In re Estate of Kipkosgei Arap Moita (Deceased) (Succession Cause 25 of 1995) [2022] KEHC 16752 (KLR) (23 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16752 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 25 OF 1995

RN NYAKUNDI, J

DECEMBER 23, 2022

BETWEEN

HENRY KIPRONO KOSGEY ..... 1ST APPLICANT

WILLIAM KIPCHICHIR KOSGEY ..... 2ND APPLICANT

AND

CORNELIUS KIPCHIRCHIR KOSGEY ..... RESPONDENT

RULING

Introduction & Background

1. The applicants herein are sons to the late Kipkosgei Arap Moita (deceased). They primarily seek to set aside the judgement and consequential orders delivered by court on the 4th of February 2020. Through summons dated the 7th of March 2022, the applicants premise their application on the fact that the succession proceedings resulting in the Judgment of February 4, 2020 where the court revoked the deceased will, were *ex-parte* and that they were never notified of the proceedings or the succession cause herein.

2. They therefore averred that the revocation of the will is extremely prejudicial to them and other beneficiaries considering that most beneficiaries have assumed possession of their respective parcels.

3. Their application was further supported by the applicants affidavits filed on the 1st of March 2022 although the affidavit of the 1st applicant is unsworn and unsigned. The applicants reiterate their grounds of application noting that they ought to be afforded an opportunity to be heard and to test the evidence adduced by witnesses through cross-examination.

4. The application was vehemently opposed by the respondent through his reply sworn on the 7th of March 2022. In particular, the respondent was of the view that this matter has taken too long to conclude considering that it was filed in 1995 and judgement delivered in 2020, 25 years later. He noted

that some of the administrators and beneficiaries have died along the way. It was his position that the applicants intention is to unnecessarily prolong the matter as they continue to enjoy substantial part of the estate to the detriment of the other beneficiaries.

5. It was the respondent's averment that the applicants herein were aware of the proceedings and were in fact duly represented by persons who were defending the will. In any case, he argued that the decision of court delivered on the 4th of February 2020 has support from most of the family members as it will eventually result in fair distribution of the estate of the deceased pursuant to the summons for confirmation of grant dated the 16th of April 2021.

6. Finally, the respondent argued that there has been inordinate delay in filing of the application taking into account the fact that the application has been filed more than 2 years since judgement was delivered. In addition, the respondent argued that the applicants filed their notice of appointment on the 17th of May 2021 and failed to file the application for more than 9 months.

7. He therefore urged court to dismiss the application.

Determination

8. The single issue that arises for determination after perusal of the parties pleadings and annextures is whether the Judgement of Court delivered on the 4th of February 2020 should be set aside.

9. The major thrust of the applicants case is that they were never notified of the proceedings, that the proceedings were ex-parte and that the resultant judgement revoking the deceased will, is prejudicial to the applicants and other beneficiaries, whom the applicants never mentioned nor list.

10. The power to set aside orders of court is a discretionary one. The principles on which the Court acts to set aside ex-parte judgment are now well known and settled. Harris J in the case of *Shah vs Mbogo & Another*, [1967] EA 116 had this to say at page 123:

> "I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside judgment obtained exparte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

11. Flowing from the above, it is obvious that where the court is persuaded that there was no proper service or that the applicants were never notified of the proceedings herein, the judgment will be set aside *ex debito justitiae* (i.e as a matter of right) and not judicial discretion. See *National Bank of Kenya vs Ndzai Katana Jonathan*, HCCC No.755 of 2002.

12. However, this is not the only factor to be taken into account. Other factors to consider is whether there is defence on the merit and whether there is inordinate delay in the bringing of the application to set aside. See *Abdalah Muhamed A. Kasinde & 2 others v Anthony Ngetich Seurey & another* [2016] eKLR.

13. In our instant case, the applicants contend that they were not notified of the proceedings and that the proceedings were ex-parte. On the other hand, the respondent noted that the applicants were represented by those opposed to the revocation of the will.

14. I note from the record of proceedings that the respondent herein and one Kibor Bungei, sons of the deceased, opposed the mode of distribution and challenged the will on grounds of mental incapacity through an affidavit of protest sworn on the 1st of February 2000. They subsequently files summons

for revocation of grant on the 24th of May 2004, unfortunately, Kibor Bungei died leaving Cornelius, the respondent herein, who is from the 1st house, as the sole objector. His main contention was that they were left out of the deceased will and in the subsequent pleadings filed in court in support of the petition for grant and its confirmation.

15. From the revoked will, it is clear that the late Kibor Bungei and the respondent herein were excluded from the will. In fact, the precise words used in the revoked will was that the two will not get any land in Emdin or mogoon. On the contrary, the applicants herein were included and given 30 acres and 20 acres in Cheptiret and Lelwak respectively.

16. As such, the respondent herein together with the late Kibor Bungei having been left out of the deceased will despite being his sons, challenged the will and grant issued. They were the ones affected by the will and not the applicants herein. There is therefore no reason that exists for the respondent to have included and or notified the applicants herein. In any case, in any succession matter, the person appointed as the administrators/executors is the one to be sued. In this case, it is clear that the said executors namely Kipserem Morogo and Julius Kirarei (both deceased) were sued by the respondent herein as representatives of the estate of the deceased. In addition, when they died, Kimurgor Ngelechei and Lucas Kosgei applied for new grants to be issued which was given on the 5th of June 2003 and issued on the 11th of June 2003. Upon issuance of the grant above, the respondent herein and the later Kibor Bungei filed summons for revocation of grant issued on the 7th of October 1996 and reissued on the 11th of June 2003. They properly sued the two who were acting on behalf of the estate of the deceased. Once again, there was no need to sue the applicants herein and or serve them.

17. I say so because I take cognizance of the fact that executors in whom the assets of the estate of a deceased vest by virtue of section 79 of the *Law of Succession Act* become entitled to exercise the powers that are set out in section 82 of the *Law of Succession Act*, which are akin to those of an owner of the property. They can thus sue or be sued over the property, they can sell or enter into contracts in respect to it, among others. The personal representatives have authority from the grant of representation they hold, whether it is one of probate or of letters of administration, to handle estate property. See *In re Estate of Julius Mimano (Deceased)* [2019] eKLR. No other person can be sued or sue on behalf of the estate of the deceased unless they intermeddle with the estate of the deceased. One can only object to the appointment of the executors and or challenge the issuance of grant or the validity of the will of the deceased.

18. Furthermore, in *Kothari vs Qureshi & Another* [1967] EA 564, the Court stated that:

> "Where a person dies leaving a will appointing an executor, the person so appointed as executor represents the estate of the deceased testator as from the date of death of the testator ...An executor may commence suit before grant of probate and he can carry on the proceedings without grant as far as is possible until he has to prove his title ... and if the will is ultimately proved no one can question the validity of such acts."

19. Since the respondent was challenging the issuance of the grant to the executors as appointed in the will as well as the will itself, there was no need to serve or notify any other persons since the service to the executors was sufficient to cover all the beneficiaries including the applicants herein.

20. In any case, I am satisfied that the applicants herein were well represented through the executors of the estate of the deceased who opposed the application by the respondent to revoke the will and subsequent grant issued.

21. Accordingly, I find no merit in the applicants arguments that they were not aware of the proceedings and or they were not notified.

22. As to the issue of delay in filing the application, I note that the judgement of court was delivered on the 4th of February 2020 while the application to set aside the judgement was filed on 7th of March 2022. This is more than 2 years since the judgement was delivered. In addition, despite filing notice of appointment on the 17th of May 2021, the applicants took another 9 months to file their application. They have not bothered to explain this delay and in the absence of any tangible explanation, the same in my view constitutes inordinate delay.

23. In *Nginyaga Kavole vs Mailu Gideon*, Misc Application No.401 of 2018, the High Court sitting in Machakos while considering an application made with delay held that:

> " Five months delay is clearly an afterthought and the applicant is under a duty to satisfactorily explain such delay."

24. While quoting the Court of Appeal in *Union Insurance Co. Of Kenya Ltd vs Ramzan Abdul Dhanji* Civil Application No.179 of 1998, the court proceeded to hold that:

> " The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it".

25. I also take judicial notice of the fact that this case has taken over 25 years in court. Some of the beneficiaries are dead while others continue to suffer awaiting their rightful share of the estate of the deceased. Parties must agree that litigation must come to an end. It must not be that 25 years after the deceased died, there is still in court a case over his estate.

26. Accordingly, I find no merit in the applicants application dated the 7th of March 2022 and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIA EMAIL ELDORET THIS 23TH DAY OF DECEMBER, 2022.

R. NYAKUNDI

JUDGE