REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NUMBER 148 OF 1997

IN THE MATTER OF THE ESTATE OF MUSAU MWANIA alias MOSES MUSAU MWANIA (DECEASED)

CHRISTOPHER MUSYOKA MUSAU

CHARLES MUINDE MUSAU

MICHAEL MUNUVE MUSAU.....RESPONDENTS

VERSUS

RUTH KALAU MUSAU.....1ST INTERESTED PARTY

ERICK K MUSAU.....2ND INTERESTED PARTY

.HARRISON MUTUA NDUNGU.....3RD INTERESTED PARTY

ROBERT MUTYANGO MUSAU.....4TH INTERESTED PARTY

PETER MUTUA MUSAU.....5TH INTERESTED PARTY

DAVID MUIA MUSAU….....6TH INTERESTED PARTY

CHOICE HOMES HOLDINGS LTD…....7TH INTERESTED PARTY/APPLICANT

RULING

BACKGROUND

1. Musau Mwania alias Moses Musau Mwania ("Deceased") died intestate on 24th March, 1996. Grant of letters of Administration were issued to the 1st respondent together with 2 other co-administrators.

2. The Applicant bought Mavoko Town Block 3/7359 from Richard Mwania Musau and filed an application dated 20th April, 2018 for orders inter *alia*, that the restriction placed on the said property be removed unconditionally and that a Public Trustee be appointed to administer the estate of Mwania Musau (deceased) for purposes of the issuance of the confirmation of grant. On the date for hearing of the application, the applicant's counsel did not appear in court thus the application was dismissed hence the instant application for reinstatement of the said application. It was supported by an affidavit deposed by Job Odhiambo Ochieng which stated that the applicant had already filed its submissions dated 21st September, 2018. Further that the hearing of the application for confirmation of grant was slated for February, 2019 and finally that no prejudice will be occasioned to the respondents.

3. The application was vehemently opposed by the 1st respondent who stated that the applicant was in court when the date was taken thus the dismissal was rightly done. It was further stated that the summons for confirmation of grant are slated for hearing on 6th February, 2019 and the applicant in this matter has already filed a protest to the said summons.

SUBMISSIONS

4. The parties appeared before me on 23rd November, 2018 when they made oral submissions and the applicant argued that the application be

allowed for the interests of justice and that they are ready to pay throw away costs. Counsel for the respondent submitted that the 1st respondent will suffer prejudice if the application is allowed for this is a 1997 matter and it has a date for hearing of the application for confirmation of grant which hearing will be affected if this application is allowed. Further, the applicant has filed a protest which should be allowed to proceed during the hearing of the summons for confirmation of grant; there is a common denominator in the application dated 20th April, 2018 and the protest filed thus if the instant application is declined, then they will still have a chance during hearing of the application for confirmation of grant. The counsel submitted that the application be dismissed with costs.

5. The issue for determination is whether the court should grant the order sought.

ANALYSIS

6. The succession cause is a matter that has been pending since 1997 and there is a proliferation of applications and this calls to mind Charles Dickens' satire on intractable litigation rendered in his peculiar and memorable prose, in *Bleak House;* (Bradbury and Evans, (1853); Gadshill Edition, P5).

> ***"Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means …. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself a real horse, and trotted away into the other world … a long procession of chancellors has come in and gone out; … but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless."***

7. Rule 73 of the Probate and Administration Rules gives this court inherent powers to make orders necessary to meet the ends of justice and prevent abuse of the court process. **In Beatrice Owino Oginga v Anne Buore Oginga [2016] eKLR**, Justice Muchelule when handling an application for reinstatement of a suit and considering the factors to be considered in deciding whether or not to reinstate the suit observed that "…..to add to the factors, the court should consider the nature of the case, the circumstances that led to the delay and/or order sought to be set aside, whether prejudice will be suffered by the setting aside or reinstatement of the matter, and whether costs should compensate for that prejudice. It should always be borne in mind that justice is best served when a dispute is heard and determined on merits. The competing principle, however, is that litigation must come to an end."

8. In the case of **Simon Makau Ndaya v Del Monte Kenya Limited (2018) eKLR** an application for reinstatement of a suit that was dismissed for non-attendance was disallowed as it was found that the explanation given by the appellant for failure to attend court was not sufficient.

9. I have noted the contents of the affidavit of the applicant and the submissions of both counsel. Counsel for the applicant has argued that the reason for his non-attendance is that the matter did not appear on the cause list. However learned counsel has not stated that the court put up a formal notice that it would not be sitting on the said date and accordingly I find that this reason is unsatisfactory. The Learned Justice Ongaya in dismissing an application for reinstatement of a suit that was dismissed for non-attendance made a similar observation in the case of **Kudheiha Workers v Diocese of Meru St.Paul Primary Boarding School [2014] eKLR.** The learned Judge stated that "the applicant's counsel was duty bound to attend court…for the purpose of hearing the application as was expressly directed by the court and the orders of 28.01.2015 having not been varied one way or the other." If in the unlikely event I am inclined to believe this reasoning of counsel, I would need to look at the matters surrounding the conduct of the case. I have noted that the said counsel for the applicant is remarkably silent to the argument of the respondent that the confirmation of grant has a hearing date and they will have a chance to ventilate their affidavits of protest on the said date. I am not satisfied that there are exceptional circumstances to warrant reinstatement of the application dated 20th April, 2018, because I am unable to see the usefulness of a remedy that has its roots in two different suits, apart from occasioning abuse of the court process that will disturb the orders made for hearing of the confirmation of grant to have been made in vain. *A priori*, the applicant has not exhausted the remedy that he seeks in the application he seeks to reinstate for he still has an opportunity to be heard during the hearing of the application for the confirmation of grant where it has filed a comprehensive affidavit of protest.

DETERMINATION

10. In light of the above arguments, in determining a balance of the right to be heard in this application and the competing principle of law that litigation must come to an end; and in effect accord substance to the old-age adage that justice delayed is justice denied, the court finds that the unique circumstances of the instant case will militate against the granting of the discretionary relief sought for the right to be heard is outweighed by the delay in finalization of the succession cause. It is not in dispute that the parties have been along the court corridors since 1997 and should gear their efforts towards the finalization of this matter and be in tandem with the rulings dated 19.10.2017 and 25.9.2018.

11. The conclusion, then, is that while justice of particular cases might influence the Court to offer relief a litigant who has suffered because of non-attendance of court, the justice of the case in this particular case does not compel me to exercise my discretion to allow the application, whose interests will be taken care of during the hearing of the summons for confirmation of grant scheduled for 6.2.2019 and in which the applicant has filed a comprehensive affidavit of protest

12. The bottom line is that litigation must, at some point, come to an end. This is one such case. Re-opening a feud that has roots on the protest will not serve the interests of justice. The applicant will not suffer any prejudice if the application dated 20.4.2018 is not reinstated.

13. Consequently, I find no merit in the Application dated 1.11.2018. It is dismissed with no order as to costs.

Orders accordingly.

Dated and delivered at Machakos this 5th day of December, 2018.

D.K. KEMEI

JUDGE