JUDGE

In the presence of: