



**Gachegwa & another (Suing on Behalf of the Estate of John Gacigua  
Njenga (Deceased)) v Mogo Auto Limited (Succession Cause  
E087 of 2021) [2024] KEHC 11210 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11210 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE E087 OF 2021  
HI ONG'UDI, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**ROSE WAIHERERO GACHEGWA ..... 1<sup>ST</sup> PETITIONER  
ESTHER WANJIRU GACIGUA ..... 2<sup>ND</sup> PETITIONER  
SUING ON BEHALF OF THE ESTATE OF JOHN GACIGUA NJENGA  
(DECEASED)**

**AND**

**MOGO AUTO LIMITED ..... RESPONDENT**

**RULING**

1. By the Notice of Motion dated 18<sup>th</sup> October 2023 the applicant prays for the following orders;
  - i. Spent.
  - ii. That this honourable Court be pleased to issue a temporary order of stay of execution preventing the respondent from taking possession and causing - transfer into their names of motor vehicle registration number KBZ 966P pending hearing and determination of this cause inter parties.
  - iii. That this honourable Court be pleased to set aside the orders issued against the applicant vide a ruling delivered on 19<sup>th</sup> September, 2023 by Hon. Justice H.K. Chemitei.
  - iv. That the honourable Court be pleased to reinstate the application dated 17<sup>th</sup> July, 2023 for disposal on merit, and the draft response to the application annexed herewith be deemed to be duly filed subject to payment of the requisite court fees.



- v. That the applicant be granted leave to file objection proceedings with respect to the grant issued by the court on 8<sup>th</sup> December, 2022 as relates to the subject motor vehicle registration number KBZ 966P.
  - vi. That costs of the application be provided for.
2. The application is premised on the grounds on its face and the affidavit of the applicant's legal officer sworn 18<sup>th</sup> October, 2023. He deposed that the final and adverse orders were issued on 19<sup>th</sup> September, 2023 against the applicants in absence. Further, that the respondent instructed a firm of advocates to protect its interests and they entered appearance on 11<sup>th</sup> November, 2021 but never filed any documents in response. He added that the mistake of its former advocates ought not be visited on it.
  3. He deposed further that the orders issued in the said ruling were prejudicial to the applicant since it had advanced a loan of kshs. 1,000,000/= to the co-registered owner, the deceased person and the subject motor vehicle offered as security. Additionally, that the respondent while petitioning for grant of letters of administration, failed to disclose the liabilities which motor vehicle registration number KBZ 966P accruing to the estate of the deceased person.
  4. He went on to depose that the applicant stood to suffer losses if the orders issued on 19<sup>th</sup> September 2023 are not set aside since it will be impossible to recover the amounts so advanced. That no prejudice would be suffered by either party in the event orders sought issue and that the applicant's to be heard was protected under article 50 of *the Constitution*, 2010. He urged the court to allow the application as prayed.
  5. In response to the application the respondent filed an undated replying on 1<sup>st</sup> February 2024 together with grounds of opposition dated 9<sup>th</sup> November 2023. She averred that the applicant could not said to have been unaware of the case and could purport to blame its earlier advocates as the Notices, Order and Application were duly served on it and it duly received the same. Further, that the chartels mortgage referred to herein were never registered so it could not be enforced in anyway and the only available remedy was to file a suit to recover the sum advanced as a simple civil debt. He urged the court to dismiss the application and order the applicant to comply with the court's orders herein which were issued after the court satisfied itself that service has been duly effected.
  6. The applicant filed a further affidavit dated 12<sup>th</sup> February 2024 in response to the replying affidavit where it reiterated the averments contained in its supporting affidavit.
  7. The application was disposed of by way of written submissions.

### **Applicant's submissions**

8. These were filed by Munyaga Githaiga Advocates and are dated 12<sup>th</sup> February 2024. Counsel identified one issue for determination and that is whether or not the applicant herein deserved the orders sought.
9. Counsel submitted that their application was not opposed for reasons that the jurat or attestation clause of the affidavit by the respondent did not bear the date and the month when it was sworn contrary to section 5 of the Oaths and Statutory Declaration Act. He also relied on the decisions in *Bayplan Credit Limited v Gesa Building & Civil Company & 2 Others* [2015] eKLR and *Talewa Road Contractors Ltd v Kenya National Highways Authority* [2014] eKLR.
10. He submitted further that courts had discretionary power to set aside ex-parte judgments for justice to prevail. He invited the court to issue an order of stay since the motor vehicle was the subject matter of this application and transferring it into the names of the respondent would risk disposition and/or



unfavorable dealings that would consequently render this suit nugatory. He went on to submit that it was in its best interest that the temporary and final orders issued on 25<sup>th</sup> May, 2023 and on 8<sup>th</sup> June, 2023 against the applicant herein in their absence be set aside.

11. In support of this position he placed reliance on Order 10 rule 11 of the Civil Procedure Rules and the judicial decisions in *Patel v E.A Handling Services Ltd* [1974] EZ 75, *Maina v Muriuki* [1984] KLR 407 and *Kenya Commercial Bank Ltd v Nyatange & Another* [1990] KLR 443.
12. He further relied on the case of *Winnie Wambui Kibinge & 2 Others v Match Electricals Limited Civil Case No. 222 of 2010*, where the court held as follows;

“It does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit”.
13. While placing reliance on section 3A and the case of *Ivita v Kyumbu* [1983] KLR 441 counsel urged the court to reinstate the application dated 17<sup>th</sup> July 2023 for disposal on merit. He added that the applicant was a beneficiary of the estate hence entitled by law to seek recourse in the present succession matter. The court’s attention was drawn to the judicial decisions in *Re Estate of Johnson Njogu Gichohi (deceased) Succession Cause No. 112 of 2016* [2018] eKLR, *Mwangi Gakuri v Bernard Kigotho Maina & Another HC NBI, Succession Cause No. 2335/2011* and *Re Estate of M’kiunga M’rinyiru (Deceased) [2021] eKLR*.
14. In conclusion, counsel urged the court to exercise its discretion and proceed to allow the application with an order as to costs.

### **Respondent’s submissions**

15. These were filed by N. Ikua & Company Advocates and are dated 5<sup>th</sup> April 2024. Counsel submitted that the applicant could not blame its former advocates as it was duly served but failed to file any objection or response to all the applications. Further, that it took the applicant three (3) years to file the present application and the delay was inordinate thus the court should not exercise its discretion in its favour. He added that the applicant was guilty of misconduct and does not deserve this court’s indulgence. He urged the court to dismiss the application with costs.

### **Analysis and determination**

16. I have considered the application, grounds of opposition, affidavits together with the submissions filed by the parties herein, and find the issue for determination to be whether the application herein is merited.
17. It is the applicant’s case that the orders issued on 19<sup>th</sup> September, 2023 against it was in their absence. Further, that it instructed a firm of advocates to protect its interests and they entered appearance on 11<sup>th</sup> November, 2021 but never filed any documents in response. Additionally, that the mistake of its former advocates ought not be visited on it as it stood to suffer losses if the said orders are not set aside and it would be impossible to recover the loan advanced to the deceased.
18. The respondent on her part contends that the applicant could not be said to have been unaware of the case since the notices, order and application were duly served on it and it acknowledged receipt. That the former advocates should not be blamed. She further argues that the motor vehicle referred to herein was never registered and so it could not be enforced in anyway and the only available remedy was for them to file a suit to recover the sum advanced as a simple civil debt.



19. Upon perusal of the court record I note that this matter commenced on 12<sup>th</sup> August 2021 when the respondent filed a petition for grant of letters of administration intestate. The applicant entered appearance on 11<sup>th</sup> November 2021 but did not raise any objection and ultimately the grant was confirmed on 8<sup>th</sup> December 2022. Prior to the grant being confirmed the applicant herein had been served with a mention notice, several applications by the respondent and court orders but it failed to file any response thereto. It's advocate and the applicant never attended court despite having filed two notices of appointment of advocates.
20. The applicant has now filed the present application seeking to have the orders issued on 19<sup>th</sup> September 2023 set aside, a temporary stay of execution, reinstatement of the application dated 17<sup>th</sup> July 2023 and that it be granted leave to file objection proceedings in respect of the grant issued on 8<sup>th</sup> December 2022. To justify its delay in the matter it has blamed it's former advocates for failing to articulate its interest in the matter and proceeded to appoint another firm of advocates to represent it.
21. The Court of Appeal in *Itute Ingu & another v Isumael Mwakavi Mwendwa* [1994] eKLR, wherein, faced with similar circumstances where the mistake of an advocate was the basis on which an application to file an appeal out of time, the court stated:

“What I understood the applicants to be telling me by citing this case is that the error by their advocate should not be a bar to my exercising my discretion in their favour. Since the amendment to this Court's rule 4, the discretion of the Court under that rule is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such a mistake is bona fide, can entitle an applicant to the exercise of the court's discretion in his favour. But before doing so, the Court must, of necessity, examine the nature or quality of the mistake or mistakes.” (emphasis added)
22. The question here is whether the mistake of the advocate in this case is reasonable or bona fide and whether it has been explained to the satisfaction of the Court. The Applicant has merely cited a failure by it's former advocates to file any documents or any response in this matter.
23. Further, the failure to file responses has not been explained well as this could have been triggered by various reasons. Merely claiming inaction on the part of its advocate is not sufficient reason. Did it make any follow up with the said advocates? It is silent on that. In *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Odunga J (as he then was) had this to say in a similar scenario.

“ 33. In this case the applicant has not expounded on the nature and quality of the inadvertence alluded to. This seems to be a case of mere inaction and as was held in *Berber Alibhai Mawji vs. Sultan Hasham Lalji & 2 Others* [1990-1994] EA 337, inaction on the part of an advocate as opposed to error of judgement or a slip is not excusable. Therefore pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client.”
24. Having considered the facts of the case, I do not find any good reason to make this court interfere with the confirmed grant herein plus the Ruling by Chemitei J delivered on 19<sup>th</sup> September, 2023.
25. The upshot is that the application dated 18<sup>th</sup> October, 2023 lacks merit and is hereby dismissed with no order as to costs.

**DELIVERED, DATED AND SIGNED VIRTUALLY THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024 IN OPEN COURT AT NAKURU.**



**H. I. ONG'UDI**  
**JUDGE**

