In re Estate of Simiyu Wasike Walubengo (Deceased) (Probate & Administration 17 of 2018) [2024] KEHC 13759 (KLR) (29 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13759 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

PROBATE & ADMINISTRATION 17 OF 2018

SC CHIRCHIR, J

OCTOBER 29, 2024

IN THE MATTER OF THE ESTATE OF SIMIYU WASIKE WALUBENGO- (DECEASED)

BETWEEN

ISAAC MANDILA SIMIYU & TIMOTHY NGUIRETE SIMIYU ...... APPLICANT

AND

NASAKA TEMTURIA SIMIYU .... OBJECTOR

RULING

1. The Petitioner's Notice of motion dated 4th June 2021 seeks for the following orders;

   a. (spent)

   b. That this honourable court be pleased to stay execution of the judgment and the orders arising from the judgment issued on 19th March 2021 until hearing and determination of this application or till further orders of this Honourable court.

   c. That the proceedings of 1st December 2021 and the resultant judgment of 19th March 2021(sic) together with all consequential orders to be set aside.

   d. That the 2 summons of confirmation of the grant to the estate of the deceased to be set down for hearing interparties by way of viva voce evidence on a date to be appointed by this honourable court

   e. Costs of this application to be provided for.

2. The application is premised on the grounds set out on the face of the Application and the Affidavits annexed thereto.

Applicant's case.

3. It is the Applicant's case that the proceedings in this case went on without their participation as they failed to attend court.

4. The reasons given for failure to attend court are that the Advocate having the conduct of the case was not informed about the directions that had been given in regard to the date of hearing of the case; that a different Advocate was in court at the time of the said directions , and this particular Advocate failed to communicate to the Advocate conducting the case.

5. It is further stated that the mistake in this case was by an Advocate and which mistake should not be visited upon the client.

6. The Respondent neither filed a response nor submissions in respect of the Application.

Applicant's submissions

7. While relying on the case of Shah Vs. Mbogo & Another (1967) EA 116 and Patel vs. E.A Cargo Handling Services Ltd (1974), the Applicant submits that failure to be in court was not deliberate and was not designed to delay the cause of justice but was caused by a genuine omission.

8. It is further submitted that the mistakes of the counsel should not be visited on the clients and in this regard , the case of Belinda Murai & others Vs. Amos Wainaina (19 78) eKLR was relied on.

9. The Respondent further submits that allowing the Application will not cause any prejudice to the respondent ,but will ensure a fair determination of the dispute.

Determination

10. The discretion of the court to set aside exparte judgment or order is wide and unfettered, save that setting aside should be done on such terms as they are just. 11. In the case of The court in Shah – vs- Mbogo [1967]EA 116, cited by the Applicant herein, sets out the factors to be considered when a court is faced with such an Application. The court stated :- The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:

    a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules ....

    b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

    c) ...."

11. The reasons given in the present case are that the Applicant and his Advocate were absent during the hearing because the Advocate who ought to have relayed the scheduled date failed to inform the Applicant's Advocate. And because the Advocate was not aware the client was consequently unaware. It is submitted that the mistake was on the Advocate who had appeared in court on the date that the

hearing was scheduled. The Applicant has further stated that his Advocate came to know about the exparte hearing , only after the delivery of judgment.

12. Apart from the guidelines set out in Shah's case(supra), there are other decisions exhorting the courts to bar a party from being heard only as a last resort.

13. In the case of Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, t was held: "The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."

14. Where a litigant raises the issue of negligence of counsel, the court should consider doing justice to the parties depending on the circumstances of the case. In the case of Belinda Muras (supra) , Madan JA (as he then was) defined what constitutes a mistake as follows: "A mistake is a mistake. It is no less a mistake because it is an unfortunate step........... A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."

15. The respondent, has chosen silence by way of response. I will therefore take the facts as presented by the Applicant as uncontested. I also have no reason to doubt what the Applicant has told the court. Finally baring a litigant from presenting the substance of his case should always be the last resort.

16. Am satisfied that the Application is merited It is hereby allowed.Each party to meet their own costs.

DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF OCTOBER 2024.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin- Court Assistant.