REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CASE NO. 83 OF 2003

IN THE MATTER OF THE ESTATE OF MUGAMBI KOBIA.....DECEASED

FRANCIS KOBIA MUGAMBI .....PETITIONER

VERSUS

GERMANO MUGAMBI MURIIRA .....OBJECTOR

RULING

1. On 14/04/2021 this matter could not proceed and was adjourned later in the evening, at about 4 p.m, after the court kept keeping it aside to enable the petitioner/applicant reach his advocate and request him to log into the platform and offer arguments in opposition to the application dated 3/12/2020. In adjourning the matter, it was ordered that the petitioner/respondent informs his counsel to attend court on 18/6/2021.

2. Come the appointed date, 18/06/2021, the counsel was once again absent and the matter was placed aside till 1.40 p.m for the respondent/petitioner to once again get his advocate and urge him to come online. The advocate never came online and the petitioner/respondent did tell the court that he had talked with his counsel on phone and was told that the advocate tried loging in in the morning, was unsuccessful, and decided to go for a funeral.

3. In its decision, the court considered the respondent side to be unkeen on concluding the matter and ordered the matter to proceed with an opportunity to him to address the court. The application was heard and ruling reserved for delivery today the 25/6/2021.

4. Very diligently and expeditiously, on 22/6/2021 the petitioner/applicant moved and filed the current application seeking among other things the, the arrest of the ruling and setting aside the orders of the court of 18/6/2021 scheduling the ruling date so that the petitioner may be heard on the application dated 3/12/2021.

5. The reasons given on the body of the application and the affidavit in support sworn by the petitioner amount to no more than an assertion that the petitioner has always had keenness and interest in the matter and that the failure by former counsel to attend court on the date appointed was a mistake of counsel which should not be visited upon the litigant with an addition that the dispute touches on land thus sensitive and emotive and that the intended submissions by the applicant/petitioner are highly and likely to persuade the court to rule and determine the application the application in his favour.

6. On its part the protestor resisted the application by the replying affidavit sworn on 23/06/2021 but filed in court on 24/06/2021. The gist of opposition is that the petitioner had severally changed advocate at will and every time it became his obligation to take a step towards conclusion of the matter. To the counsel, the scheme to delay conclusion of the matter is informed by the fact that the petitioner continues to enjoy the subject property contrary to the decision by the court and to the exclusion of the protestor. His conduct is considered a design to defeat justice. It was then urged that the petitioner was indeed afforded an opportunity to be heard and was heard on the application. She urged that the application should be dismissed.

DISCUSSION AND DETERMINATION

7. I see the application to seek the setting aside of the proceedings of 18/6/2021 by which the application of 3/12/2020 was heard so that the petitioner is accorded a chance to offer submissions on the said application. When Mr. Carlpeters Mbaabu Advocates, made his submissions, I did ask him whether if given time he could offer his submissions instantly but he responded that he needs time to file a supplementary affidavit because the response by the former advocate was bare.

8. In considering every application of this nature the court considers several factors including but not limited to consideration if anything

could have happened which ought not to have happened save for the default and then what interests of justice stands to be served by grant of setting aside.

9. The application argued on the 18/6/2021 sought three orders which I consider to merely seek that the decision of Gikonyo J. dated the 17/12/2019 been enforced. That decision was on an application by the protestor seeking orders that the documents of transmission be signed by the Deputy Registrar in place of the petitioner who had refused to do so and another by the petitioner seeking stay of execution pending appeal.

10. From the two applications and the records of the file, it emerges that the grant was confirmed on the 5th December, 2018 but had not been implemented by the petitioner. In coming to the decision it did, the court considered several factors among them the fact that the appeal was only on plot No 28B on which the petitioner continued to collect rent. On that property, the court had found that the development thereon were by the deceased even though the petitioner had added others during the pendency of the proceedings in violation of the law. He then performed the delicate balance between the parties interests and then granted a limited stay with terms for six months. One of the terms that was solely within the ability of the petitioner was that the rent collected from the subject property be deposited into court pending the determination of the appeal. That condition of stay has not been complied with todate and when I asked Mr. Carlpeters to comment on the default he said that he would persuade his client to comply. In deed on 18/6/2021 when the petitioner was given a chance to say something on the application he told the court that even if given time he has no money to deposit because he has not collected the rent.

11. To the court this is straight forward matter that need not be convoluted. The decision of the court of 17/12/2019 was self-explanatory and all is sought in the application of 3/12/2020 is to enforce noncompliance therewith. That being the case, the question I have to ask before I set to set aside is what benefit or burden, in terms of interests of justice would be meted out to the parties by grant of orders of setting aside. To answer that question one has to pose the question what is the fact that arguments by counsel would avail so as to be applied to the law to come to a conclusion that the application dated 3/12/2020 is not merited. On the later question I find this as a matter that must be determined on the facts on record and no more hence no additional facts would prevail.

12. I have anxiously considered all material availed and I come to the conclusion that no benefit at all will be served by setting aside. Rather hardship and injustice would be served in that the protestor would be delayed further from having his adjudicated scare held back from him by the petitioner, a trustee, who is not even keen to comply with court orders demanding deposit of rent into court.

13. It was strenuously argued that mistake of counsel should not be visited on a litigant. Here I see no mistake but on design. But then it is no longer the law that a mistake of counsel can never be visited upon litigant. It has come to a time when at times the mistake of counsel must be left to fall and be born by litigant. **In Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 Kimaru, J the court said -;**

> **"Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, *it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court.***

14. More to the point was the court of appeal in **Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR,** in which it was held that in determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled *vis-a-viz* the prejudice to be visited on the opposing party. My take is that the respondent stands to suffer no prejudice by proceeding being held up so that the process of transmission is concluded. To the contrary, setting aside would perpetuate the deprivation of the protestor by the petitioner.

15. On the argument on mistakes of counsel that should not be visited on an innocent litigant. The Court observed as follows-;

> **"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."**

16. The court then went on to underscore the need for efficient and expeditious disposal of legal disputes and said-:

> ***"Legal business should be conducted efficiently.* We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads *rather than allowing an amendment at a very late stage in the proceedings*."**
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> (emphasis provided)

17. Here I find that there was no mistake but rather a design to delay and obstruct Justice. I see though the façade of mistake of counsel and say the delay must come to an end.

18. I find no merit in the application and I order that it be dismissed. Each party to bear own costs.

Dated, signed and delivered at Meru **virtually by Microsoft teams** this 25th day of June 2021

Patrick J.O Otieno

Judge

In presence of

Mr. Carlpeters Mbaabu for the petitioner

Miss Othieno for the protestor

Patrick J.O Otieno

Judge