



In re Estate of Magdalene Oluoch Ooro (Deceased) (Succession Cause 213 of 2013) [2022] KEHC 16651 (KLR) (19 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 213 OF 2013**

JN KAMAU, J

DECEMBER 19, 2022

IN THE MATTER OF THE ESTATE OF MAGDALENE OLUOCH OORO (DECEASED)

AND

**IN THE MATTER OF AN APPLICATION FOR THE
SETTING ASIDE OF CONFIRMATION ORDERS**

BETWEEN

JOHN OKELLO OORO ADMINISTRATOR

AND

GEORGE OSORO OORO ADMINISTRATOR

RULING

1. In his summons dated December 6, 2021 and filed on December 7, 2021, the 1st administrator herein sought an order setting aside the proceedings of September 27, 2021 that led to the confirmation of grant and the orders emanating therefrom and that upon the setting aside of the aforesaid orders, fresh confirmation be done involving all the beneficiaries and the parties interested in the deceased's estate.
2. He swore an affidavit in support of his said summons on November 6, 2021. He also swore a further affidavit on April 25, 2022. The same was filed on May 5, 2022.
3. He averred that pursuant to the judgment delivered on May 30, 2019, the court appointed the 2nd administrator as his co-administrator to the deceased's estate and that they were to confirm the grant within thirty (30) days after the issuance of the letters of administration.
4. He pointed out that subsequently, he made several trips to the court registry to confirm if fresh letters of administration had been issued and that on his last visit to the Registry on December 3, 2021, he discovered that the 2nd administrator had made an application for confirmation of the grant for the



only property that formed the deceased's estate and the same granted to him. He pointed out that the said certificate of confirmation of grant was issued on November 2, 2021.

5. He was categorical that he was not aware of the application for confirmation of grant dated May 27, 2021 and filed on June 18, 2021 and that he did not sign any document or consent allowing the 2nd administrator to have the whole land parcel xxxx (hereinafter referred to as the "subject property"). He added that the proceedings leading to the impugned confirmation of the grant were done clandestinely without involving him. He averred that the 2nd administrator had lied to the court that he had been served with a hearing notice for the aforesaid application for confirmation of grant that took place on September 27, 2021.
6. He urged this court to grant him the orders he had sought because if the same were not granted, he stood to be disinherited by the 2nd administrator with regard to the only property that was left behind by his mother. He added that the 2nd administrator was likely to have the property registered in his name and dispose it to third parties hence defeating the object of his application.
7. In opposition to the said application, the 2nd administrator swore a replying affidavit on January 5, 2022. The same was filed on January 17, 2022. He averred that he was the co-administrator of the deceased's estate and the subject of the proceedings had been distributed to him and as such he was not an objector as indicated in the application. He stated that the said application lacked merit and was only a tactic by the 1st administrator to delay the registration of the land in his name.
8. It was his case that the 1st administrator had fraudulently and unlawfully obtained and confirmed the grant of letters of administration but that Cherere J revoked the same in her ruling of May 30, 2019. He stated that the 1st administrator had failed to notify the court that the land was not available for succession despite filing a certificate of search showing that the 2nd administrator was a joint owner with the deceased hence had a right of ownership. He added that in her decision, the learned judge directed them to apply for confirmation of the grant within thirty (30) days and to ascertain all beneficiaries including the sisters who had been left out.
9. He stated that none of them applied for the confirmation of the said grant within the said thirty (30) days period but the whole family rooted for him to have the whole portion as they appreciated the history behind it and the plan their deceased father put in place to cushion him against the excesses of his elder brothers. He asserted that the family was also alive to the fact that the 1st administrator had sold parcels that were gifted to him which had made his family unhappy with his schemes and that he had declined to cooperate opting for antagonism.
10. He pointed out that the 1st administrator was aware of the court's judgment and had in fact annexed the same to his affidavit. He added that in all the proceedings, the 1st administrator was represented by the firm of Oguso & Okumu Advocates and while lodging the present application he filed a notice of change of advocates by PD Onyango & Co Advocates. He asserted that when the 1st administrator declined to give consent to confirmation of grant, a citation was issued to him through his legal representative and the same was served alongside the summons for confirmation of grant.
11. He averred that the 1st administrator chose not to attach copies of the documents that were served upon his advocate because he knew that such copies bore the dates of when the matter was to come up for confirmation. He added that the 1st administrator did not offer any explanation why the grant could not be confirmed within the period of fifteen (15) days that had been stipulated in the citation.



12. He contended that the citation was served on the 1st administrator on June 23, 2021 and that he had up to July 9, 2021 to file his affidavit of protest to the confirmation but he did not do so as a result of which the confirmation of grant proceeded as scheduled on September 27, 2021.
13. Serfine Ooro Muga and Vallery Akinyi Ooro who were the 2nd administrator's sisters swore their replying affidavits on January 5, 2022 in support of his case. This court did not consider these affidavits as they were not party to the proceedings herein and further, the same were filed without leave of the court.
14. The 1st administrator's written submissions were dated and filed on May 26, 2022 while those of the 2nd administrator were dated June 13, 2022 and filed on June 14, 2022. This ruling is based on the said written submissions which parties relied upon in their entirety.

Legal Analysis

15. The 1st administrator submitted that the judgment by Cherere J was clear that confirmation was to be done in accordance with the provisions of the law after ascertaining and determining all persons and their respective beneficial entitlement to the estate. He further cited rule 40(4) of the *Probate and Administration Rules* and argued that the 2nd administrator had a duty to determine all persons entitled to the deceased's estate but also their respective shares or beneficial entitlements.
16. He added that although the 2nd administrator listed him as one of the persons who survived the deceased, he was not allocated any share which was contrary to the provisions of the law. He pointed out that the 2nd administrator had even noted that he had not given a consent disinheriting him from the deceased's estate.
17. He asserted that the 2nd administrator's allegation that he was not entitled to the deceased estate because the land was jointly owned by himself and the deceased and that upon the demise of the deceased the estate ought to be his sole property by operation of the law was not correct. He argued that it was evident that both the 2nd administrator and the deceased each had half (1/2) share as per entry no 1 which was common ownership and as per the provisions of section 91(5) of the *Land Registration Act*, the half (1/2) share ought to go to the deceased's estate which he was entitled to inherit from it as his son.
18. He contended that the claim that he had been given other parcels of land by the deceased which he had since sold was not true. He added that there was no evidence that was led as to that effect. He argued that instead, it was the 2nd administrator who had been given land and sold the same. He stated that there was green card for land parcel number xxxx which had been registered in the name of the deceased and the 2nd administrator was subsequently transferred in the 2nd administrator's name who sold it to one Christopher Okoth Obongo. He urged the court to set aside the confirmation orders that disinherited him.
19. The 1st administrator was emphatic that he was not notified of the said date by his advocates on record which was a mistake. He argued that the said mistake should not be visited upon him as he was an innocent litigant. In this regard, he relied on the case of *Re Estate of Onyiego (deceased)* [2021]eKLR which cited with approval the cases *CMC Holdings Ltd vs James Mumo Nzioki* [2004]eKLR and *Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 others*[2013]eKLR where the common thread was that the court's discretion to set aside ex parte judgment or order was intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who had deliberately sought to obstruct or delay the course of justice.



20. He placed reliance on the case of *Philip Keipto Chemwolo & another vs Augustine Kubende* [1986] eKLR where it was held that blunders would continue to be made by the parties or their advocates but there was no mistake that could not be put right by payment of costs unless it involved fraud or overreach. He invoked section 47 of the *Law of Succession Act* cap 160 and rule 73 of the *Probate and Administration Rules* and urged the court to invoke its inherent powers to meet the ends of justice in the case herein.
21. He relied on the case of *Estate of Saverio Ruri Njuiri (Deceased)* [2021] eKLR where it was held that the court was bestowed with jurisdiction to determine any dispute which came before it in relation to an estate of the deceased and further it had inherent powers to make orders for the ends of justice to be met or to prevent abuse of the process of the court.
22. He pleaded with the court not to dismiss his application because doing so would be being driven out of the seat of justice by the same court that ought to assist him. It was his assertion that the 2nd administrator would not suffer any prejudice as he would have an opportunity to put his case before the court as to why he felt that he was entitled to the entire estate and the court would make a determination as to what each beneficiary was entitled to.
23. On his part, the 2nd administrator reiterated the averments in his replying affidavit and contended that the 1st administrator slept on his rights only to wake up months later in the hope of taking the court back to what had been dealt with.
24. He was emphatic that there was no fraud or material non-disclosure in the process leading to the confirmation of the grant. He added that he had listed the 1st administrator as his brother and even issued him with citation so that he could explain to the court why he had not given consent to the confirmation of the grant. He blamed the 1st administrator for turning an accusing finger to his advocate who was not present to defend himself. He asserted that court ought not favour the indolent.
25. He placed reliance on the case of *Aggrey Marunbgu Wakbu vs David Otieno Obulemile* [2011] eKLR where it was held that the case belongs to a litigant and not his advocate and that it was his duty to be aware of the progress of his case and hence a court would not exercise its discretion in favour of such an indolent and negligent litigant.
26. It was his case that therefore the grant was procedurally and lawfully confirmed after the court was satisfied itself that there was proper service and proceeded with the confirmation of the grant. He pointed out that the 1st administrator opted to waive his right to be heard and there was no plausible explanation as to why the citation was not responded to or why there was no appearance on the date of hearing of summons for confirmation.
27. He pointed out that it was clear from the official search that he jointly owned the land with the deceased. He added that in a joint tenancy, he enjoyed the right of survivorship over the whole parcel. He asserted that the 1st administrator had attached a green card allegedly showing that the subject property was owned through tenancy in common in the ratio half (½) share each but did not explain why the certificate of search and green card bore different information. He added that the green card came after the issue of joint tenancy was raised which rendered it questionable and of no evidentiary weight. He also cited the Luo customary in explaining how he came to acquire the subject property.
28. Right from the onset, this court noted that the issue of whether or not the 2nd administrator was a joint owner and/or a co-owner with the deceased under joint tenancy and/or tenancy in common was hotly contested.



29. This court also noted that there was an interested party herein by the name of Muronga Kadurenge Benard. He had also filed a chamber summons application dated and filed on February 18, 2022 claiming his rights over the subject property as a purchaser for value. He tendered in evidence a title deed for xxxx which he claimed was originally xxxx. This court directed that this present application be heard before his application could be heard.
30. On his part, the 1st administrator also accused the 2nd administrator herein of having transferred the subject property in his name and transferring it to one Christopher Okoth Obongo.
31. It was therefore evident that the ownership of the subject property was central and it was important to ascertain whether or not the said subject property formed part of the deceased's estate as at September 27, 2021 when the court confirmed the grant of letters of administration Intestate in the deceased's estate. There was also a question of whether or not this court had the jurisdiction to determine the dispute relating to the title of the subject property.
32. As the subject property appeared to have been transferred and/or alienated to the interested party and/or to Christopher Okoth Obongo, this court was not persuaded that it should issue any injunctive orders herein as it appeared that the prayer for granting the same may have been overtaken by events. It is trite law that courts ought not to issue orders in vain and more so when it is not clear what the status of a matter is at the time the orders have been sought. There was a need for further interrogation of the issues the parties herein had raised before this court could issue substantive orders.
33. It was for that reason that this court determined that the issue of the 1st administrator's non- attendance in court on September 27, 2021 ought to be considered in priority.
34. Whereas this court was satisfied that the 1st administrator was duly served with the hearing notice of the proceedings of September 27, 2021 as per the affidavit of service of James Odhiambo that was sworn on September 20, 2021 and filed on September 22, 2021 and that it acted properly in confirming the grant of letters of administration, it was persuaded to find, purely in the interests of justice, that the 1st administrator ought to be given an opportunity to ventilate his case through another counsel. It was evident that his previous advocates were duly served with the citation and summons for confirmation of grant on June 23, 2021 but failed to attend court.
35. Further, while this court agreed with the 2nd administrator that cases belong to litigants and they ought to follow up on the progress of their cases, this court nonetheless had due regard to the case of *Philip Keipto Chemwolo & another vs Augustine Kubende* (supra) and several other cases where it has been held that litigants ought not to be punished for the mistakes of their advocates.
36. Indeed, under rule 73 of the *Probate and Administration Rules*, the court is urged to invoke its inherent powers to meet the ends of justice. In doing so, it can order that a party who has been set back in the proceedings be compensated by way of costs.

Disposition

37. For the foregoing reasons, the upshot of this court's decision was that the 1st administrator's summons for setting aside confirmation orders dated December 6, 2021 and filed on December 7, 2021 be and is hereby allowed in terms of prayer Nos (4) and (5) therein.
38. It is hereby directed that the 1st administrator pays the 2nd administrator throw away costs in the sum of Kshs 20,000/= by January 31, 2023.
39. In the event the 1st administrator fails to pay the said sum, the 2nd administrator will be at liberty to institute legal proceedings for the recovery of the same.



40. This matter will be mentioned on March 6, 2023 for further orders and/or directions.

41. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER 2022

J. KAMAU

JUDGE

