



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: D. K. Kemei, J)

SUCCESSION CAUSE NO. 616 OF 2013

IN THE MATTER OF THE ESTATE OF ALICE MUTHOKI MUTHAMA(DECEASED)

DAVID MUTHOKA NYALA.....CITOR

VERSUS

JONES MUTIE MUTHAMA.....CITEE

RULING

1. By a notice of motion dated 22nd March 2021 filed under certificate of urgency, the Citee seeks for the setting aside of the exparte proceedings conducted on the 11th February 2021 and all consequential orders arising therefrom.

2. The application is supported by the affidavit of Mary Gathoni Kamau an advocate working in the firm of Anne Kiusya & Co Advocates for the applicant. The application is based on grounds that a representative of the Citee's advocates left employment without diarizing or communicating the hearing date of 11th February 2021 fixed by consent hence the hearing proceeded in the absence of the Citee, his witnesses or his advocates. According to the Citee's advocates, they became aware of the proceedings when they were served with the Citor's written submissions hence the non-attendance was inadvertent. It was contended that the mistake of counsel should not be visited upon the Citee who will suffer grave injustice if not given an opportunity to present his case. The applicant seeks that his case should be reopened so as to accord him an opportunity to be heard.

3. In opposition, the Citor swore a replying affidavit on 7th May 2021 where he deponed that the Notice of Motion is an afterthought solely geared towards sanitizing the Citee's indolence and/or casualness. According to the Citor, the hearing date was taken by consent on 21st October 2020 hence the failure to attend court is a clear manifestation that the Citee has already lost interest in the case. The Citor averred that this is a clear case where mistake of counsel is visited upon the client. According to the Citor, the Citee's case was procedurally closed on 11th February 2021 due to his absence or that of his advocate. The Citor further avers that the Citee has exhibited unseriousness and the orders sought by Citee are prejudicial to him since he has incurred a lot of expenses while prosecuting his Citation dated 15th August 2013. According to the Citor, attempts to whittle down the court business amounts to injustice, judicial time cannot be wasted, justice shall not be delayed and litigation must come to an end. It was also averred that the Citee has come to court with unclean hands hence the court cannot invoke its discretionary powers to assist the Citee. Based on the advice of his advocate, the Citor averred that a Citation cannot be opposed as opined by *Sitati J.* in the case of *Sabby Makhaya Lusalenji vs Margaret Khalili (2016)eKLR*. Further that the court is functus officio with regard to the orders of 11th February 2021 and cannot sit on appeal from its own orders. The Citor urged the court to dismiss the notice of motion with costs.

4. The Citee filed written submissions on 9th June 2021. It is submitted that mistake of counsel should not be visited upon the Citee since it was the advocate who misadvised the hearing date. It was submitted that the Citee's case should be heard on merit to meet the ends of justice. Reliance is placed on the case of *Securicor Courier(K) Ltd vs Owino[1993]eKLR*. According to the Citee, the reasons given are sufficient to allow the Citee be heard on merit and not ousting him from the seat of justice. It is submitted that the application was filed without undue delay as it was filed immediately the Citor's written submissions were served upon the Citee's advocates. Reliance is placed on the cases of *Pithon Waweru Maina vs Thuka Mugiria[1983]eKLR*, *Bank of Africa Kenya Limited vs. Put Sarajevo General Engineering Co.Ltd & 2 Others [2018]eKLR* and *Philip Keipto Chemwolo & Another vs Augustine Kubende[1986]eKLR*. According to the Citee, this is a proper case where the court should invoke its inherent powers under section 3 A and 63(e) of the Civil Procedure Act. Reliance is placed on the cases of *Kenya Power & Lighting Company Ltd vs Benzene Holdings t/a Wyco Paints[2016]eKLR*, *Shah vs. Mbogo[1967]EA*, *Securicor Courier (K) Ltd vs. Owino(supra)*. It is submitted that Article 50 of the Constitution guarantees the right to fair trial. Reliance is placed on the cases of *Patriotic Guards vs. James Kipchirchir Sambu[2018]eKLR* and *Mbaki & Others vs. Macharia & Another(2005)2 EA*. The Citor has urged the court to allow the application.

5. On the Citor's part vide the written submissions filed on 23rd June 2021, it is submitted that the Citee's advocates excuse that Citee's

advocate office and the representative failed to diarise the matter is a mere scape goat since the name of the representative has not been disclosed neither has the representative sworn an affidavit. Further, that the diary excerpt has not been annexed to confirm the position. The Citor placed reliance on section 107 to 109 of the Evidence Act that he who alleges must prove. By dint of Article 159(2) (b) of the Constitution justice shall not be delayed. According to the Citor, he will be prejudiced since he has incurred a lot of expenses in prosecuting the Citation. It is submitted that mistake of the Citee's advocate should be visited upon the Citee. Reliance was placed on the cases of **Christopher Murrithi Ngugu vs. Eliud Ngugu Evans (2016)eKLR**, **Nathan Ogada Atiagaga vs. David Engineering Ltd (2016)eKLR**, **Chemensia Nyanchoka Kinaro vs. Joyce Nyansiboka Onchomba[2020]eKLR**, **Jomo Kenyatta University of Agriculture and Technology vs. Mutuura Mbeera & 3 Others[2015]eKLR** and **Bains Construction Co.Ltd vs. John Mzare Ogowe[2011]eKLR**. It is submitted that despite the Citee's case being closed there is no prayer pleaded for re-opening the case. Reliance is placed on the case of **Yaron Gurevish vs. Carnation Plants Ltd[2019]eKLR**. Further, that the Citee responded by filing documents not recognized by the Rules hence the same should be struck out. Reliance is placed on the case of **Sabby Makhaya Lausalenji vs. Margaret Khalili (2016)eKLR**. According to the Citor, the overriding objectives can never be a panacea for all ills and in every situation. Reliance was placed on the case of **John Musakali vs Speaker County of Bungoma & 4 Others(2015) eKLR**. It is submitted that the court was functus officio. Reliance was placed on the case of **Raila Odinga & 2 Others vs IEBC & 3 Others[2013]eKLR**.

6. The Citor urged the court to dismiss the application with costs. Reliance was placed on *Rule 69 of the Probate and Administration Rules* to award costs to the Citor since the Citee irregularly opposed the Citation and filed the application before court.

Determination

7. I have considered the application herein, rival affidavits and submissions filed.

8. The issue that fall for determination is *whether there are sufficient grounds to warrant setting aside the court orders of 11th February 2021*. The decision whether or not to set aside an order is discretionary. The burden is on an applicant to convince the court to exercise that discretion. The court's discretion will be exercised based on applicable legal principles.

9. The application is premised on **Order 51 Rule 1 of the Civil Procedure Rules, 2010**, **Rule 49 of the Probate and Administration Rules** and **Article 159(2) of the Constitution**. This being a succession cause, the Succession Act and/or its Rules do not have the provisions for setting aside orders. **Order 51 Rule 1(supra)** does not concern itself with setting aside ex parte orders but the mode of applications. Setting aside under the Civil Procedure Rules is provided for under **Order 12 Rule 7** and amplified by **Order 51 Rule 15** but none of the orders have been cited although under **Order 51 Rule 10(1)** it is stated that no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

10. *Rule 49* provides that:-

“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.”

11. ***In the matter of the Estate of Mumenya Njogu (deceased), Succession Cause No.113 of 1994 at Nyeri***, the court held that Rule 49 does not provide for the discretionary power to set aside a decree or an order of court. **Justice M.S.A. Makhandia** expressed himself thus:

“Rule 49 aforesaid does not provide for the setting aside of any order made in a Succession Cause. Neither does it provide for the setting aside a judgment..... the rule provides a procedural remedy.... The only rule that deals with exercise of discretion is rule 73 of the Probate and Administration rules. That rule was not cited in the application.....Unlike the Civil Procedure rules which have Order L rule 12 that deals with situation where there is failure to cite a proper order, rule or other statutory provisions under or by virtue of which the application had been brought which failure is not fatal, the law of Succession Act has no such equivalent provision and nothing can come to the aid of the applicant in the circumstances. The application is thus incompetent.”

12. It follows therefore that the Citee ought to have filed a Chamber Summons and not the Notice of Motion hence incompetent as presented. However, I note that the Citee has invoked *Article 159(2) of the Constitution* where at (d) the courts are required to administer justice without undue regard to procedural technicalities. Again, it is submitted by the Citee that under **Article 50 of the Constitution** he is guaranteed to have a fair trial. Reliance was placed on the case of **Patriotic Guards Lts vs. James Kipchirchir Sambu[2018]eKLR** where the Court of Appeal held that *the right to fair trial remains at the heart of any judicial determination and court should endeavor to protect and uphold the same*.

13. The court is alive to the inherent jurisdiction conferred to it under *section 47 of the Law of Succession Act* and *Rule 73 of the Probate and Administration Rules* to make such orders as may be expedient and necessary for the ends of justice to be met or to prevent the abuse of the court process. The decision by **Makhandia J** was decided before the promulgation of the Constitution, 2010 which abhors technicalities. As regards the discretion to set aside ex parte orders, the court has wide powers save that where such discretion is exercised, the court should do so on terms that are just. The court in **Shah –vs- Mbogo [1967]EA 116**, stated:-

“This discretion is intended to avoid injustice or 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”.

14. The basis of the Citee's case is that he wants to be heard in court since it was not his mistake that his case was closed but his advocates. The Citee's advocate blames their representative for not diarizing and informing the Citee. According to the advocate, they became aware that the Citee's case had been closed when they were served with the Citor's written submissions. In the converse, the Citor argues that the hearing date was taken by consent on 21st October 2020 and the mistake of counsel pleaded by the Citee's counsel is not excusable hence

should be visited upon the Citee.

15. It is an established principle that the mistake of counsel should not be visited upon his client. However in **Bains Construction Co.Ltd vs. John mzare Ogowe[2011]eKLR** the Court of Appeal held that *it is equally true when the counsel as agent is vested with authority to perform some duties as principal and does not perform it, such principal should bear the consequences[Emphasis mine].*

16. A cursory perusal of the proceedings reveals that the Citor and his witnesses testified and the Citor's case was closed on 4th July 2019. On 21st October 2020, Mrs. Wanyoike appeared on behalf of Mrs.Wambua for the Citee whereby the hearing date of 11th February 2021 was fixed by consent. The Citee's case was closed without his testimony on 11th February 2021 and the order of that day is the subject matter before court. The Citee's counsel came to know about the order when served with Citor's written submissions. By the time the matter was coming up for mention on 19th May 2021 to confirm parties had filed written submissions, the Citee's advocate had filed the Notice of Motion before court seeking to set aside the orders of 11th February 2021.

17. In my view the record proves that the Citee is interested to canvass his case in court. A copy of the diary excerpt may have been relevant to the Citee's case but in this case counsel for the Citee asserted that she came to know about the status of the case when the Citor's written submissions were served upon them. I note that Citee had always been represented in court but it is on 11th February 2021 that Citee or his advocate were absent. The Citee's advocate did act with haste in filing the Notice of Motion herein. I am also not persuaded that the Citor will suffer any prejudice if the application is allowed. This is because the Citor can still challenge the evidence to be presented by the Citee through cross-examination.

18. I will associate myself with the case of **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC** stated:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.”

19. In the same vein, in **Martha Wangari Karua vs. IEBC Nyeri Civil Appeal No.1 of 2017** the Court of Appeal held as follows:-

“The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be..”

20. Indeed in **Belinda Murai & Others vs. Amos Wainaina [1978] KLR 278 per Madan JA (as he then)** described what constitutes a mistake in the following terms:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.” See Phillip Chemwolo & Another – Vs – Augustine Kubede [1982-88] KAR 103 AT 1040, Apaloo J

21. The Citee's will have a chance to canvass his case in a hearing. The decision of **Yaron Gurevish vs. Carnation Plants Ltd[2019]eKLR** cited by the Citor is in regard to re-opening of pleadings which is distinguishable to the Citee's case before this court. No prejudice will be caused to the citor if the case is reopened. It is not in dispute that the citation herein sought to require the cite to accept or refuse to take up letters of grant of administration and if that is the position, then the Citee should be given the space to do so. This warrants for reopening the case so that the citor can present his case.

22. In the premises, I find the Notice of Motion dated 22nd March 2021 has merit. The same is allowed as prayed with costs being in the ccause.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021.

D. K. KEMEI

JUDGE