



In re Estate of Mary Taplelei Kilel alias Taplelei w/o Kilel (Deceased) (Succession Cause 305 of 2015) [2023] KEHC 3506 (KLR) (24 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3506 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 305 OF 2015
JK SERGON, J
APRIL 24, 2023**

BETWEEN

ESTHER CHEROTICH KISIARA APPLICANT

AND

CHARLES CHEPKWONY RESPONDENT

RULING

1. The 1st Petitioner/Applicant filed Summons dated 8th December, 2022 under section 48 of the [Law of Succession Act](#) and all other enabling provisions of law seeking for the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That the Honourable court be pleased to set aside all the proceedings of 28th November, 2022 and all subsequent orders thereto.
 - iv. That is any event the certificate of confirmation of the grant has been issued the same be cancelled.
 - v. That the cost of the suit be in the cause.
2. The Application is supported by the grounds laid out on its face and the facts stated in the affidavit of Enock Anyona Miruka, the Applicant's Advocate who avers that the 1st Petitioner/Applicant is ailing and the court was very much aware.
3. The Advocate further avers that on 24th November, 2022 he wrote a letter to the Court and the 2nd Petitioner's advocate on behalf of the 1st Petitioner/Applicant over the 1st Petitioner/Applicant's health status and inability to proceed on the 28th November, 2022.



4. It was his averment that on 28th November, 2022 he instructed Mr. Morata advocate to hold his brief and seek an adjournment but the said Mr. Morata inadvertently confirmed the grant.
5. He contends that the 1st Petitioner/Applicant who was absent in court due to her sickness had not given instructions on the summons for confirmation dated 20th July, 2022 and the applicant's advocate was bereaved hence was also absent in court.
6. He avers that without the instruction of the 1st Petitioner/Applicant the confirmation of grant is prejudicial to her right to be heard either to approve or file her formal protest being that the law requires that all the beneficiaries be present or give written consent during the confirmation of the grant.
7. It is his contention that as an advocate and without a proper instruction from the 1st Petitioner/Applicant, he stood to be accused of misconduct and that unless the proceedings of 28th November, 2022 are set aside, he stands to face disciplinary proceedings.
8. He contends that the court shall not prejudice the estate or any other beneficiary by granting his request.
9. The Respondent opposed the Application and filed a Replying Affidavit sworn by Francis Chepkwony dated 24th March, 2023 in which he contends that the instant succession cause has been pending in court for a long time from the year 2015 and that the Applicant is deliberately frustrating the cause of justice because the honourable court already made a determination in its judgement dated 25th March, 2022 upon full hearing of the objection proceedings in this cause and held that Francis Chepkwony, Esther Cherotich Kisiara, Charles Chepkwony and Beatrice Chelangat are the beneficiaries of the deceased estate and the applicant has not appealed the said judgement.
10. That the Applicant has been employing double standards in that when she was unwell, by consent recorded in court she was allowed to dispose three (3) acres of the estate of the deceased comprised in L.R No. Kericho/Roret/777 which is part of her share in the said property for her medication yet she has frustrated the other beneficiaries including the Respondent herein from taking possession of their shares in all the properties of the deceased hence the other beneficiaries have remained living outside the deceased estate, leasing space in trading centers to live in since the time the deceased passed on.
11. He contends that despite her advocate intimating that she was unable to give instructions during the confirmation of the grant because of her ailment, she was suddenly able to sign the supporting affidavit seeking to set aside the confirmation of grant which was insincerity of unmatched proportions and that the court record bore witness that the 1st Petitioner/Applicant has all along recognized them as beneficiaries as manifested in many consents in the court proceedings, and it was unfair to keep them out of enjoying and using their shares of the estate using delaying tactics.
12. The Respondent wondered the purpose that setting aside proceedings will achieve being that the mode of distribution filled by the respondents was compliant with the judgement of the court on equal distribution of the estate appeal having not been preferred against the said judgement.
13. He avers that the law treats the children equally hence the discretionary power of the court is based on equity and the mistreatment of the other beneficiaries by the Applicant will militate against grant of orders she is seeking.
14. He contends that the court having decided and delivered the said judgement on the mode of distribution, the matter is determined and the court cannot entertain a rehearing on the mode of distribution other than what was ordered in the judgement as the 1st Petitioner/Applicant has never filed an appeal against the said judgement.



15. He avers that the court on 7th June, 2022 gave directions that the parties file summons for confirmation of grant and the same be served and that the Respondents complied with the said directives and when the matter came up for confirmation of grant on 28th November, 2022 the court allowed their application.
16. He contends that the court allowed their application having been satisfied that the same was compliant to the Court's orders contained in its judgement thus the Applicant's application will only inordinately delay the conclusion of the instant succession as the health of the said 1st Petitioner/Applicant is deteriorating and it is in the best interest of justice that the matter be expedited to conclusion.
17. He avers that the summons for confirmation of grant was allowed not due to the inadvertent error of Counsel holding brief but, on the court's discretion acting in the best interest of justice hence the 1st Petitioner/Applicant's application is frivolous, vexatious and a waste of the court's time and the same should be struck out with costs.
18. He contends that to avert further suffering by the other beneficiaries, the court upon dismissing the application, orders that the Certificate of Confirmation of Grant do issue as a matter of course of justice in the matter at hand.
19. I have considered the grounds laid out on the body of the Summons and the facts deponed in the affidavits supporting the and opposing the summons.
20. In *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR, the court while quoting the holding in *Shah vs. Mbogo & Another* [1967] EA 116 stated as follows:

“That the decision whether or not to set aside ex parte judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
21. In this case, the ground upon which the application to set aside the proceedings leading to the Confirmation of Grant of Representation was that the Applicant was not present in court during the said confirmation of grant due to her ailment.
22. In *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR, the Court of Appeal held that:

“In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.”
23. It is worth noting that the orders sought to be set aside are with regards to proceedings leading to confirmation of grant. This court pronounced itself via a judgement dated 25th March, 2022 on who the beneficiaries of the deceased estate were and the mode of distribution upon the full hearing of the objection proceedings. The said decision remains intact to date as an appeal has not been preferred against it. The court ordered that parties file their Summons for Confirmation and the Respondents



complied. The said Summons were served upon the Applicant as acknowledged in the letter by the Applicant's Advocate dated 24th November, 2022.

24. The Applicant never objected to the mode of distribution nor filed a protest against the summons for confirmation of grant. In the instant summons, the Applicant through her advocate has intimated that the confirmed grant should be set aside since it is not known whether the Applicant would have approved the said confirmation or filed a formal protest had she been in court. The Applicant advocate has also intimated that the said confirmation having been done in the absence of the applicant's express instruction and in the presence of the Counsel holding brief for the Applicant's advocate, he risks facing disciplinary actions for misconduct.
25. As it has been explained in the authorities cited above, the decision whether or not to set aside ex parte order is discretionary and its purpose is to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
26. What purpose will be served by setting aside the confirmed grant the issue of the beneficiaries to the estate of the deceased and the mode of distribution having been determined by the court upon hearing both parties. The Applicant has indicated that since she was not present in court, the confirmation of grant was prejudicial to her right to be heard either to approve or file her formal protest. From the records, on 20th December, 2022 the court invited the Applicant to appear in court on 13th March, 2023 and on the said date, the applicant did not appear in court and neither did her advocate explain her absence instead the discussion was around the instant application. I want to believe that the court was according the Applicant an opportunity to be heard by inviting her to appear in court. It should be noted the proceedings of 28/11/2022 were not ex parte. The parties' Advocates were present.
27. The Applicant having not appeared in court and without any explanation on the same or formal protest in place, There is no good reason given to justify the setting aside the confirmed grant.

The court is being invited to exercise its discretion to set aside an order confirming the grant to give the applicant time to decide on what cause of action to take. That is an absurd proposal which the Court cannot content.
28. Concerning the issue of the Applicant's advocate being accused of misconduct, I am in agreement with the Respondents that the grant was confirmed because it was in line with the court's judgement and not due to the inadvertent error on the part of the Counsel holding brief for the Applicant's Advocate. The court had already pronounced itself on the issue of beneficiaries and the mode of distribution.
29. Even if the Applicant had filed a formal protest, which she has not, this court became functus officio so long as the beneficiaries and the mode of distribution is concerned being that the summons for Confirmation of Grant was with regards to this court's judgement which the court arrived at after hearing both parties and therefore this court cannot re-open the matter again.
30. In re Estate of Kiberenge Mukwa (Deceased) [2021] eKLR, the court opined as follows:

... What such a person should do instead, is to file an appeal against the orders made by the court on distribution. The court confirming a grant largely becomes functus officio so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review.

24. The grant herein was confirmed on 20th July, 2017, and the trial court became functus officio so far as confirmation of the grant was concerned. The Appellant ought to have appealed against the orders that confirmed the grant, if she was not satisfied with the distribution that the court ordered. Alternatively, the Appellant should have mounted an application for review of those orders, if she



had the competence to file such an application, and if she had grounds upon which she could urge review. This court is being invited to relook at confirmation orders through a process that has not been provided for in law.

31. This matter has been in court from the year 2015 and from the Respondent's Affidavit, the Applicant herein has been frustrating the process of completion of the matter as the Respondents are unable to enjoy their share of the estate as long as this matter remains pending. I find that the instant Application is one of the delay tactics that the Applicant is employing. The respondent has stated that the Applicant's health is deteriorating hence the matter ought to be expedited to conclusion.
32. The upshot therefore is that the Summons dated 8th December, 2022 lacks merit. The same is dismissed. This being a family matter, I order that each party bears its costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 24TH DAY OF APRIL, 2023.

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

Miruka for the 1st Petitioner/Applicant

Victor Kirui for the Respondent

