



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
MISC. CIVIL APPLICATION NO. 64 OF 2010

GENESIO MURITHI BORE (Legal Rep. of the Estate of M'BOORE

MURANGA – Deceased) 1ST APPLICANT

FESTUS MWALIMU 2ND APPLICANT

мбака MURANGA 3RD APPLICANT

RAINI MURANGA 4TH APPLICANT

-VERSUS-

GENESIA CIARWIGI MUCHIRI RESPONDENT

R U L I N G

The applicant herein through an application dated 16th October, 2013 seek that a temporary stay of execution of the grant issued by the Resident Magistrate in his decree in judgment in Runyenjes court in Resident Magistrate court Succession Cause No. 63 of 2013 dated 19th November, 2001 pending the hearing of this application interpartes and thereafter pending the hearing and determination of this application. The applicants further seek that this Honourable court do set aside and/or vary its order dated 9th July 2013 dismissing the applicant's application dated 27th April 2010 for want of prosecution and reinstate the same for hearing and determination on merits. The application is based on several grounds on the face of the application and supported by applicant's affidavit dated 16th October, 2013. The Respondent is opposed to the application and filed Replying Affidavit dated 25th October, 2013 and supplementary affidavit dated 14th November, 2013. The 4th Applicant filed grounds of opposition dated 24th October, 2013. The 1st, 2nd and 3rd applicants filed list of authorities in support of their application.

That when the application came up for hearing Mr. Nyamu Nyaga, learned counsel appearing for the 1st, 2nd and 3rd Applicants orally submitted that the applicants were not aware of the court's order dated 2nd

July, 2013; that they were required to pay court adjournment fees ordered on 27th April, 2010 within a week and set the matter down for hearing in default the application be marked as dismissed. Mr. Nyamu, urged that the counsel acting for the applicants by then M/S I.C. Mugo & Co Advocates failed to notify the applicants of the court's order and that the non-compliance was due to advocates mistake for which the applicant's should not be punished for advocates mistakes. He urged that the case concerns land and distribution of the deceased estate amongst his heirs and that the applicants should be given an opportunity to ventilate their case before the court.

Mr. Mutani, learned counsel for the Respondent opposed the application urging that the court acted properly in dismissing the applicants application on its own motion. That the court exercised its discretion properly. He further argued that in lifting the order the applicants should give tangible and substantive grounds to challenge the court's decision. He argued that the distribution of the deceased property was fairly done as deponed by Respondent. He submitted that the court's order of 2nd July 2013 had not been complied with and as such the applicants are not entitled to court's discretion.

The 4th applicant prayed that his grounds of objection be marked as withdrawn as he was satisfied with lower court's decision.

The issue for determination is this application is whether the applicants have raised reasonable grounds to justify setting aside the order issued on 9th July 2013 and further whether justice shall be served upon all by denying the applicants' application.

The applicants' application which was dismissed for want of prosecution was dated 27th April, 2010. The applicants in their application were seeking leave to appeal out of time against the judgment of Mr. D. O. Onyango, S.R.M. in Runyenjes Succession cause No. 63 of 2013. That on 18th October, 2010 applicants had not served the application and court ordered them to serve and pay court adjournment fees before next hearing date. That on 24th May, 2011 court noted the earlier order had not been complied with and further condemned the applicants to pay court adjournment fees ordered on 18th October, 2010 and that day's court adjournment fees all in all totaling to Kshs.2,000/= before fresh date could be taken. The applicants set this matter down for hearing on 2nd July, 2013 having not complied with court's earlier orders. That on 2nd July, 2013 court noted that the applicants were not serious with their application as the application had not been served since 2010 and that court adjournment fees had not been paid since court issued orders that effect. This court then gave the applicants one week to pay court adjournment fees, set suit down for hearing and serve the same. The court set the matter down for mention on 9th July 2013 to confirm the position. On 3rd July, 2013 the application was set down for hearing on 17th September 2013. However the court adjournment fees was not paid as ordered. Consequently on 9th July, 2013 the application was dismissed for failure to comply with court's order. The court's record reveals that the adjournment fees was paid on 2nd July 2013 partly.

The applicants assert that failure to comply with court's order was due to mistake of their advocate by then M/S I.C. Mugo & Co Advocates. That they were not aware of the court's order of 2nd July 2013, that in default of compliance that their application was to be marked dismissed. They argued that they should not be made to suffer because of the mistake of their advocates. In the case of **Maina v Muriuki (1984) K.L.R. 407** court stated:-

“As the applicant had stated that he was not aware that the suit was to proceed and that he was relying on his advocate who had failed to turn up at the hearing the applicant would not be punished due to his advocate’s fault (Shabir Din v Ram Parkash Anand (1955) 22 BACA 48)”

The Respondent did not challenge the applicants assertion that default to comply was due to failure of their advocate to communicate the court’s order to them. From the applicants affidavit I take it that their failure to comply with the court’s orders was due to the failure of their advocate to communicate the court’s order to them. This court is much aware that any case before court do not belong to the advocate but belongs to the parties but not advocates who are engaged to act on parties behalf. I am therefore of the considered view that errors of mistakes committed by an advocate acting for a party should not be visited on the party.

I have also considered the fact that the parties are heirs to the deceased estate. The applicants intended to appeal out of time to challenge the trial court’s judgment for reasons set out in their application. The issue before the trial court was over a land which is a sensitive issue in this country and denial of the applicants an opportunity to prosecute their application and be determined on merits would amount to condemning them unheard and may result to denial of justice. The Respondent in this application would be adequately compensated by way of costs if the application is allowed.

Having said so much I am inclined to grant the applicants application in the following terms:-

- 1. A temporary stay of execution of the Resident Magistrate’s, D. O. Onyango decree, order, judgment in Runyenjes. R.M.C. Succession Cause No. 63 of 2003 dated 19th November, 2011 be and is hereby granted pending the hearing and determination of application dated 27th April, 2011.**
- 2. Courts order dated 9th July, 2013 dismissing applicant’s application dated 27th April, 2010 be and is hereby set aside and the application dated 27th April, 2010 reinstated for hearing and determination on merits.**
- 3. Applicants ordered to pay the Respondent costs of the application to be agreed and/or taxed by Deputy Registrar of this court.**

DATED AT MERU THIS 6TH DAY OF FEBRUARY, 2014.

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:-

Mr. N. Nyaga for the Applicant

Mr. Mutani for the Respondent

J. A. MAKAU

JUDGE