



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 3110 OF 2014

IN THE MATTER OF THE ESTATE OF TITUS MUTIGA WAMWEA (DECEASED)

PERPETUA MUTHONI MUTIGA.....ADMINISTRATRIX/1ST APPLICANT

ANNE WANJIRU MBOGORI.....ADMINISTRATRIX/2ND APPLICANT

VERSUS

AGNES WANGUI MUTIGA.....RESPONDENT

RULING

1. The deceased Titus Mutisya Wamwea died intestate on 9th June 2014. His widow Perpetua Muthoni Mutiga (1st administratrix/1st applicant) and his daughter Anne Wanjiru Mbogori (2nd administratrix/2nd applicant) applied for the grant of letters of administration intestate. The grant was issued to them on 27th July 2015, and confirmed on 18th April 2016. The 1st administratrix had, in all, six children with the deceased. Where the grant was confirmed the administratrices were asked to hold the estate in trust for the family.
2. On 8th March 2017 the respondent Agnes Wangui Mutinga filed an application to revoke and or annul the grant. She claimed to be the 2nd widow of the deceased, and that she had two children with him, but that the petition had been filed, grant issued and the estate distributed without reference. She stated that the fact that the deceased had a second house, her house, was known to the applicants; that the applicants had concealed this information; and had fraudulently disinherited her and her children.
3. On the basis that the application had been served and had not received any response, on 18th September 2017 the court allowed it. It revoked the grant and set aside the certificate of confirmation.
4. On 22nd June 2018 the applicants filed the present application seeking to set aside the judgment that revoked the grant and certificate of confirmation, and for them to be heard on the application that led to the judgment. Their case was that they were not served with the application, and that was why they did not respond to it. They stated that they were not served with the hearing notice, and therefore they were condemned unheard.
5. The applicant filed a replying affidavit to oppose the application. She stated that the application for revocation was served on the applicants on 7th March 2017 at Kariokor Market; that the service was effected by advocate Edward Gacau Kariuki. Further, that the same advocate had served the applicants with the hearing notice at the same place. Consequently, she said, the failure to file response and/or attend the hearing was intentional, and therefore it would be prejudicial to her to set aside the judgment that had been regularly obtained.
6. 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 including **Patel –v- E.A Cargo Handling Services Limited [1974] EA 75**, **Shah –v- Mbogo [1967] EA 116**, **Pithon Waweru Maina –v- Thuku Mugira [1988] KAR 171** and **Sebei District Administration –v- Gasyali [1968] EA 300**, 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.”

7. It is important to appreciate that every person has the right to be heard before decision is made to affect his rights. This natural 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.”

8. The applicants say that they were not served with both the application and the hearing notice. The question to be determined is if indeed they were served.

9. In the affidavit of service filed (“AWM2”) the advocate swore that he had the conduct of the matter for the respondent, and:-

“3. That on the 7th day of March 2017 I served Perpetua Muthoni Mutiga and Anne Wanjiru Mbogori with the Notice of Appointment of Advocate, Certificate of Urgency, Summons of Annulment/Revocation and Annexures all dated the 7th day of March 2017.

4. That the said Notice of Appointment of Advocate, Certificate of Urgency, Summons of Annulment/ Revocation of Grant and Annexures were served upon Perpetua Muthoni Mutiga and Anne Wanjiru Mbogori at Kariokor Market, Nairobi County.

5. That they accepted service thereof but delivered to sign the principle copies.”

10. The respondent annexed the hearing notice (“AWM 1”) but did not indicate how it was served. There is no return of service in respect of the hearing notice. She stated that her advocate had served it. The advocate did not file a return of service. He did not swear any affidavit in response to the application to set aside the judgment. There is therefore no evidence that the applicants were notified that the application was coming for hearing. They, therefore, failed to attend because of lack of notice. It follows that the hearing was irregular, and the result judgment was irregularly obtained. The court has no discretion in the matter. The proceedings and judgment have to be set aside *ex debito justitiae*.

11. As regards the service of the Notice of Appointment, Certificate of Urgency and the Summons of Annulment/Revocation, I agree with the applicants and the submissions of their counsel that the same was neither proper nor effective. The affidavit of service did not say where in Kariokor Market the applicants were found for service. The affidavit did not say that the advocates knew the applicants before. If he did not know them, he did not say who led him to them, or identified them to him. The affidavit did not say at what time the applicants were served.

12. Under **Order 5 rule 15(1)** of the **Civil Procedure Rules**:-

“15(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.”

13. The decision in **In re Estate of Fredrick M’Ithinji (Deceased) [2017] eKLR** and **Esther Njeri Waitthaka –v- Loise Njeri Nduta & Another [2016]EKR** were cited by the advocate for the applicant. In either case, the court found that the time of service had not been indicated and found the affidavit of service incurably defective. In the instant case, it was not only the time of service that was not indicated. The advocate did not indicate the manner of service, and did not indicate whether he knew the applicants or not. If he did not know them, he did not indicate who had identified them to him. Kariokor Market is a large place. He did not indicate where in the Market he had found them. Lastly, how did he even know they were to be found at Kariokor Market? In short, I find that the affidavit of service cannot be relied on as evidence that the applicants were served with the summons for revocation and/or annulment of the grant. They did not respond to the summons, which they were entitled to do, because they were not served with it.

14. I should point out that the non-service of the summons went to the core of the jurisdiction of this court. Without service, the court had no power to hear and determine the summons (**Terry Wanjiku Kariuki –v- Equity Bank Limited and Another [2012] eKLR**).

15. In conclusion, I allow the application by the applicants. I set aside the proceedings of 6th June 2017 and 10th July 2017 and the judgment signed on 14th September 2017 and delivered on 18th September 2017, and all consequential orders. The applicants have 21 days to file a response to the application dated 7th March 2017 by the respondent. The respondent shall have 14 days to file any further affidavit. Thereafter, the matter shall be mentioned on **13th July 2020** to take directions on the hearing of the summons.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 30TH day of APRIL 2020.

A.O. MUCHELULE

JUDGE