



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE 35 OF 2009

IN THE MATTER OF: THE ESTATE OF NICOLA POLCINO (DECEASED)

AND

IN THE MATTER OF: THE LAW OF SUCCESSION ACT CAP 160 LAWS OF KENYA

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 31 OF 2006

IN THE MATTER OF: THE ESTATE OF NICOLA POLCINO (DECEASED)

AND

IN THE MATTER OF: THE LAW OF SUCCESSION ACT CAP 160 LAWS OF KENYA

TONY KENT APPLICANT/BENEFICIARY

RULING

(1) Counsel for one Tony Kent, an alleged beneficiary to the Estate of Nicola Polcino (deceased), seeks to withdraw his Summonses for Revocation of Resealed Grant of this court in the said estate dated 27th February 2012 and 12th June 2012 together with attendant interlocutory applications by Notice of Motion made thereunder dated 27th February 2012 and 14th June 2012, respectively. Counsel has intimated that he intends to bring further similar proceedings after the withdrawal of the present proceedings which the Respondent has opposed on various grounds.

(2) The Notice of Motion dated 27th February 2012 under the first Summons for Revocation of Grant was pending ruling before the court on a Preliminary Objection taken by the Respondent on the validity of a Power of Attorney in favour of one Maurazio Turato, the deponent of the supporting affidavit therein.

(3) The Applicant obtained ex parte orders under the Notice of Motion of 14th June 2012 filed in the second Summons for Revocation of Grant prompting the Respondent to file a counter-application dated 20th June 2012 upon which the court set aside its ex parte order of 14th June 2012. This application by the

Respondent would following the withdrawal of the Summons for Revocation and Notice of Motion of 14th June 2012 be spent.

(4) In response to the Applicant counsel's prayer for leave to withdraw the two summonses and corresponding interlocutory applications, counsel for the Respondent has submitted that the proceedings should be withdrawn subject to the payment of costs thereon to be agreed between the parties or in default taxed by the taxing officer of the court. Counsel also objects to the filing of any further proceedings by the Applicant before the payment of such costs.

(5) The applicant's counsel has offered to give a professional undertaking to pay the costs as taxed or agreed between the parties.

(6) The issue that arises therefore is whether the proceedings filed by the Applicant shall be withdrawn with costs to be paid before the Applicant may file further proceedings in the matter.

(7) I have considered the matter and rule as follows: -

(1) The Applicant shall have leave to withdraw his

Summonses for Revocation of Grant dated respectively 27th February 2012 and 12th June 2012 and the related interlocutory applications thereunder of 27th February 2012 and 14th June 2012 subject to the payment to the Respondent of costs thereon to be agreed or in default taxed by the taxing officer of the court.

(2) The Applicant shall also pay to the Respondent the costs of the Respondent's spent application dated 20th June 2012 as prayed to be agreed or in default taxed by the taxing officer of the court.

(3) Although the court has a discretion under Order 25 rule 4 of the Civil Procedure Rules to stay subsequent proceedings before payment of costs for withdrawn proceedings, I, in view of the constitutional right to access to justice under Article 48 of the Constitution and the seriousness of the allegations of forgery and fraud made in the present case, permit the Applicant to file further proceedings as he may be advised subject to a professional undertaking by counsel for the Applicant, Mr. Macharia Ng'aru, to be lodged within the next 7 days, binding himself to pay the taxed or agreed costs within 7 days after the costs become ascertained.

Dated and delivered this 5th day of July 2012.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Macharia for the Applicant

Mr Inamdar for the Respondent

Ms.linda Court Clerk