



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION APPEAL NO. 7 of 2018

IN THE MATTER OF THE ESTATE OF JOHN V. BOSSE (DECEASED)

B E T W E E N:

FRANCIS KABURU.....APPLICANT/APELLANT

AND

JANE V. BOSSE.....RESPONDENT

RULING

1. This matter comes before the Court again of the Application of Francis Kaburu. He has, in previous proceedings been an unsuccessful citor, He then filed an Appeal which was abandoned leading to its dismissal. The File was then closed.

2. The Application now being brought is by a Chamber Summons “under **Rule 63 and 73 of the Probate and Administration Rules, Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules**. The Application seeks the following Orders:

“1. This application be certified urgent and heard ex parte in the 1st instance.

2. There be a stay of execution of the orders issued herein on the 2nd day of February 2021

3. The Honourable Court be pleased to review, vary or set aside the orders issued herein dismissing the applicant’s appeal.

4. Costs be provided for.”

3. The Application is Supported by the Affidavit of Francis Ingosi. There is no explanation provided as to whether the Deponent, Francis Ingosi is the same person as Francis Kaburu, the Applicant. That should have been explained. The Respondent asserts that they are not the same person.

4. The Grounds relied upon are that:

“1. There is an error apparent on the face of the record.

2. The appeal was dismissed when the matter came up for mention for directions.

3. No directions has been taken yet.

4. The appeal was dismissed because the respondent claimed to have filed a succession cause which cause number was never disclosed.

5. The court did not consider that the succession cause had been filed long after the citation had been filed and served.

6. The court dismissed the appeal on evidence from the bar as the citation had not been opposed or respondent to by the respondent but was still dismissed.

7. The appeal had not been heard on its merit despite raising serious triable issues.

8. It is in the best of interest for the application to be allowed.”.

5. The Respondent through her Advocates has filed Grounds of Opposition. The following grounds are put forward:

“1. That the application is misconceived, bad in law and is made in law and is made on grounds not satisfying the minimum requirements of Section 80 of the Civil Procedure Act and Rule 45 of the Civil Procedure Rules 2010 in order to be granted review orders.

2. That the application is misconceived, bad in law and is made on grounds not satisfying minimum requirements set and as required under Order 22 rule 22(1) of the Civil Procedure Rules, 2010

3. THAT the entire appeal and instant application was and is a nullity ab initio since the core function of citation as per Probate & Administration Rules 22 has been dispensed with by dint of **NAIROBI HIGH COURT SUCCESSION CAUSE No 509 OF 2018** which Cause was heard and grant confirmed.”.

6. The Appeal came before the Court for Hearing on 2nd February 2021. The Appellant was represented by Counsel (Mr Munyendo) as was the Respondent (Mr Arwanda). The Memorandum of Appeal had been filed on 11th December 2018 (challenging a Decision which appears to have been made on 24th August 2018 and again on 14th November 2018). That decision was that the Citor was non-suited as he had no connection to the Estate.

7. By 2nd February 2021 a record of appeal had not been filed. The Lower Court file was called for and made available. Still nothing was filed. When the matter came before the Court, the Court was informed that there had been a Petition filed in **Nairobi Succession Cause 509 of 2018** where the process was complete and the certificate of confirmed grant had been issued.

8. After the Appeal was dismissed, the File was closed. Naturally, the Lower Court File was returned to the Chief Magistrate’s Court Registry. The Appellant then filed the current Application. That Application has not been accompanied by an application for the file to be re-instated. Further, there has been no directions given to call for the Lower Court File.

9. The Letters of Administration and the Certificate of Confirmed Grant were called for and have been availed by the Hon DR Family Division. The Lower Court File was returned to the Lower Court Registry on 9th February 2021 after the appeal had been dismissed. That is when the file was closed.

10. Before that, the Appeal was before the Court on 2nd February 2021 in accordance with the overriding objective the appeal was dismissed for the following reasons (1) The Citation was superseded by events, namely the filing of a petition (in Nairobi), (2) The Family Division in Nairobi was seized of the matter, (3) The record of appeal had not been filed more than 2 years after the Memorandum without explanation. In the circumstances, there was nothing on which the jurisdiction of the Court could attach.

11. Notwithstanding that the file was closed, the Applicant filed the above state application on 11th May 2021. There is no application for reinstatement of the file.

12. The matter was placed before this Court for directions. The Respondent filed the above Grounds of Opposition. The oral

submissions on behalf of the Applicant made amount to an assertion that since his citation provoked the succession cause, his interest in the matter should be allowed to continue in this litigation. Unfortunately, that demonstrates a misunderstanding of the law and procedure in succession matters. There is a succession file for the Estate subject matter of these proceedings. That Succession Cause 509 of is as a result of a petition filed in Nairobi. The Petitioner is the Widow, in other words the person with the highest priority. The Court in Nairobi is seized of the matter.

13. The Applicant's case is that he has a claim in the Environment and Land Court in relation to one of the pieces of land. That claim originates through the Estate of his own father. The Deceased here was said to be a joint owner and therefore he feels he is entitled to use the Estate of the Deceased herein to pursue his claim. Again, that is not a claim that is founded in law. If he has a proprietary claim he must pursue that in the Land and Environment Court as administrator of his own Father's Estate. He cannot be an administrator in this Estate. In any event his alleged claim is denied. It is said that the Deceased purchased the land in question and there was no dispute during his lifetime.

14. In the circumstances, and for the reasons set out above, the Application is dismissed with costs. The Applicant has failed to demonstrate any connection with this Estate. Further, if there is evidence that he has an entitlement, the relevant application must be pursued in the Nairobi File.

15. This Ruling was scheduled to be delivered on 23rd September 2021. That was not possible as the Judge was attending an essential training course. Any delay occasioned as a consequence is regretted and it is hoped the parties are not inconvenienced.

Dated 21st January 2021

Order accordingly,

FARAH S. AMIN

JUDGE

Dated and Signed this the 31st day of January 2022 in Kakamega High Court

JUDGE

Dated, Signed and Delivered in Kakamega High Court on 22nd day of March 2022.

In the Presence of:

Court Assistant:

Appellant/Applicant:

Respondent:



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