

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2573 OF 1999

IN THE MATTER OF THE ESTATE OF NJURU NDEGWA MAGITHIA (DECEASED)

RULING

1. The summons dated 14th March 2015, filed herein on 14th March 2016, seeks the striking out of the summons for revocation of grant dated 17th February 2009, and the setting aside of orders made on 24th February 2009. The grounds upon which the application is founded are set out on the face of the application, while the facts of the matter are deponed in the affidavit sworn in support of the application. The gist of it is that the applicant in that application filed it in 2009, and obtained injunctive orders which have been pending since then. The applicant's case is that the applicant in that application has failed to prosecute that application because he has been enjoying the interim orders made in 2009. It is averred that the respondent has lost interest in the application.

2. In response to the application the respondent has filed a preliminary objection and affidavits in reply. In the notice of preliminary objection on a point of law, dated 9th May 2016, the respondent states that the application is defective and an abuse of the court process, for it is founded on provisions of the Civil Procedure Rules, which are not applicable to a probate cause. It is argued that there is no jurisdiction and the application ought to be struck out. In the affidavit sworn on 9th May 2016, it is averred that the respondent had fixed the application for hearing several times and it would not be right to aver that the same has been dormant since 4th October 2010. He states that the last time the matter was listed it was taken out at the instance of the court. He avers that his advocates had on many occasions sent out invitations for the purpose of fixing the application for hearing. He also explains that there have been efforts to settle the matter out of court, and the applicants even filed an application dated 28th June 2011 which contributed to the delay in the finalization of the matter. He states that the applicants are also at liberty to have the matter fixed for hearing on their own motion. He swore a further affidavit on 27th June 2016, along similar lines. He states that the applicants have changed advocates several times which has had the effect of delaying the finalization of the matter. He also states that his mother died in 2015 and he took time mourning her, which contributed to the delay.

3. Directions were given on 31st May 2016, that the application, together with the preliminary objection, would be disposed of by way of written submissions. Both sides have filed detailed submissions thereon. I have had occasion to read through the same and to take note of the various arguments made therein.

4. The application dated 17th February 2009 was filed under certificate of urgency and was placed before Onyancha J. on 24th February 2009. It was certified urgent and interim orders were made to restrain division of estate assets. The matter was mentioned on 10th March 2009 when further directions were made and the matter stood over for further mention. The application was generally active throughout 2009, but there was a lull after 1st November 2010. The matter was fixed for hearing on 8th March 2011, but it was not listed. Nothing happened after that until 28th March 2013, when both parties attended the registry to obtain a date for its hearing. It was not listed on 25th April 2013, and on 22nd July 2013, counsel for the applicants in the instant application obtained a date *ex parte* for its hearing on 5th November 2013, when again the matter was not listed.

5. The applicants herein attended the registry on 6th August 2014 and obtained a date *ex parte* for hearing on 6th October 2014, both parties attended court on 6th October 2014 but could not proceed with it as the matter could not be reached on account of the court's heavy caseload. The matter was given a date in

court for 11th December 2014. Come that date the respondent herein applied for leave to amend his papers. The matter was taken out. It was placed before the Judge on 7th October 2015, a date that had been obtained *ex parte* by counsel for the applicants in the instant application. On that date directions were given for the disposal of the matter. After that the applicants herein then moved this court by the application herein dated 14th March 2015 which was placed before the Duty Judge on 14th March 2016.

6. From the record before me, it cannot be said that the matter has altogether been inactive. I agree that for some time between 2010 and 2013 there was little activity regarding the application, but throughout 2013, 2014 and 2015 there was quite some effort to have it going, unfortunately that took the efforts of the applicants herein rather than the respondent who is the applicant in the application dated 17th February 2009. It would appear to me that the applicants tired of having to have the said application fixed for hearing when the mover of the motion himself did not appear too keen to prosecute it.

7. The respondent appears to concede that he probably did not do much to have his application prosecuted. He has advanced several reasons for his failure. He blames the applicants for having filed an application in 2011 which had the effect of delaying prosecution of his own application. However, he does not explain why he did not appear too keen after 2013 to have the matter fixed for hearing and left it to the applicants herein. He also alleges that the applicants herein kept changing advocates, which excuse I find to be quite lame. He also alleges that there were negotiations to settle the matter out of court, yet the respondent has not provided any proof of that allegation.

8. It was submitted that there is no jurisdiction vested in the probate court to dismiss an application for want of prosecution. It could be that there are no specific provisions in the Law of Succession Act, Cap 160, Laws of Kenya, and the Probate and Administration Rules, but the court does have inherent powers to make such orders as may be expedient for the purpose of doing justice and to prevent abuse of the court's process. The inherent power is saved by Rule 73 of the Probate and Administration Rules. There is power vested in the probate court to dismiss suits for want of prosecution.

9. As the matter has been active as late as October 2015, I shall give the respondent the benefit of the doubt. In the end I shall make the following final orders -

(a) That the respondent is hereby granted thirty (30) days from today's date to have the application dated 17th February 2009 fixed for hearing;

(b) That any applications for adjournment of the hearing of that application shall not be entertained;

(c) That in default the application dated 17th February 2009 shall stand automatically dismissed with costs;

(d) That the estate comprises of only two parcels of land situated at Muguga, Gitaru within Kiambu County, the matter shall accordingly be transferred to the High Court of Kenya at Kiambu for final disposal.

(e) That the applicants in respect of the application dated 14th March 2015 shall have costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 20TH DAY OF JANUARY, 2017.

W. MUSYOKA

JUDGE