

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS SUCCESSION CAUSE NO. 158 OF 2016

In the Matter of the Estate of FREDRICK M'ITHINJI (DECEASED)

MERU BAKERS LTDAPPLICANT

VERSUS

JOSEPH GITONGA RESPONDENT

RULING

1. This is a Ruling on the Application by Joseph Kithinji Gitonga (hereinafter “the Respondent”) dated 3rd March, 2017. The Motion is brought under Order 12 Rule 7 of the Civil Procedure Rules. He seeks the setting aside of the Order made on 28th February, 2017.

2. The grounds for the application are contained in the Supporting Affidavit of Muia Mwanzia Advocate sworn on the 3rd March, 2017. These are that the application of 12th February, 2017 should be heard on merit; that on the 28th February, 2017, Mr. Mwanzia Advocate had several matters spread out between three Judges of this Court; that his assistants were engaged in other courts; that by the time he arrived from the other courts, he found that the said matter had been called out and dismissed. He deponed that his non-attendance was neither deliberate nor intentional.

3. The Application was opposed on the basis of a Replying Affidavit sworn by Mr. Joel Muriuki on 21st March, 2017. As a director of the Applicant in the main proceeding, he deponed that the matter was number 20 in the Cause list for the day and was called out at about 10.00 a.m.; that the Respondent’s Counsel had enough time to appear and prosecute the same; that both the present and the dismissed applications were made to delay the dispensation of justice. That Mr. Mwanzia Advocate for the Respondent was acting for the Applicant in Meru HCCC No. 112 of 1996 and should therefore be barred from acting in this matter.

4. At the hearing of the application, Mr. Mwanzia relied on his Supporting Affidavit while Mr. Thangicia, Learned Counsel for the Applicant submitted that the Respondent was not interested in the matter. He also submitted that the application intended to delay the hearing of HCCC No. 112 of 1996 in which Mr. Mwanzia was acting for the Applicant. Counsel urged the application be dismissed.

5. I have considered the affidavits on record. I have also considered the submissions of Counsel. The first issue is the appearance of Mr. Mwanzia for the Respondent in this matter. His appearance for the Respondent was objected on the grounds that he was previously appearing for the Applicant in Meru HCCC No. 112 of 1996. The evidence of such appearance that was exhibited was a copy of a list of authorities filed in the said HCCC No. 112 of 1996 by Muia Mwanzia and Company, Advocates. In that document, he is shown as acting for the Plaintiffs against the Defendants in that case. The Respondent, Meru Bakers Limited was listed as the 3rd Defendant in that suit. It cannot therefore be said that Mr. Mwanzia was acting for the Respondent in that case. In any event, even if it was shown that he was acting for Meru Bakers Limited in that suit, the best procedure would have been to file a formal application by way of an injunction to restrain that law firm and not by way of an objection in the Replying Affidavit. I reject that objection.

6. The next issue is whether the application has any merit. This is an Application to reinstate an application that was dismissed for non-attendance. The applicable principles in such an application are

well known; that an applicant must give sufficient or satisfactory reasons for non-attendance; that there has been no delay in applying for re-instatement and that no prejudice will be suffered by the opposite party.

7. In the present case, Mr. Mwanzia has sworn that on the material day, he had various matters listed before three (3) different Judges of this Court. He exhibited a Cause list for the Meru High Court for 28th February, 2017. He highlighted this matter as being before this Court, **Succession Cause No. 313 of 2014 – In the Matter of the Estate of Nkunga Kirichiu Ncebere and ELC 152 OF 2011 Irvine Mwenda Japhet v M’Kanga M’rwito** as being before Onginjo and Mbugua JJ. That fact was not challenged. The Applicant contented that this matter was called at around 10.00 a.m. and that therefore the Respondent took too long to attend to it. I have perused the record. It shows that at 9.40 a.m. on that day, Mr. Mwanzia came to this Court and wanted the matter to be re-opened but the Court declined as orders had already been made thereon.

8. In view of the foregoing, I am satisfied that the reasons adduced for failure to attend Court on 28th February, 2017 were satisfactory. It is not correct that the matter must have been dismissed around 10.00 a.m. as the record is clear on that. There may not have been an intention on the part of Counsel for the Respondent to over-reach.

9. As regards the time taken to lodge the present Application, I think it was timeous. The application of 12th February, 2017 was dismissed on 28th February, 2017 and the present Application was lodged on 3rd March, 2017, a period of three (3) days. To my mind, that was reasonable time. As regards prejudice, none was alleged and I also see none will arise if the application is allowed.

10. In the premises, I find that the application has merit and the same is allowed. I will however order the costs to be in the cause.

DATED AND DELIVERED AT MERU THIS 3RD DAY OF MAY, 2017.

A. MABEYA

JUDGE

03/05/2017