



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 306 OF 2003

In The Matter of the Estate of the Late Jackson M'Riungu Muindi (Deceased)

RUSA RUFAS NTWIGA.....PETITIONER

Versus

JANE GACHUNKU...INTERESTED PARTY

RULING

Dismissal of succession cause

[1] Before me is the application dated 5th October 2017 made by way of summons and expressed to be brought under Rule 49 and Rule 73 of the Probate and Administration Rules. The applicant (Interested Party) seeks the following orders:

- 1. THAT the order of dismissal made on 16th July 2015 be set aside and the cause herein be reinstated for hearing***
- 2. THAT the cause herein be transferred to the Chuka High Court for hearing and determination.***
- 3. THAT costs of this application be in the cause.***

[2] The application is premised on grounds set out in the summons and the affidavit sworn by Jane Gachunku on 5th Day of October 2017. The applicant stated that this cause was dismissed without according her a chance to be heard. She claims that she was excluded during the filing of the cause and was a result disinherited. Thus, if the cause is not reinstated she will suffer irreparable loss and damage.

[3] In the affidavit, she averred that neither she nor her advocates were served with a notice that the matter would be in court on 16th July 2015. She deposed further that she has always been keen in and desirous of pursuing this cause so as to enable her and her elderly mother to get their rightful share in the estate of the deceased herein. She stated that they wrote a letter to the Deputy Registrar on 25th October 2016 seeking to have this matter transferred to Chuka High Court for hearing and disposal for it falls within that jurisdiction. But, the court file was not traced. Her advocates followed up on the issue. According to her, the beneficiaries of the deceased should get their respective shares

Analysis and Determination

[4] Parties were given 14 days to file their replies but none was filed. But I have the record which I have perused and it reveals the following: in a judgment delivered on 22nd May 2014 (see the formal order issued on 12th August 2014) the court revoked the grant of representation issued to the Petitioner was revoked/ annulled and the Petitioner together with Harriet Karimi were appointed as joint administrators. The court also ordered that the title deeds issued on the strength of the grant that has been revoked in respect of the property of the estate of the deceased to be cancelled and to revert back into the name of the deceased. Regrettably, no party took any steps to further prosecute this cause as was ordered. Consequently, the cause was marked as closed for want of prosecution on 16th July 2015 prompting this application.

[5] The Applicant asserted that they were not aware of the listing of the cause on 16th July 2015 and were not served with the notice thereof. She also stated that she has been following up the matter so that it could be transferred to the proper jurisdiction, which is Chuka High Court, but the file could not be traced. What does the facts and law say on request such as this?

Special interventions in lieu of dismissal

[6] Some eminent commentators have postulated that a succession cause may be dismissed for want of prosecution. Powerful arguments have been made in support of that approach. I am also aware that equity loathes lashes; and it would stop at nothing to prevent a party who

has slept on his or her rights- especially where the delay has become a source of injustice and prejudice to the other party- from asserting on the stale rights. Prolonged delays in or non-prosecution of cases is one such example. See **Smith v Clay [1767] ER 55, (1767) 3 Bro CC 646, (1767) 29 ER 743**, where Lord Camden LC splendidly espoused on the application by courts of the *doctrine of laches as follows*:

‘A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.’ Equity would not countenance laches beyond the period for which a legal remedy had been limited by statute, and that where the legal right had been barred, the equitable right to the same thing was also barred: ”Expedit reipublicae ut sit finis litium’, is a maxim that has prevailed in this court at all times, without the help of parliament.”

[7] However, the nature of the proceeding at hand and the spirit of any special enactment governing the particular cause should matter and should be one of the considerations in an application for dismissal of the particular cause. The law of Succession Act governs probate and administration causes (popularly known as succession causes) and has placed the estate of the deceased in the hands of the court and the law for protection and due administration thereof. The said law has provided for special and appropriate interventions by the court to ensure diligent administration and distribution of the estate of the deceased. For instance, where the administrator has not, within one year from the date of the grant applied for confirmation thereof, the court may issue notice to the person holding the grant to apply for confirmation of the grant. See section 73 of the Law of Succession Act which provides as follows:-

73. Duty of court to give notice to holder of grant to apply for confirmation

The court shall, within one year from the date of any grant of representation, give notice to the holder of the grant to apply for confirmation thereof.

[8] Failure to act as required in the notice issued in accordance with section 73 of the Law of Succession Act may result into revocation or annulment of the grant of representation under section 76(d) of the said Act. The court may also issue notice to the person to whom grant of representation has been made:

i. to proceed diligently with the administration of the estate; or

ii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular;

[9] Similarly, failure to comply with the notice so issued is a ground for revocation or annulment of grant of representation under section 76(d) of the Law of Succession Act. See section 76 below:

Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

ii. to proceed diligently with the administration of the estate; or

iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
[underlining mine]

(e) that the grant has become useless and inoperative through subsequent circumstances.

[10] I should also add that given the nature of succession and probate causes, the law has granted the probate court such wide powers under section 47 of the Act and Rule 73 of the Probate and Administration Rules *to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient and necessary for the ends of justice or to prevent abuse of the court process*. Therefore, in my view, and in light of the foregoing, dismissal of a succession cause for want of prosecution like you would in a civil suit, should be carefully weighed against the duty of the court to protect and distribute the estate of a deceased person. I

should think also that the office of the public trustee could be useful in causes where the administrators have failed to take appropriate action in the administration of the estate; just thinking aloud.

Applying the test

[11] I will apply the said test of law here. In this case, the administrators of the estate have exhibited extreme dilatory behavior and have not followed through on their duties as required of administrators by the law. And I do not believe the explanation on the delay which has been given by the applicant in her affidavit. Of significance, however, is that the grant issued to the petitioner was revoked on 22nd May 2014 and the Petitioner and Harriet Karimi were appointed as joint administrators of the estate. The administrators were also ordered to file separate schedules of distribution within 60 days thereof. It seems only the Petitioner filed schedule of distribution on 7th July 2014. No other action was taken on the matter despite the clear directions and order by the court which included cancellation of titles issued upon the grant that has been revoked and that those titles to revert to the name of the deceased. Nevertheless and despite the dilatory behavior of the administrators, distribution and administration of the estate is still outstanding especially in light of the order revoking the initial grant issued to the petitioner and the appointment of the joint administrators of the estate. As such, it would be most unfair to leave this estate in such ambiguous state or limbo where the identity of the rightful beneficiaries of and their respective share in the estate has not been determined. Now that the applicant has shown interest in pursuing this cause, the fairest thing to do is to reinstate the cause so that the estate is distributed effectively in accordance with the law. Accordingly, in the interest of justice, I reinstate the cause for hearing and disposal by court. I also direct that the file shall be transmitted to the High Court sitting at Chuka as the subject matter herein falls within the territorial jurisdiction of that court. Parties are however politely warned that there is renewed vigour energy and spirit in the judiciary to dispose of matters expeditiously in accordance with the constitutional command. And, therefore, no delay of whatever kind; intentional or inadvertent shall be allowed to temporize these proceedings any while longer. Parties must also comply with all directions by the court lest the court should fall back to its final discretion and appoint as administrators, such persons who will be willing to administer this estate in accordance with the law. It is so ordered.

Dated, signed and delivered in open court at Meru this 19th day of September 2018

F. GIKONYO

JUDGE

In the presence of:

M/s. Wamalwa for Respondents

Basikio for applicants – absent

F. GIKONYO

JUDGE