



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
SUCCESSION CAUSE NO. 175 OF 2011
ESTATE OF PRANJIVAN JESANG DEVJI CHUDASAMA

RULING

1. In the application before me dated 6.2.18 (the Application), Ranjan Pranjivan Chudasama and Sailesh Pranjivan Chudasama, the Applicants seek that the order of this Court of 27.11.17 dismissing their application dated 11.8.11 (the dismissed application) be set aside. In the dismissed application brought under Section 26 of the Law of Succession Act, the Applicants, a former wife and son of Jesang Devji Chudasama, the deceased, sought reasonable provision out of his estate.
2. In an affidavit sworn on 6.2.18 in support of the Application, Paul Ogunde, Counsel for the Applicants averred that the matter was scheduled for mention on 26.9.17 but the Court did not sit. Since that date, they have made attempts to fix the matter for hearing. On their last attempt on 22.11.17, they were informed by the firm of AB Patel & Patel Advocates that the dismissed application came up for hearing on 27.11.17 and was dismissed for want of attendance. Counsel further stated that failure to attend Court for the hearing was not intentional, as they were not aware of the hearing nor had a hearing notice been served upon them. The Applicants, were totally dependent on the deceased and are experiencing immeasurable financial, social and emotional hardship as the deceased made no provision for them in his will. Counsel further stated that upon knowing of the dismissal of the dismissed application, he had to take instructions from the Applicants and deliberate on the way forward, hence the excusable delay in filing this application. The Applicants are still desirous of prosecuting the dismissed application and ought to be accorded an opportunity to do so. No prejudice will be visited upon the Respondents if the orders sought are granted while the Applicants stand to suffer irreparably if they are not afforded an opportunity to ventilate their case, contrary to articles 48 and 50 of the Constitution.
3. The Respondents opposed the Application by way of a replying affidavit sworn on 4.11.19 by Rajesh Pranjivan Chudasama (Rajesh). Rajesh averred that the deceased was his father. The deceased appointed him and his wife Anjana Rajesh Pranjivan Chudasama as executors of his will. The deceased was of sound mind when he executed the will and did so in the presence of his brother and 2 competent witnesses. The dismissed application was dismissed for failure to prosecute the same. Rajesh stated that their application for confirmation of the grant of probate issued to them cannot proceed due to the present Application.
4. Rajesh further averred that the Applicants were duly served with the hearing and mention notices and were fully aware each time the dismissed application was scheduled for hearing. No sufficient reason has been given for failing to attend Court on the said dates. The Applicants have been indolent and disinterested in prosecuting the dismissed application and equity cannot assist them. Their disinterest is further demonstrated by the filing by their advocates of an application dated 25.7.17 to cease acting for them, for want of instructions. The application was later withdrawn. Rajesh denied that the Applicants were dependent on the deceased.
5. According to the Respondents, the Application is misconceived, incompetent and abuse of the Court process and intended to delay the hearing of the summons for confirmation of grant. The Applicants in a bid to frustrate Rajesh filed Nairobi Succession Cause No. 189 of 2011 which was dismissed by the Court of Appeal in a ruling of 13.11.14. Rajesh urged the Court to decline the Application.
6. I have considered the Application, the rival affidavits and submissions together with the oral submissions made by counsel before me. It is to be noted that the dismissed application is dated 20.4.15 and not 11.8.11 as indicated in the Application, and filed on 12.6.15.
7. It is the Applicants' claim that they were not served with the hearing notice for 20.11.17. The dismissed application was thus dismissed without them being given an opportunity to be heard. Their right to a fair trial and access to justice was therefore infringed.
8. I have carefully reviewed the record. There is an affidavit of service sworn on 1.11.17 by one Alfred Lumu Khamusali, who averred that he served the hearing notice in respect of the dismissed application, on the Applicants' advocates on 1.11.17 at 12.10 pm. There is also on record, a hearing notice dated 30.11.17 clearly stating that the matter would be heard on 20.11.17. The hearing notice has an acknowledgment stamp of the Applicants' advocates. The claim by the Applicants that service of the hearing notice was not effected, is not therefore correct. They simply did not attend Court on 20.11.17, when their dismissed application came up for hearing.
9. Further, looking at the record and what has transpired since the Applicants filed the dismissed application, there is no doubt in my mind that they were given ample opportunity to prosecute their application, which regrettably, they did not. On several occasions, on the date fixed for the hearing of their application, they, through their advocate stated they were not ready to proceed and sought adjournment.

10. Prior to 20.11.17, the dismissed application had been fixed for hearing on 11.1.17. On this date however, while the Respondent's advocate was ready to proceed, the Applicants counsel stated that he was not ready to proceed as his clerk had misdiarised the matter and informed him of the wrong date. The record however shows that this date was taken in Court on 26.10.16, when the Applicants' were ably represented by counsel. The claim that a clerk misdiarised the hearing date is therefore lacking in credibility.

11. The foregoing notwithstanding, the Court adjourned the matter and stood it over to 14.3.17. Again on this date, the Respondents were ready to proceed but, the Applicant's counsel applied for adjournment. The reason given this time was that the 1st Applicant had been taken ill and the 3rd Applicant who resides in Australia had just had a baby. The Court allowed the adjournment and directed that evidence of the 1st Applicant's illness be produced at the next hearing. This however, has not been done to date.

12. The next hearing date of 25.7.17 was taken at the registry. On that date however, the Court was informed that the Applicants' counsel was in the process of filing an application to cease to act for the Applicants, for want of instructions. The Respondents' counsel protested that the date had been taken by consent and no communication had been made to them. The matter was stood over to 18.9.17 for the hearing of the said application. On that date, the Applicants' counsel withdrew the application claiming that they now had instructions. Directions as to how to proceed were fixed for 25.9.17 but the Applicants' counsel did not attend Court. Hearing of the dismissed application was fixed for 20.11.17. The Applicants' counsel again failed to attend Court for the hearing of the dismissed application which was then dismissed for non-attendance.

13. It is a cardinal principal of law that all parties who come to Court must be given an opportunity to be heard. Indeed, access justice to justice is a right that is secured to all persons by virtue of Article 48 of the Constitution of Kenya, 2010. Further Article 50(1) guarantees to every person the right to a fair hearing as follows:

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 sword of justice however cuts both ways. The parties to a dispute must adhere to the directions given by the Court. In the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR**, Kiage, JA stated:

This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.

15. In the present case, neither the Applicants nor their counsel attended Court for the hearing of the dismissed application on 20.11.17 though duly served with the hearing date. By their conduct from the time the dismissed application was filed, the Applicants, in spite of the indulgence by the Court severally, derogated from the overriding objective of the expeditious, fair, and just proportionate and economic disposal of the matter herein. This Court should therefore not provide succour and cover to the Applicants who exhibited scant respect for the directions of the Court and timelines which serve to make the process of judicial adjudication and determination fair, just, certain and even-handed.

16. The Applicants further submitted that the mistake of their counsel should not be visited upon them. While the Court recognises that the mistake of an advocate should not be visited on his client, it is not in every case that the mistake of counsel would warrant the setting aside of the orders of the Court. The dismissed application belongs to the Applicants and not their counsel. As such, the Applicants were obligated to demonstrate due and reasonable diligence in the pursuit of the hearing of their application, which they did not. Indeed, their counsel at one point sought to cease acting for them for want of instructions. Thereafter after counsel told the Court that he had taken instructions, both counsel and the Applicants failed to attend the hearing of the dismissed application in spite of being duly served with the hearing date. In this regard, I am persuaded by the holding of Kimaru, J. in **Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002** where he stated:

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. It is the duty of the litigant to constantly check with her advocate the progress of her case... She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant.

17. The orders sought by the Applicants are discretionary. The conduct of a party is key, in any matter where the jurisdiction of the Court to exercise its discretionary powers is invoked. The conduct of the Applicants herein, is in my view indicative of a deliberate attempt to obstruct or delay the course of justice.

18. From the averments of the Applicants and the grounds set out in their Application, which the Court has found to lack veracity, I am unable to find a basis for granting the orders sought. The Applicants filed the dismissed application in 2015 and did not take adequate steps to prosecute the same. The record shows that they severally made excuses for not proceeding on the dates scheduled for hearing. In the meantime, the Respondents' summons for confirmation of grant remains pending and could not proceed due to the Applicants' dismissed application and the present Application. Justice cuts both ways and the interests of all parties must be taken into account. This is a 2011 matter. Given these circumstances and the conduct of the Applicants, it would be a travesty of justice for the Court to exercise its discretion in the Applicants favour and prejudice the Respondents' right to a fair hearing.

19. Accordingly, I find and hold that the Application dated 6.2.18 lacks merit and the same is hereby dismissed with costs to the Respondents.

DATED, SIGNED and DELIVERED in MOMBASA this 29th day of May 2020

Amended on 15.6.2020

M. THANDE

JUDGE

In the presence of:

..... **for the Applicants**

..... **for the Respondents**

..... **Court Assistant**