



In re Estate of Protus Wekesa Manuel (Deceased) (Succession Cause 466 of 1998) [2024] KEHC 12840 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12840 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 466 OF 1998**

S MBUNGI, J

OCTOBER 25, 2024

**IN THE MATTER OF THE ESTATE OF PROTUS WEKESA MANUEL.....
(DECEASED)**

BETWEEN

JERIDA WAKHOYA AMBANI APPLICANT

AND

SYLVESTER MANYIFU 1ST RESPONDENT

DAVIS WEKESA WANJALA 2ND RESPONDENT

SAMUEL WEKESA SIFUNA 3RD RESPONDENT

RULING

1. The applicant filed an application dated 16.11.2023 under Certificate of Urgency seeking the following orders: -
 - I. Spent
 - II. Spent
 - III. That the Honourable court be pleased to set aside the orders made on the 12th day of July 2023 dismissing the Objector/Applicant's application dated the 27th day of June 2023 and reinstate the application for hearing and determination on merit.
 - IV. That the costs of this suit be provided for.
2. The application was premised on the following grounds: -



- a. That the Objector/Applicant and her counsel were not informed about the directions given by the court in respect of the hearing of their application dated the 27th day of June 2023 despite making several inquiries about the same at the registry.
 - b. That the Objector/Applicant's counsel found out about the directions given by the court when the application had already been dismissed.
 - c. That the Objector/ Applicant's absence from court on the 12th day of July 2023 was not deliberate because she was not aware of the date.
 - d. That the Objector/Applicant's counsel was also absent from court on the 12TH day of July 2023 since he was not aware of the date despite making several inquiries from the court registry about the directions given in respect of the application.
 - e. That the Objector/Applicant will suffer irreparable loss unless this application is allowed. That the Petitioner/Respondents will not suffer any loss if this application is allowed.
 - f. That the Objector/Applicant will be put in civil jail in execution despite her advanced age unless this application is allowed.
 - g. That it is in the interest of justice that this application be allowed.
3. The application was supported by an affidavit sworn by the applicant.
 4. The application was opposed by the respondents on the following grounds: -
 - a. That it is the applicant who took and served the date of 12h July, 2023 and therefore this application is without merit, openly frivolous and an abuse of court process.
 - b. That an application for stay cannot be based on an appeal that is bad in law, improper, unprocedural and incurably defective for offending the provisions of the Advocates Remuneration Order.
 - c. That the applicant has not met the conditions requisite for grant of stay of execution of costs.
 5. The application was canvassed by way of written submissions.
 6. I have looked at the submissions for both parties

Applicant's Submissions.

7. The applicant's submissions reiterate what is contained in the grounds in support of the application and the averments contained in the supporting affidavit.

Respondent's Submissions.

8. The respondent contends that it is the applicant who fixed the date of hearing of the application dated 27.06.2023 on 12.07.2023 and failed to attend court thus making the court dismiss the application.
9. The respondents further submitted that the application is defective for it has not been brought according to the provisions of paragraph 11 of the Advocates Remuneration Order thus this application and the one dated 27.06.2023 are a waste of time.
10. The respondent cited the *Speaker of the National Assembly v James Nienga Karume* Court of Appeal at Nairobi Civil Application No. 92 of 1992 /1992/eKLR where it was held that: - "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any



particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed'

11. On whether the applicant has met the conditions requisite for grant of stay of execution of taxed costs, the respondents cited Civil Application No. 298 of 1996 Francis Kabaa v Nancy Wambui & Jane Wanjiru, where it was held that stay cannot be granted in respect of costs.
12. The respondents submitted that without depositing the taxed costs in a joint interest earning account or even showing any willingness to do so, the applicant's pleas cannot be seen as anything else other than frivolous attempts to stop the lawful process of execution that is already underway following her own indolence.

Analysis and Determination.

13. Power to reinstate a dismissed suit/application is purely discretionary. The applicant must convince the court why it should exercise its discretion in their favor.
14. From the record the application dated 27.06.2023 was placed before Lady Justice S. Chirchir on 27.06.2023 and the court gave directions that inter-partes hearing be on 12.07.2023.
15. The record does not show whether those directions were typed at the registry so there is a possibility that the applicant did not know of the date of 12.07.2023. It was the responsibility of the counsel to follow up and inform the applicant of the date.
16. There are many authorities which say that the mistake of a counsel should not be visited on the client. However this depends on the circumstances of each case. In the case of CFC Stanbic Limited versus John Maina Gitbaiga & another [2013] eKLR, the Court of Appeal held as follows-

“On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant. This Court is guided by the case of Lee G Muthoga V Habib Zurich Finance (k) Ltd & Another, Civil Application No. Nai 236 of 2009, where this Court held: "It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight." In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel.”

17. I have looked at the other two points of the respondents' submissions; they attack the dismissed application dated 27.06.2023 but not this instant application.
18. For the reason that there is a possibility the applicant was not aware of the date of 12.07.2023, I will exercise my discretion in favor of the applicant and I reinstate the application dated 27.06.2023 and order the same to be heard inter parte on 20.11.2024. The applicant to serve the respondent with the application and the hearing notice.
19. The applicant to pay the respondent a throwaway cost of Kshs. 5000/-.
20. Right of appeal 30 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF OCTOBER, 2024.

S.N MBUNGI



JUDGE

In the presence of:

Applicant – absent

Respondents – absent

Counsels for the parties- absent

Court Assistant – Elizabeth Angong'a

