REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NUMBER 53 OF 2007

(IN THE MATTER OF THE ESTATE OF MOSES GATUNDU MUGO alias MUSA GATUNDU alias GATUNDU S/O MUGO)

MARIAM WANJIKU KINYUA…….....PETITIONER/ APPLICANT

VERSUS

NGUNJIRI WAMBUGU…….....1ST OBJECTOR/ RESPONDENT

MUNENE WAMBUGU……..…....2ND OBECTOR/ RESPONDENT

FRANCIS KIBUE WAMBUGU…….....3RD OBJECTOR/ RESPONDENT

RULING

By a summons in general form dated 4th June, 2010, the respondents asked this court to enlarge time within to apply for leave to appeal to the Court of Appeal against the judgement of this Honourable Court delivered on 7th May, 2010. They also sought for leave of this Court to appeal to the same Court against that particular judgement. Finally, they urged that the notice of appeal filed and served upon the respondents be deemed as duly filed once the leave has been granted.

Prior to this application, the respondents filed a summons, again in general form, seeking a stay of execution of the judgement aforesaid pending the determination of an intended appeal against it; the summons was dated 14th February, 2011 but was filed in court on 17th February, 2011. The application was heard *inter partes* and on 11th April, 2011 this Court issued a stay of execution of the judgement and all consequential orders pending the hearing and determination of the respondents' intended appeal.

The judgement whose execution was stayed arose out of a protest filed by the respondents against the confirmation of grant that had been made in respect of the estate of the deceased. According to that judgement, the protest was dismissed and the grant confirmed.

By a summons dated 16th of October, 2015, and filed in court on 25th of November 2015, the petitioner sought to have the order staying the execution of the judgement (delivered on 7th May, 2010) vacated or, in the alternative, the respondent's application dated 4th June, 2010 dismissed for want of prosecution. It is this applicant's summons that is the subject of this ruling.

The applicant's case is that since 5th November, 2012 the respondents have never taken any steps to

prosecute their application dated 4th June, 2010 apparently because they continue to enjoy orders for stay of execution; with these orders in place, they have simply lost interest in the prosecution of the application.

The respondents opposed the application and in the affidavit sworn on their behalf by the second respondent, they stated that the delay in the prosecution of their application was caused by the departure of the advocate who was seized of the matter in the firm of advocates on record for them. The advocate who took over their case only came to learn of their pending application on 16th October, 2015.

The second reason why there has been a delay in the prosecution of the application, so they have deposed, is because the applicants have never been supplied with a certified copy of the judgement and the proceedings. For these two reasons, the respondents have urged this Court to give them a chance to prosecute their application dated 4th June, 2010 and determine it on merits.

Counsel filed written submissions in which they largely rehashed the depositions in their respective clients' affidavits.

The record shows that the only time the respondents fixed the application for hearing was on 26th March, 2012 when their representative was given a hearing date at the registry; the application was scheduled to be heard on the 5th November, 2012; On the material date, counsel for the applicant informed the court that she had just been served with the application and therefore she sought time to respond. The court directed that afresh date for the hearing of the application be fixed at the registry. No date was ever fixed as directed or in any other manner.

The respondents' explanation that the reason for inaction on their part was because of the departure from their firm of advocates of the advocate who was handling their cause does not appeal to me to carry any water. First it is not clear from their affidavit who this advocate was- and even if this advocate was known, it was the firm of advocates, and not any particular advocate in that firm, that was responsible for this matter on behalf of the respondents. Simply put, this brief was not personal to any particular advocate in the firm of advocates on record for the respondents.

Again, none of the advocates in the firm of advocates which is on record for the respondents has sworn any affidavit to the effect that the delay in prosecuting the respondents' application was occasioned by the departure of one of their own. For the same reason, the allegation that advocate who is currently seized of this matter on behalf of the respondents only became aware of it on 16th October, 2015, also cannot be verified because the purported advocate has not sworn any affidavit in this regard. Without such an affidavit, there is no explanation why it took more than two years for this latest advocate to be aware of the matter.

I have also noted that it is not clear from the affidavit of the respondents when the alleged advocate left; the date of his departure is obviously material because it would show who between the previous advocate and the current advocate seized of the matter was indolent, assuming that the respondent's argument that their brief was assigned to a particular advocate is anything to go by.

As early as April, 2011, this Court acknowledged the respondents' lethargy in the prosecution of the application; in a ruling on the application by the petitioner to have the deputy registrar of this Court execute the transmission documents in respect of the deceased's estate, Sergon, J. had this to say on the respondent's conduct:

> "***It is also not in dispute that the respondents filed a notice of appeal on 17th May, 2010. There is also evidence that the respondents have applied to be supplied with the proceedings and judgement. The record shows that the respondents advocate was informed on 9th August, 2010 that the typed proceedings and judgement were ready for his collection. It would appear that the respondents have not deemed it fit to treat the matter with the urgency it deserves. There are two pending applications filed by the respondents. The first one is the summons dated 4th June, 2010***

in which the respondents are seeking for leave to enlarge time to apply for leave to appeal to the Court of Appeal against this court's decision on 7th May, 2010. The second application is the summons dated 14th February, 2011 in which the respondents are praying for an order for stay of execution pending the hearing and determination of the intended appeal. There is no evidence that those two applications were served upon the petitioner's advocate. It is also obvious from the court records that the respondents have never fixed those applications for hearing. It would appear they were woken up from their slumber by the petitioner's application thus the respondents were prompted to file and fix for hearing the second application when they realised that the petitioner was keen to have the confirmed grant actualized. In my view, the respondent's conduct shall not attract the sympathy this court… Typed proceedings and judgement were ready for collection as of 9th August, 2010. The respondents have not deemed it fit to prosecute the applications."

It is clear that even after the court expressed its reservations about the respondent's conduct with regard to their application they never took cue and have it prosecuted. It is also clear from the learned judge's ruling that, contrary to the respondents' allegation that they have never been supplied with a certified copy of the proceedings and the judgement, these parts of the court record had been duly prepared and have always been ready for collection as early as 9th August, 2010. To allege that they have never been supplied with the proceedings or the judgment they intend to impugn is a sheer lie.

For the reasons given I agree with the applicant that having obtained a stay of execution of the judgement against them, the respondents are no longer interested in their application dated 4th June, 2010. It is worth noting that even after the applicant filed this application, they still did not take any action to fix their application for hearing. This court will not countenance their indolence; accordingly, I would allow the applicant's application dated 16th October, 2015 and in the same breath, dismiss the respondents' application dated 4th June, 2010 for want of prosecution. With the dismissal of this application, it follows that the order made by this Court on 11th April, 2011 staying the judgement of the Court delivered on 7th May 2010 is automatically discharged.

I am persuaded this sort of an order is covered by **section 47** of the **Law of Succession Act** which clothes this court with the jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees or make such orders as may be expedient.

Parties will bear their own respective costs. It is so ordered.

Dated, signed and delivered in open court this 2nd day of December, 2016

Ngaah Jairus

JUDGE