REPUBLIC OF KENYA

High Court at Machakos

Succession Cause 61 of 2009

IN THE MATTER OF THE ESTATE OF LENGATU RAURAU

KAKAAI ENE NANGOO MOSIANY……..PETITIONER

VERSUS

KATETO OLE KERRIONGI MIISIA…….PROTESTOR

RULING

On 17th November, 2008, one **Kateto Ole Kerriongi Miisia** hereinafter "*the applicant"* filed an application for revocation of grant. The said application was served on the administrator of the estate one, **KAKAAI ENE NANGOO Mosiany** hereinafter"*the respondent*" who filed a replying affidavit to the same. On 14th December, 2009, **Lenaola,J** gave directions that the application be heard by way of *viva voce* evidence. The cause was then fixed for hearing on 10th May, 2010.

On 10th May, 2010, the application could not proceed to hearing as the applicant was not in court. It was then stood over to 26th July, 2010. Come this day and this time around, the respondent's lawyer was absent. The application was then stood over generally. On 15th February, 2012, parties by consent fixed the application for hearing *interpartes* on 26th March, 2013. On this date, the applicant was a gain absent. His counsel sought an adjournment on the ground that the applicant was unwell. As expected, the application was vehemently opposed on the grounds that the applicant had not demonstrated sufficiently that he was unwell. I agreed with counsel for the respondent and declined to adjourn the hearing of the application. Counsel for the applicant then stated that in the circumstances, he had not evidence to offer. Counsel for the respondent then urged me to dismiss the application. I acceded to the counsel's invitation and dismissed the application for revocation of grant with costs to the respondent.

The applicant felt done in by the aforesaid order of dismissal. Accordingly on 10th May, 2012, he mounted the instant application in which he sought amongst other prayers, that this court do set aside the order dismissing the summons for revocation of grant and reinstate the same for *interpartes* hearing. The application was made under the inherent jurisdiction of this court and all other enabling provisions of the law.

The grounds in support of the application were that the appellant's counsel was in court on 26th March, 2012 and indicated to court that the applicant was not going to make it to court to give oral evidence, that the applicant had visited counsel's offices on 24th April, 2012 to inquire on the progress of the matter and was informed of the dismissal order, the application had merit, the respondent would not be prejudiced if the application was allowed and lastly, that it was in the interest of justice that the application be allowed.

The applicant in support of the application as well, swore a supporting affidavit. Where pertinent, he deponed that much as the application was scheduled for hearing on 26th March, 2012 and a letter to that effect had been addressed to him by his counsel, he never received the said letter. That the postal address he uses is for Safiloni Primary School. Otherwise he was ready and willing to attend court and adduce evidence in this succession cause as he is a beneficiary. That unless the orders sought in the summons are granted, he will suffer great injustice as the respondent was bent on excluding him from his adaptive parents' estate.

When served with the application, the respondent reacted by filing a replying affidavit. Where pertinent she deponed that the application was frivolous, vexatious, lacked merit, was an afterthought and an abuse of the due process of the court process. The applicant had all along since the filing of the application for revocation of grant exhibited an indolent and casual conduct and or approach. In the premises the instant application was only meant to delay and or deny the respondent who is the legal and rightful beneficiary of the said estate from enjoying the same. Although the applicant purportedly visited his advocates on 24th April, 2012, this application was filed on 10th May, 2012 purely as an afterthought meant to delay and or defeat the cause of justice. In any event on the day the application was dismissed, counsel for the applicant had in seeking adjournment told the court that the applicant was unwell.

When the application came before me for *interpartes* hearing on 13th July, 2012, parties had already filed and exchanged written submissions signifying their intention to canvass the application by way of written submissions. I have since carefully read and considered the respective written submissions and cited authorities

Whether or not to set aside the order of dismissal made on 26th March, 2012 is an exercise in discretion. In other words, this court has a wide and enfettered discretion to set aside orders of dismissal. However, such discretion is not exercised whimsically or capriciously. It is exercised on sound legal principals. Indeed under rule 73 of the Probate and Administration rules, this court is given inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Infact, the applicant should have hoisted this application on this rule as opposed to ***"under the inherent jurisdiction of the court and all enabling provisions of the law"***

In exercising the discretion, this court must look at the conduct of the parties prior to and after the filing of the application, whether the applicant has been candid with the court, whether the application was made expeditiously, whether the order will do justice to the parties and to avoid hardship or injustice arising from inadvertence or mistake even though negligent. However the discretion should not be exercised to assist anyone to delay the course of justice.

In this case and as I pointed out in my ruling refusing the application for adjournment, the applicant had not exhibited any enthusiasm to prosecute his application to finality. The applicant lacked interest, zeal and or passion in prosecuting the application as he always prompted adjournments whenever the application came up for hearing. I think to allow the instant application will be tantamount to assisting him delay the course of justice. It is instructive that the order of dismissal was made on 26th March, 2012. However, it was not until 10th may, 2013, that the applicant mounted the instant application. This was almost 2 months down the line. Obviously, given the circumstances of this case, it cannot be said that the applicant filed the application to set aside the dismissal order expeditiously. No reasons have been advanced by the applicant as to why it took him that long to file and prosecute the instant application.

On 26th March, 2012, the applicant's counsel sought an adjournment on the ground that the applicant was unwell. Yet in the instant application, the applicant now seeks to set aside the order of dismissal on the ground that he could not attend court on the material day because he never received communication from his counsel as regards the hearing date. This is an obvious contradiction which embellishes the candidness of the applicant. Lack of candor ordinarily tilts the scales in favour of not exercising the discretion in favour of such person. This contradiction further demonstrates the level of the applicant's unwillingness to reveal and or tell the truth on issues concerning and or touching on this matter and has such not approached this court with clean hands.

In a bid to clean up the above mischief, the applicant's counsel on 10th July, 2012 swore a further affidavit in which he deponed that the applicant had been informed of the hearing date vide their letters dated 21st February, and 28th March, 2012 respectively and the requirement of his presence in court to adduce evidence. He therefore expected him in court. However, when on the material day he called out his name in court, there was no response. After a few minutes, but before the court commenced sitting, one of the family members of the respondent told him that the applicant could be sick. With that presumption he made an application for adjournment. Later the applicant came to their offices and he realized that he had not received their letters and was therefore not aware of the hearing date. The advocate therefore owned up to the mistake and pleaded that his mistake should not be visited upon the applicant.

The advocate's affidavit is full of falsehoods. First and foremost, they could not have written a letter dated 28th March, 2012 informing the applicant of the hearing date, when the application had already been heard on 26th March, 2012. Secondly, if indeed such letters were sent and never reached the addresses they would have been returned to them. i.e. "***return to sender***" as is the normal practice. This was not the case here. The counsel has also not disclosed the name of the member of the family of the respondent who heard him calling out the name of the applicant and remarked in a brief conversation that the applicant may have been unwell. Nor has he caused the said relative to swear an affidavit. I also doubt that a member of the family of the respondent engaged in a bitter fight with the applicant in this cause would volunteer such information. The applicant talks of the letters not reaching him because he uses Sajiloni Primary School address. However, he conveniently fails to disclose the details of such postal address of the said school. Significantly however, the applicant in his affidavit in support of this application has used P.O. Box 129 Kajiado. This is the same address that the letters informing him of the hearing date were forwarded through and which he is disowning now. How convenient? This is the address he has been using all through. Who is fooling who here?

Clearly the applicant is undeserving of the discretion of this court on account of lack of candor and his own previous antecedents. The Application is dismissed with costs to the respondent.

RULING DATED, SIGNED, and **DELIVERED** at **MACHAKOS** this **15TH** day of **OCTOBER, 2012.**

ASIKE-MAKHANDIA
JUDGE