



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. SUCCESSION CAUSE NO. 77 OF 2015

SEBASTIAN KAMBO MACHARIA.....APPLICANT

VERSUS

JOTHAM MIANO GILBERT.....RESPONDENT

RULING

1. **SEBASTIAN KAMBO MACHARIA**, the applicant herein has moved this Court through summons dated 17th September, 2014 for orders that the Summons for Revocation of Grant herein dated 13th October, 2005 be dismissed for want of prosecution on the following grounds:-

(1) That the applicant was granted 90 days on 31st January, 2012 to prosecute his application but he has failed to do so.

(2) That the applicant has lost interest on the matter.

2. When the matter came up for hearing of the application, the applicant's counsel pointed out that this cause was last in court on 26th April, 2012 when the applicant/respondent requested for more time stating that he had not served all the interested parties. It was argued that despite the court's leniency to grant the applicant/respondent a further 30 days as the last chance to prosecute his application he failed to comply.

3. The applicant further pointed out that the respondent has showed no interest to fix his summons for revocation of grant dated 13th October, 2005 for hearing as the record demonstrated.

4. The respondent through his counsel, **Mr. Igati Mwai** opposed the application stating that he had difficulties tracing the parties in this cause and was therefore unable to serve. He also stated that he had experienced difficulties in tracing the file in the registry given that the file was originally in Embu.

5. I have considered this application and the response, thereof. The record clearly shows that the application for revocation of grant dated 13th October, 2005 has been pending in court for now close to 15 years. The respondent has not taken out any step to prosecute the same. This is despite the sentiments expressed in court vide a ruling dated 31st July, 2012. Directions on the said summons were taken in Embu High Court on 7th May, 2007, which is over 8 years ago. He has absolutely taken no action from that date to prosecute his application.

6. I have noted the respondent's letter dated 23rd March, 2012 on record complaining that the court file

had not been traced and yet on 16th March, 2012 the applicant's counsel was at the registry and fixed the application for hearing on 24th September, 2012. It is therefore incorrect for the applicant to claim that he was hampered by the disappearance of court file from taking steps to prosecute his application.

7. It is also apparent from the record that when this matter last appeared in court on 26th April, 2012, the respondent requested for more time to enable him effect service. This Court sitting in Embu granted the respondent last chance and gave orders which the respondent again has not complied with due to indolence on his part and equity helps the vigilant but not the indolent. In the case of **PHINEHAS NYAGAH -VS- ISAAC ONGIRI & ANOR [2015]eKLR** the court dealt with a similar application like the present one and made the following observations:

“In deciding the matter in favour of an applicant, the court must be satisfied that the prolonged delay has not been justified by the respondent. In other words sufficient reasons must be given.....Failing to take action in a matter for a period of 4 years 11 months is inordinate delay and the reasons given are not convincing. The plaintiff has been indolent and equity only assists the vigilant.”

8. In the present case, the respondent has not taken action for more than 10 years despite being directed by court to take necessary steps to prosecute his application. I find that the respondent has not been diligent enough since if he was he could have served all the interested parties. The reasons that he could not trace them does not hold as he could have easily applied for alternative mode of service as provided by law if it is true he encountered challenges in effecting service.

9. The respondent had every reason to comply with the orders issued by court on 31st January, 2012 and 24th April, 2012. He failed and the only assumption that can be inferred is that he has lost interest in this matter. This Court finds no reason to keep this matter alive and pending in court when the mover obviously is not interested. I have noted that the applicant had taken citations against him initially before applying for letters of administration but he also failed to answer to the citation. The respondent has therefore been indolent from the inception of this cause to-date without any justifiable cause advanced.

In the premises I find merit in the application dated 17th September,

2014. The same is allowed with costs.

Dated and delivered at Kerugoya this 12th day of April, 2016.

R. K. LIMO

JUDGE

12.4.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Igati Mwai for Respondent present

Maina for Applicant absent

COURT: Ruling signed, dated and delivered in open court in the presence of Igati Mwai for Respondent

and in the absence of Maina for applicant.

R. K. LIMO

JUDGE

12.4.2016