



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 90 OF 1994

IN THE MATTER OF THE ESTATE OF SILMAN NYAMARIDECEASED

BETWEEN

DICKSON NYAGAKA OYIEKO

EVANS MOSES NYAMARI

BIRIA KERUBO NYAGAKA

RUTH KERUBO NYAGAKA.....APPLICANTS

VERSUS

NICHOLAS NYAGAKA OYIEKO..... RESPONDENT

RULING

1. This ruling relates to the application dated 17th October 2016 brought under rule 49 of the Probate and Administration Rules, Article 159 of the Constitution and Sections 1A, 1B and 3A of the Civil Procedure Act. In the said application the applicant seeks orders that:

(i) **Spent.**

(ii) **That the honourable court be pleaded to grant an order that the deputy registrar of this honourable, signs transfer forms and all relevant documents to enable the parties herein to have LR NUMBER CENTRAL KITUTU/MWAMOSIOMA/389/ to the heirs of the deceased in place of NICHOLAS NYAGAKA OYIEKO alone the respondent herein, who has refused to sign the same as per the Court Order dated the 1st day of July 2003.**

(iii) **That cost of this application be provided for.**

2. The application is premised on the grounds that the respondent has refused to sign transfer forms as ordered by the court on 1st July 2003 and the all efforts to have him sign the said forms and other relevant papers to sub-divide the suit land have been futile.

3. The application is further supported by the affidavit of one Dickson Nyagaka Oyieko, who describes himself as one of the heirs of the estate of the deceased herein, Silimani Nyamari. He repeats the granting of the orders outlined in the body of the application is intended to give effect to the orders of the court made by consent, on 1st July 2003.

4. The respondent did not file any response to the said application and when it came up for hearing, Mr. Masese and Mr. Mugun counsel for the respondent and applicant respectively agreed to canvas the application by way of written submissions which I have perused and I am of the view that the main issue for determination is whether the prayers sought should be granted.

5. I note that the prayer sought by the applicant is to enforce the order of the court made on 1st July 2003 which order was entered by consent. The said order has not been reviewed or set aside to date and it was to the effect that the deceased property to wit, LR. NO. KISII/CENTRAL KITUTU/MWAMOSIOMA/389 be shared equally and according to the existing boundaries.

6. As I have already noted in this ruling, the respondent/Petitioner did not oppose the instant application but stated in his written submissions filed before this court that:

“A similar application dated 8th October 2004 was dismissed for want of prosecution on 13th December 2013. This was after the said application had been (sic) lying in court file all that time and the petitioner had to move the court to have it dismissed. This matter is *res judicata* and cannot be revived without setting aside the dismissal order which is in the court file.”

7. I have perused the earlier application dated 8th October 2004 (hereinafter “the earlier application”) and I note that the orders sought therein are not the same as the orders sought in the instant application.

8. In the earlier application, the applicant sought orders to compel the petitioner to carry out the survey of the suit property, restore boundary features and execute the transfer documents failure of which the deputy registrar of this court would execute the transfer forms. In the instant case however, it is clear that the orders sought are specifically directed to the deputy registrar to execute the relevant transfer forms.

9. Under the above circumstances, I find that instant application is not **res judicata** as has been alleged by the petitioner as the matter was not heard and determined by the court, but was rather dismissed prematurely for want of prosecution. In any event, the substantive dispute between the parties, which was, the distribution of the deceased estate had been agreed upon between the parties and the only issue that is outstanding is the actualization of the court orders issued on 1st July 2003.

10. In an ideal situation, the execution of a court order should be an automatic event that follows the issuance of the said court order and should not be a matter for further contestation or deliberation by the court, in which case, this case would not be before this court today, almost 15 years after the consent order was recorded, had the petitioner complied with the terms of the court order and executed the land transfer documents.

11. It is clear to me that the petitioner has been reluctant in complying with the court order, for years on end, thereby precipitating the filing of the instant application. The petitioner cannot therefore hide behind the doctrine of *res judicata* as a cover for continuing with his non compliance with the court order. The petitioner has not demonstrated what steps he has undertaken towards the actualization of the said court order.

12. In any event, it is trite law that dismissal of an application for want of prosecution does not make the application *res judicata* in view of the fact that the said application was not heard and determined on merit. **(see Kenya Hotel Properties Ltd vs Willisden Investments Limited and 6 Others [2013] eKLR).**

13. Having regard to the circumstances of this case and in the interest of justice, I find that the orders sought by the applicant in the instant application are merited as the respondent has not shown that he will be prejudiced in any manner if the orders sought are granted. Consequently, I allow the application dated 17th October 2016 as prayed. Each party will bear his own costs of the application.

Dated, signed and delivered in open court this 7th day of March, 2018

HON. W. A OKWANY

JUDGE

In the presence of:

- N/A MOKUA for the Applicant
- Mr. Sagwe for the Respondent
- Omwoyo: Court Clerk