



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC.SUCC. APPL. NO. 56 OF 2001

IN THE MATTER OF ESTATE OF KIPNGENO ARAP CHEMURUBIL - DECEASED

KIPKOECH CHUMO SEREM.....1ST OBJECTOR

MICHAEL KIPTOO ROTICH.....2..ND OBJECTOR

VERSUS

KIPROTICH NGENO.....PETITIONER /APPLICANT

RULING

1. The application for my determination is the one dated 19th November, 2015 filed under **Rules 49** and **73** of the Probate and Administration Rules.

It seeks only one prayer - that the application dated 28th March, 2001 filed by *Ms Kipkoech Chumo Serem* and *Michael Rotich* be and is hereby dismissed with costs for want of prosecution.

2. The application is supported by an affidavit sworn by the applicant *Mr. Kiprotich Arap Ngeno* on 19th November, 2015. In the affidavit, he deposed that he was the administrator of the Estate of the late *Kipngeno Arap Chemurbii* having obtained a grant of letters of administration to the Estate on 15th November, 1990 in Kapsabet Principal Magistrate's court succession cause No. 17 of 1988 which was subsequently confirmed; that thereafter, Kipkoech Chumo Serem and Michael Kiptoo Rotich (hereinafter the respondents) filed their application dated 28th March, 2001 which they have failed to prosecute for about 15 years; that the prolonged and inordinate delay in the prosecution of that application is occasioning great injustice to him and other innocent parties considering that there are interim preservative orders in place issued by the court on 14th June 2001 pursuant to that application.

3. The application is opposed through an undated replying affidavit sworn by *Jepkoech Chumo Serem*. It was filed in court on 1st April, 2016. He deposed that that the applicant is no longer the administrator of the deceased Estate since the grant issued to him was revoked by this court on 5th March, 2007; that the delay in prosecuting the application has been occasioned by factors attributable to court processes in particular the misplacement of the court file and unavailability of hearing dates which factors were beyond their control; that the applicant has also contributed to the delay as he had promised to have the dispute between them amicably settled and they waited for him to fulfill his promise for years in vain; that the interim orders had been issued to protect their interests as stake holders in the Estate and the same should not be lifted. They urged the court to find that it is not in the interest of justice to allow the application and that the same ought to be dismissed.

4. The application was canvassed before me on 4th April 2016. Learned counsel *Mr. Wafula* argued the application on behalf of the Applicant while learned counsel *Ms Ruto* represented the respondents. They made brief oral submissions which I have carefully considered together with the depositions in the affidavits filed by the parties.

5. I have perused the court record. It reveals the following; that *Kipngeno Arap Chemurbii* died on 22nd January, 1983 and that the applicant was appointed as Administrator to his Estate on 17th March, 1990 in Kapsabet Succession Cause No. 17 of 1988. The grant was subsequently confirmed. The respondents thereafter approached this court through a summons dated 28th March, 2001 seeking annulment of that grant on grounds that it was fraudulently obtained through concealment of material facts. The summons was filed on 5th April, 2001 contemporaneously with the chambers summons of even date which is the subject of the instant application.

6. In that application, the respondents sought orders to preserve the deceased's Estate pending the hearing and determination of the summons filed for annulment of the grant issued to applicant. Prayer 1 sought that the applicant, his servants or agents be restrained from intermeddling with the Estate by selling, leasing, charging, subdividing, transferring, trespassing upon, erecting structures thereon, cultivating, planting crops, paddocking or otherwise interfering with parcel of Land known as Nandi/Mosombor/419 or its mutations known as Nandi/Mosombor/503, 503 and 504 while prayer 2 sought that the land registrar in respect of the said parcels of land be inhibited pending the hearing and determination of the summons for the annulment of the grant.

7. The record also shows that the court (Nambuye J as she then was) issued interim orders in terms of prayer 1 and 2 till 5th July, 2001 when the summons for annulment of grant was scheduled to be heard interparties. Hearing did not take off on that date and on subsequent dates and the interim orders remained in force till 5th September, 2001 when the application was scheduled for mention.

8. From 2nd August, 2001 when the interim orders were extended upto 5th September, 2001, the respondents appear to have gone to sleep as the record does not show that they took any other step towards progressing the hearing of the application. There is therefore no doubt that the application has remained unprosecuted for the last 15 years or so.

9. The respondents have sought to explain the prolonged delay by deposing in the Replying affidavit that they have on several occasions sought to have the matter fixed for mention for directions but their efforts did not bear any fruits allegedly because the court file could not be traced or dates were not available. They annexed three letters dated 3rd October, 2013; 17th November, 2016 and 23rd June, 2015 collectively marked as KCS/3 showing that their advocate had invited the applicant to take a mutually convenient date from the court registry for mention of the matter for directions.

10. Though I agree with *Ms. Ruto* that Succession Causes are sensitive matters which require the court to rise to its higher calling of administering substantive justice by giving the beneficiaries and other people interested in the Estate sufficient latitude in sorting out their differences either amicably or through the court process, that does not mean that succession disputes should not be determined expeditiously and that prolonged and inordinate delay in their prosecution cannot lead to their dismissal for want of prosecution. Though the Succession Act and the Probate and Administration Rules do not provide for instances in which succession causes should be dismissed for want of prosecution, the court can use its inherent powers to dismiss them or applications filed therein for want of prosecution if the interests of justice so demands.

11. In this case I have considered the explanation given for the delay of 15 years in the prosecution of the application dated 28th March, 2001. The reasons are in my view not convincing or satisfactory since there is no confirmation from the Deputy Registrar that the court file had gone missing at any one time and there is no explanation why the respondents sought to have the matter fixed for mention albeit belatedly instead of just fixing a hearing date for the application.

12. Besides not having satisfactorily accounted for the aforesaid inordinate delay, it is apparent that the application has now been overtaken by events. I say so because the application had been filed with the aim of obtaining interim orders pending the annulment of the grant issued to the applicant in Kapsabet Succession No. 17 of 1988 and It is not disputed by either of the parties that the said grant was revoked or annulled by this court on 5th March, 2007 in Misc Succession cause No. 195 of 2001. It is therefore my opinion that the ends of justice dictates that the application can be dismissed because retaining it on record will not serve any useful purpose.

13. *Miss Ruto* in her submissions urged the court not to allow the instant application as this would amount to lifting the interim orders issued therein thereby giving the applicant a free reign to interfere with the estate to the detriment of the respondents. I find this submission quite misplaced because the court record clearly shows that there are no interim orders in place. The interim orders issued on 14th June, 2001 lapsed on 5th September, 2001 over fourteen years ago.

14. In view of the foregoing, it is evident that whichever way one looks at it, the respondent's application dated 28th March, 2001 cannot be salvaged. I therefore find merit in the application dated 19th November, 2015 and it is hereby allowed. The application dated 28th March, 2001 is consequently dismissed with costs to the applicant for want of prosecution.

It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 12th day of May, 2016

In the presence of:-

Mr. Melly holding brief for Ms. Ruto for the Respondents

No appearance for the applicant

Naomi Chonde - Court clerk