



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 65 OF 1999

IN THE MATTER OF THE ESTATE M^r MIRITI THIORA alias MIRITI THIORA (DECEASED)

CHARLES MURANGIRI PETITIONER

-VS-

FESTUS KINGIORI MIRITI OBJECTOR

RULING

1. **M^rMiriti Thiora alias Miriti Thiora (deceased)** died intestate on 26th May, 1989. On 29th October, 1999, a grant was issued to the petitioner and subsequently confirmed on 17th July, 2000. The three properties forming the estate were all distributed to the petitioner.
2. On 1st July, 2002, the objector filed an objection and cross petition which was opposed vide various affidavits sworn by and on behalf of the petitioner. That objection and cross petition remained unprosecuted until 15th November 2016, when the parties appeared before Gikonyo J who set it down for hearing on 16th May, 2017.
3. On 16th May 2017, when the objection came up for hearing, before me, neither the objector nor his advocate attended court. The court noted that since this was a 1999 matter, the same would proceed at 11:45am on that day. Again, at the appointed time, neither the objector nor his advocate was present in court. Counsel for the petitioner therefore urged the court to dismiss the objection for want of prosecution which request was acceded to by the court.
4. Before me now is a Motion on Notice dated 8th May 2018, in which the objector seeks an order to review, vary, discharge and or altogether set aside the orders made on 16th May, 2017 which that dismissed his objection. There is also a Summons dated 3rd August, 2018 in which the petitioner has sought the lifting of the inhibition orders against **LR. Nos. Abothuguchi/Kariene/ 1878 and 1880** and **Abothuguchi/Upper Kaongo/539**.
5. I propose to deal first with the Motion dated 8th May, 2018. That application is supported by the grounds on the face of it and affidavit sworn by the objector Festus Kingo'ri on 8th May, 2018. He contended that; the case had been listed for mention on 16th May 2017, but his previous advocates did not notify him of the date to attend court; that his said Advocates failed to attend court and did not send anyone to represent them in the matter. That it is in the month of July, 2017 that he visited the offices of his former advocate to enquire about the position of the file whereupon he was informed that the same could not be traced in the registry. That he was later informed by a court clerk that his case had been marked as closed. The objector therefore contended that it was entirely because of his previous advocate's mistake and failure to keep him informed that led to the file being marked as closed.
6. The application was opposed vide a replying affidavit by the petitioner sworn on 16th October, 2018. He deposed that no good reason had been offered by the applicant for the inordinate delay in prosecuting his objection which had remained unprosecuted for more than 15 years. That the delay in filing the instant application had also not been explained. That in the circumstances, if the mistake was on the part of the applicant's advocates, he had a recourse in law.
7. When the two applications came up for hearing, Mr. Ndubi for the objector and Mr. Kariuki for the petitioner asked the court to determine the applications on the basis of the affidavits on record. I have carefully considered the affidavits and the entire record.
8. The first application is for setting aside of the order that dismissed the objection and cross-petition dated 1st July, 2002. That objection and cross-petition remained unprosecuted for over 15 years. No reasons were advanced by the objector as to why he never prosecuted the cross-petition and the objection.
9. The principles applicable in an application such as the present one are; that the application should be made timeously; the reasons for non-attendance and the prejudice to be suffered, if any. The order sought to be set aside was made on 16th May, 2017. The present application

was lodged on 10th May, 2018, a year later. There was inordinate delay in making the present application.

9. As to the reasons for non-attendance, the objector deposed that his previous advocate did not advise him of the hearing date. That may be so. My view is, when a party blames his former advocate for any mistake whose consequences he wishes to escape, such application must be served upon the advocate. This is so because, it is imperative for the court to hear the advocate before making any conclusion. The advocate may have failed to attend court for lack of instructions whereby the party is to blame. On the other hand, if the advocate fails to attend court out of sheer negligence, it is a matter of professional negligence between such a party and his advocate. The innocent party and the court should not be dragged into such a conflict.

10. A party will not be allowed to rush and take away a file from his former advocate, heap blame on such advocate and expect to get a respite. Such an application must be served upon the previous advocate. In the present instance, the objector did not serve his previous advocate. As a result, the blame against the said advocate cannot be verified. Making a finding against the said advocate without hearing them will be unfair to them.

11. Accordingly, I am satisfied that there are no good reasons that have been advanced as to why the objector or his advocate failed to attend court on the 16th May, 2017. I find the application to be without merit and the prayer for re-instatement is hereby dismissed.

12. While I was reviewing the record, I found that apart from the objection and cross-petition which were filed on 1st July, 2002 and which are what the court dismissed on 16th May, 2017, there was an application dated 18th April, 2001 and filed on the same day for revocation of grant. That application remains unprosecuted to-date. In this regard, under **Article 159 of the Constitution of Kenya and section 47 of the Law of Succession Act**, I hereby set aside the order closing the file and order that the said application be prosecuted within 30 days of the date of this ruling.

13. In view of the foregoing, I suspend any determination on the petitioner's application dated 3rd August, 2018. I will also make no order as to costs.

DATED and DELIVERED at Meru this 1st day of November, 2018.

A. MABEYA

JUDGE