



**IN THE HIGH COURT OF KENYA AT CHUKA**

**MISC SUCCESSION CAUSE NO. 47 OF 2017**

**IN THE MATTER OF THE ESTATE OF M'IMWITHA M'ITHANGA ALIAS IMWITHA ITHANGA (DECEASED)**

ESTHER KAMBURA.....1<sup>ST</sup> APPLICANT

ZIPPORAH MUKWANYAGA.....2<sup>ND</sup> APPLICANT

GRACE MUMU NYAGA.....3<sup>RD</sup> APPLICANT

PHILLIS MUTHONI.....4<sup>TH</sup> APPLICANT

JOHN MBAE.....5<sup>TH</sup> APPLICANT

**-VERSUS-**

**ROSE IGOKI.....ADMINISTRATIX/RESPONDENT**

**R U L I N G**

**Introduction**

1. The deceased, M'imwitha M'ithanga alias Imwitha Ithanga, died intestate living 9 children surviving him. The grant of letters of administration intestate was issued to Nehemiah Njeru and the Respondent on 08/03/2018 and confirmed on 04/03/2020.
2. Before this court is a summons application dated 05/03/2020 and seeks the setting aside of the orders of 04/03/2020 that confirmed the grant of letters of administration intestate and in the alternative, the annulment of the Certificate of Confirmation of Grant issued herein on 04/03/2020. The applicants also prayed that the costs of this application be in cause.
3. The court directed that the application be canvassed through written submissions. However, neither of the parties filed their submissions on this present application and they requested the court to rely on the affidavits of the parties.

**The Applicants' case**

4. They aver that they are children of the deceased and hence beneficiaries of the estate.
5. The Applicants contend that they are not satisfied with the manner in which the subject estate has been distributed. They contend that some of the Applicants were seated in court when the grant was confirmed but did not register their displeasure due to "ignorance of procedure and the layman's natural fear of the court atmosphere.
6. It is their contention that they have a legitimate objection against the manner in which the estate has been distributed for the reason that a stranger to the estate has been included as a beneficiary. It is further contended that the estate as distributed will result in massive displacements of persons already in occupation of ascertained portions of the estate.
7. The Application was opposed through the Replying Affidavit sworn by the Administratix/Respondent on 26/05/2020. In the affidavit, it was deposed that the Applicants and all the interested persons were served with the summons for confirmation of grant dated 31/01/2020. The Respondent contends that all the interested parties were therefore fully aware of the hearing of the application for confirmation of grant and that save for Nehemiah Njeru, the original petitioner, they were all in court on 04/03/2020 when the matter was called out and the court assistant called out the names of all the persons appearing in the summons for confirmation of grant who then came out to the front of the court.

**The Respondent's case**

8. The Respondent further depones that the court asked whether there was any objection to the mode of distribution as contained in the summons for confirmation of grant and the those present confirmed that they were satisfied with the manner in which the Respondent had proposed to distribute the subject estate as per the said summons for confirmation of grant. Consequently, she deponed that the present application to set aside the orders of 04/03/2020 is an afterthought.

#### **Issue for determination**

9. The only issue for determination is whether the Applicants' application dated 05/03/2020 should be allowed.

#### **Analysis**

10. From the onset, it is evident that there is an error apparent on the face of the record as honourable R. K. Limo (J), in confirming the subject grant, recorded as follows:

*“The grant issued on 08.01.2018 is hereby confirmed in terms of paragraph 6 of the affidavit in support.”*

11. It is clear from the record that the grant was issued on 12.03.2018 and not 08.01.2018. However, since this application seeks the setting aside of the confirmation of grant, I shall limit my analysis to the prayers sought herein.

12. The application is expressed to be brought pursuant to Section 47 of the Law of Succession Act and Rules 49 and 73 of the Probate Administration Rules which when read together provide for the jurisdiction of this court to entertain the present application and make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.

13. It is important to appreciate that every person has the right to be heard before decision is made to affect his rights. This natural justice law principle is so important that it found itself enshrined in **Article 50(1)** of the Constitution in the following terms:-

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

14. The Applicants state that only some of them were in court when the grant was confirmed. On the other hand, the Respondent contend that all the parties were aware of the hearing of the summons of confirmation as her advocate on record served all of them with both the application and the hearing notice. Thus, the question to be determined is if indeed they were served.

#### **Whether the applicants were served with the summons application for confirmation of grant and hearing notice**

15. The matter was scheduled for a mention on 04/03/2020 to confirm service of summons for confirmation of grant and for further orders. Learned counsel for the administratrix, Mr. Mugo, informed the court that the Administrator had served all the parties and that there was an affidavit of service on record.

16. The Applicants admit, in the grounds in support of the present application, that some of them were seated in court when the grant was confirmed. They however do not specifically give the names of those who were in court. That notwithstanding, it is trite law that he who alleges must prove. The onus was therefore on the Respondent to prove that she indeed served all the parties affected in this matter with the summons for confirmation of grant as well as the hearing notice of the said summons.

17. From the record, there is indeed an affidavit of service sworn sometime in March 2020 by one Dennis Murimi Gitari, a licensed process server who depones that he duly served the summons for confirmation of grant dated 31/01/2020 slated for hearing on 04/03/2020 on:

(i) Nehemiah Njeru,

(ii) Elina Gaaji,

(iii) Esther Kambura (the 1<sup>st</sup> Applicant herein) and

(iv) Grace Mumu (the 3<sup>rd</sup> Applicant herein).

18. It is further deponed in paragraph 9 of the said affidavit of service that Elina Gaaji and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents herein acknowledged service of the summons of confirmation of grant by signing in front of the Respondent's copy. However, the copy of summons of confirmation of grant attached to the said affidavit of service does not contain any signatures that might prove acknowledgment of the alleged service.

19. The court record shows that in confirming the grant, learned counsel Mr. Mugo was present for the Respondent/Administrator as well as the Respondent. There is no indication that there was any other party present. That notwithstanding, it is my considered view, from the depositions in the said Affidavit of Service, that the contention by the Respondent that all the parties save for Nehemiah Njeru were aware and present during the hearing of summons for confirmation of grant is questionable. The affidavit of service shows that only some parties were alleged to have been served.

20. The Applicants aver in paragraph 5 of the affidavit in support of this application that it is after the court session that a court assistant informed them that the grant of Letter of Administration had been confirmed and the matter had come to an end. It is then that they appointed the firm of M/S Basilio Gitonga Muriithi & Associates on 05/03/2020, a day after the confirmation of the grant, and the said firm then proceeded to file the present application. Noting that the applicants were unrepresented before this, it is my considered view that the present application is not in the very least an afterthought because it was brought without unreasonable delay.

21. Without going into the basis and legitimacy of the Applicants' supposed objections to the mode of the distribution of the subject estate, it is my view that the Respondent ought to have informed every interested party, and not just some of them, of the existence of the summons for confirmation and notified them of the scheduled hearing of the same.

22. In my view, this is the kind of situation where the setting aside of an order may be made *ex debito justitiae*. See the dictum of Lord Diplock in *Isaacs v. Robertson*, [1984] 3 All E.R. 140 at 143:

*"[T]here is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice."*

23. The Court of Appeal in *Attorney General –v- Small Wonder Ltd* [2015]eKLR reiterated the principles applicable in setting aside a default judgment as settled in various decisions and went on to state that –

**“Where there is no proper or any service of a hearing notice, the resulting proceedings including the default judgment are irregular and the court must set them aside *ex debito justitiae* (as a matter of right) on application by the affected party. Such proceedings and judgment are not set aside in exercise of discretion but as a matter of judicial duty to uphold the integrity of judicial process itself.”**

24. In my view, the above said affidavit of service is defective as it does not indicate the time of service and whether the process server knew the applicants or not so as to be able to identify them. In either case, the non-service of the application and the hearing notice to **ALL** the parties forms a valid reason for setting aside the confirmation of grant. The non-service of the summons went to the core of the jurisdiction of this court since without service, or proper service for avoidance of doubt, the court had no power to hear and determine the summons.

### **Conclusion**

25. From the foregoing, I conclude that the application dated 05/03/2020 is merited.

I allow the application and order that the order of this court issued on 4<sup>th</sup> March 2020 is set aside with the consequence that the grant confirmed under the said order is revoked. The administratrix shall file a fresh summons for revocation of grant. If the applicants will not agree with her proposed mode of distribution, they will be at liberty to file affidavits of protests. I make no order as to costs.

**Dated, signed and delivered at Chuka this 25<sup>th</sup> day of February 2021.**

**L.W. GITARI**

**JUDGE**

**25/2/2021**

The ruling has been read out in open court.

**L.W GITARI**

**JUDGE**

**25/2/2021**