



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 683 OF 2015

(FORMERLY EMBU HIGH COURT SUCCESSION CAUSE NO.490 OF 2010)

**IN THE MATTER OF THE ESTATE OF M'RINJEU MUTHARA alias NJEU MUTHARA
(DECEASED)**

AND

HUMPHREY MUTWIRI MICHENI.....APPLICANT

VERSUS

CAROLINE KAARI MUTEGI.....PETITIONER/RESPONDENT

R U L I N G

1. **HUMPHREY MUTWIRI MICHENI**, the applicant herein has taken out summons under **Rules 49** and **73** Probate and Administration Rules and **Article 159(2)** of the **Constitution** seeking the following orders/reliefs namely:-

(i) *That this application be heard urgently.*

(ii) *That pending the hearing and final determination of the instant application this honourable court be pleased to issue stay of execution orders against the orders issued on 8th May 2017.*

(iii) *That this honourable court be pleased to issue conservatory and/or inhibition orders against the deceased's estates L.R No. KARINGANI/MUGIRIRWA/239 and Plot No.22 KIERENI MARKET pending the hearing and determination of this application and/or until furthers orders of this honourable court.*

(iv) *That the dismissal orders issued on 8th May 2017 dismissing the applicant's application dated 8th December 2010 for want of prosecution be set aside.*

(v) *That the applicant's application dated 8th December,2010 for Summons for Revocation of grant be set down for hearing de novo.*

(vi) *That costs of this application be provided.*

2. The grounds upon which the above reliefs/orders are being sought are as follows namely:-

a) *That there was an apparent error on record when dismissing the applicant's application dated*

8th December, 2010 for want of prosecution.

- b) That the proceedings of 15th February, 2017 bear witness that the Respondent's counsel to serve the applicant's counsel with a hearing notice for 8th May 2017.***
- c) That the Respondent's counsel did not serve the applicant's counsel with the hearing date of 8th May 2017 as directed by the honourable court on 15th February, 2017.***
- d) That the Respondent's counsel misrepresented the honourable court that the hearing date of 8th May 2017 was taken by consent.***
- e) That the foregoing clearly demonstrated that the counsel for the Respondent grossly misrepresented the court on 8th May 2017 and the dismissal order issued on 8th May ought to be set aside.***
- f) That there is great danger of the applicant being disinherited if the stay orders are not issued urgently.***
- g) That unless the dismissal order on 8th May 2017 is set aside the applicant stands to suffer irreparable loss and damage.***
- h) That the applicant's application dated 8th December, 2010 has overwhelming chances and probability of success and that is only fair and just that the same be reinstated and be heard on its merit.***
- i) That the Respondent will not suffer any prejudice.***

3. In the Supporting Affidavit sworn by Benson Kijaru, the learned counsel for the applicant, the applicant depones that he was not served with any hearing notice for 8th May 2017 despite the directive from this honourable court on 15th February, 2017. He contends that the applicant was absent because he was not aware that the matter was coming up for hearing on 8th May, 2017. He further contends that he faces danger of being disinherited unless the orders sought are granted.

4. The Respondent has opposed this application through a Replying Affidavit sworn by the Respondent on a date not specified on the Replying Affidavit. I will come to that issue later in this ruling.

5. The Respondent contends that this application was filed in bad faith after inordinate delay and that the main interest is to stall the distribution process.

6. It is also contended that the applicant is not a direct beneficiary of the estate as his interests on the estates lies with his mother who was married to Eliphas Micheni a deceased son of the deceased.

7. The applicant is also faulted for indolence and abuse of court process. The Respondent points out that the Summons for Revocation of Grant was filed on 15th December 2010 and listed for hearing on four occasions on 5th October, 2016, 3rd November, 2016, 15th February, 2017 and 8th May, 2017 and in all the occasions the applicant failed to turn up for hearing. The Respondent's counsel, Mr. Mugo has further added that the dismissal of the applicant's application was done on 8th May, 2017 and that he only came to this court on 6th February, 2018 with this present application which in his view is an inordinate delay.

8. The Respondent has also deposed that she has already paid a sum of Kshs.42,000/- to the surveyor for subdivision of the estate in accordance with the distribution approved by this court and that she stands to suffer loss if this matter is delayed any further.

9. The Respondent has faulted the applicant's counsel for swearing an affidavit in support of this application contending that Advocates should not swear affidavits in cases where they also act as Advocates. He has cited the decision in the case of TRITON PETROLEUM CO. LTD -VS- KIRINYAGA CONSTRUCTION CO. LTD (High Court Nairobi Civil Case No. 830 of 2003) to support her contention.

10. The Respondent has deposed that the applicant was served with the hearing notice for 8th May 2017 and has exhibited a hearing notice dated 15th February, 2017 showing that the hearing notice was duly received and stamped by the firm of Kijaru Njeru & Co. Advocates.

11. The Respondent further depones that she stands to suffer much financial loss if the prayers in this application were granted given the legal fees and surveyors fees she says she has incurred in the administration of the estate. She has asked this court that the applicant be compelled to refund or reimburse her to the sum of Kshs.112,000/- in the event that the court was inclined to allow this application.

12. I have considered this application and the representation made by both parties. The main bone of contention in this application is that the applicant was not served with a hearing notice for the hearing of his Summons for Revocation of Grant dated 8th December, 2010. That application was fixed for hearing on 8th May 2017 and the date was taken on 15th February, 2017 in an unexplained absence of the applicant's counsel and his client. I say unexplained because the record of proceedings shows that the applicant has a record of being indolent and disinterested in his own application. He and his counsel were absent on 5th October, 2016. When the cause was listed for hearing on 4th November, 2016 they were also absent and they were also absent on 15th February, 2017 when a hearing date was taken. This pattern of absence even assuming that they were not served clearly shows the applicant is guilty of indolence because as the mover of the pending application, he needs to show some seriousness in fixing his own application for hearing. He should not just lie and wait for the Respondent to move the court only to complain he was not served. Surely he should be the one moving the court and serving the Respondent if he really believes in his cause.

13. Secondly the applicant's application was dismissed on 8th May, 2017 for want of prosecution again for good reasons premised on indolence on the part of applicant. Again he waited until 6th February, 2018 to move this perhaps on realizing that the administration of the estate was coming to conclusion. He has not explained why it took him more than eight months to file this application. Surely if the applicant was diligent enough and interested with his cause, he should have bothered to even check about the progress on his case even assuming he was unaware of the fact that his application had been dismissed. This inaction on the part of the applicant bespeaks of an indolent person and the Respondent is right to fault him for laches.

14. Now turning back to whether or not the applicant was properly served to appear in court for hearing on 8th May 2017, I have keenly looked at the hearing notice exhibited by the Respondent and it does appear on the face of it that the hearing notice was duly received by the firm of Kijaru Njeru Advocate as it is duly stamped and signed. The only deficiency in that hearing notice is the absence of an affidavit of service. I have also noted from the proceedings that this court proceeded on 8th May, 2017 inadvertently on a wrong premise that the hearing date had been taken by consent. The hearing date was taken in the absence of the applicant and this court had directed that the applicant be served which appears to have been done but on the scheduled date this court as observed inadvertently proceeded on the wrong premise that the hearing date was by consent without requiring proof of service.

15. I have also looked at the Replying Affidavit of the Respondent and noted that the commissioner for the oath omitted the date when the oath was taken and thereby contravened the provisions of **Section 5** of the **Oaths and Declaration Act (Cap 15)** which states as follows:-

"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or

affidavit is taken or made."

The Replying Affidavit in opposition to the application before me does not state at the jurat when it was commissioned and that in my view renders the Replying Affidavit defective.

16. The Respondent's has faulted the applicant's counsel for swearing an affidavit in support of this application but the rules under **Order 19** of the **Civil Procedure Rules**, which rule is applicable pursuant to **Rule 63** of **Probate and Administration Rules**, state as follows under **Order 19 Rule 3(1)**;

" Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove....."

The decision cited by the Respondent related to an Affidavit sworn by an Advocate on matters that were contested between the parties. The distinction here is that the Respondent's counsel has deponed on facts which came to his knowledge while acting and those facts are on court record save for paragraph 8 which I find to be improper. An Advocate is precluded from deposing of such facts that are in the domain of litigants themselves. I therefore would not hesitate to strike such a paragraph which I hereby do under **Order 19 rule 6** of the **Civil Procedure Rules**.

17. In the premises this court finds that in view of the fact that the Replying Affidavit in opposition of this application is defective, the application shall be allowed. I am not persuaded that the Respondent will suffer prejudice for having paid survey fees and legal fees. The fees paid shall still be relevant upon determination of this cause. In the interest of justice I direct that the Summons for Revocation of Grant dated 8th December, 2010 be heard on priority basis and since I had already given directions, I direct that a hearing date be taken. Wheels of justice may grind slowly but at times they do so but at the end of the day justice will be served. Costs of this application shall be in main cause.

Dated, signed and delivered at Chuka this 7th day of March, 2018.

R.K. LIMO

JUDGE

7/3/2018

Ruling dated, signed and delivered in the presence of Mugo for Petitioner and Kijaru for Applicant.

R.K. LIMO

JUDGE

7/3/2018