REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO. 67 OF 2016

IN THE MATTER OF THE ESTATE OF THE LATE MUGIRA NGARUNI (DECEASED)

NKANATA MUGIRA.....PETITIONER/APPLICANT

VERSUS

MARY KAJUGU.....RESPONDENT

R U L I N G

1. **NKANATA MUGIRA** , the Petitioner/Applicant herein has moved this court by summons dated 5th May 2020 brought under **Article 48 Constitution of Kenya**, Section **47 Law of Succession Act** and **Rule 73 P&A Rules** for the following reliefs/orders namely:-

i) That this honourable court be pleased to re-open both the Petitioner's and Respondent's cases and call the Petitioner to produce his evidence and for the Respondent to be cross-examined.

ii) Costs of this application

2. The Applicant has listed the following grounds as a basis for this application namely;

a) That the matter came up for hearing on 12th February, 2020 when he Respondent testified and the Petitioner cross-examined her in absence of counsel.

b) That on the material day counsel for the Petitioner had an urgent matter before ELC Meru vide ELCA 25 of 2014 and requested an Advocate to hold her brief.

c) That the counsel was informed by this court that adjournment was not allowed.

d) That the Petitioner's counsel concluded the matter in Meru and embarked on the journey to Chuka however on arrival she was informed that the matter had proceeded.

e) That the Applicant was not given a chance to be heard despite being in court.

f) That the absence of counsel was not intentional and as such it would be necessary to reopen the case and recall the Respondent for further cross-examination to facilitate fair hearing and just determination of this matter.

g) That the Respondent would not be prejudiced if this application is allowed.

3. The Applicant has sworn an affidavit in support of the above grounds and basically reiterated the same. She has added that she was not given an opportunity to be heard due to absence of counsel on the hearing date despite the fact that she cross-examined the Respondent herself.

4. In her written submission dated 18th May 2020 made through learned counsel Kiautha Arithi & Co. Advocates, the Applicant has invoked the provisions of **Article 159** which provide that justice should be administered without undue regard to technicalities. She has further pointed out that she has a right to fair hearing and right to access justice as provided under **Articles 48** and **50** of **Constitution of Kenya.**

5. She contends that the inherent power donated to this court under **Section 47** of **Law** of **Succession Act Rule 73** of **P&A Rules** should be used in favour for the ends of justice. She relies on the case of ***Justice Msagha Mbogholi - vs- Chief Justice & 7 Others [2006] 2KLR 553*** which reiterates the principles of natural justice. She adds that she was not given a chance of being heard as the case proceeded without her legal representation.

6. The Applicant has further decried being denied an adjournment by this court stating that this court should have been obligated to be more circumspect in rejecting an application for adjournment by considering whether denial would result in a miscarriage of justice. She relies on the case of ***Savannah Development Co. Ltd -vs- Merchantile Co. Ltd [1992] eKLR*** (citations not provided) to buttress her contention. In that case the court in declining an adjournment held that adjournment should only be granted on most compelling reasons.

7. Mary Kajugu Marete, the Respondent herein, has opposed this application through a Replying Affidavit sworn on 1st May 2020. She contends that the Applicant's main intention in this application is to procrastrate or delay the finalization of this matter.

8. The Respondent avers that the hearing date of 12th February 2020 was taken by consent and that the matter duly proceeded after a while with the presence of both parties. She claims that she was duly cross-examined by the Applicant herself and that the record does not reflect the allegations of not being given a chance to be heard. She accuses the Applicant for peddling falsehoods and bringing this application in bad faith given that she is elderly.

9. This court considered this application and the grounds raised. I have equally considered the response. This is an application to re-open a matter that is pending for judgment after the parties had closed their respective cases. The Applicant has invoked her right to access justice under **Article 48** and the inherent powers of this court under **Sections 48** and **Rule 73 P & A Rules** to make such orders as it deems fit first in order to meet the ends of justice. Before I consider the law cited it is prudent to consider the factual background of this application.

10. The matter pending in this cause is a Summons for Confirmation of Grant dated 12th June 2019 filed by the Petitioner/Applicant herein which was protested by the Respondent herein. The proceedings herein shows that the protest was fixed for hearing on 8th October 2019 by consent and the date taken for hearing was 12th February 2020. On 12th February 2020 when the matter was called out, the Petitioner represented by Saluni Advocate holding brief for Matiri informed this court that Matiri Advocate had an urgent matter in Meru and that owing to the age of the matter he was reluctant to ask for an adjournment and instead asked that the file be placed aside which request was allowed by this court.

At 11.30 am same day, the matter again was called out but neither Miss Matiri Advocate nor Saluni were present and no reasons were advanced to explain their absence. This court noting that the matter was old (filed in 2000) directed the Petitioner who was present to proceed and she proceeded to testify and closed her case. The protestor also testified and closed her case. This court in the interest of justice on its own motion summoned the Area Chief Iruma location to come and shade some light regarding the estate and the dependants. It fixed the matter for hearing on 12th March 2020 when the Chief duly turned

up and gave his evidence. Again on that both parties were present but only the protestors advocate turned up. The Chief testified and this court fixed the matter for mention on 5th May 2020 for purposes of filing written submissions and this court further directed the protestor's counsel to serve the counsel representing the Petitioner. On 5th May 2020 due to covid 19, the court proceeded via zoom and the protestors counsel told this court that he had filed his submissions but Matiri asked for time to put in the present application.

11. The Applicant's main ground in this application is that she was not given a chance of being heard which I find misleading because as the record shows the hearing date of 12th February 2020 was taken by consent on 8th October 2019 and both parties had more than 3 months to prepare to make their representation to this court. It is quite clear that the Applicant's counsel knew quite well about the hearing date of 12th February 2020 which explains why she asked Mr. Saluni Advocate to hold her brief. Mr. Saluni for good measure shied away from outrightly asking for an adjournment when his attention was drawn to the fact that the matter had been pending in court for close to 20 years now and the parties are quite old. That is why he instead asked that the file be placed aside ostensibly perhaps to enable him get in touch with his principal (Miss Matiri) who had asked him to hold her brief. At 11.30 a.m the petitioner was present and was ready to proceed despite the absence of her counsel whose absence was not explained because Saluni Advocate was then nowhere to be seen. Now the Applicant after almost 2 months has come to court complaining that she was not given a chance to be heard because her counsel reportedly had an urgent matter in Meru at the time. It is not the mandate for this court to decide for the counsel which matters requires her urgent attention and therefore prioritize them accordingly but certainly, it is the duty of this court to ensure that matters are expeditiously heard and determined and at the same time ensure that parties are given equal and sufficient time to be heard. That is why this court fixed the matter for hearing by consent of both counsels expecting that both counsels after looking at their respective diaries would propose a date convenient to both of them. Having proposed a convenient date and after being given that date it is really misleading and unfounded for a counsel to turn up later (after failing to honour the date) and say that the client had not been given a chance to be heard. When parties are given hearing dates they are required to turn up on the scheduled date(s) and failure to turn up for whatever reasons depending on the circumstances is not a sufficient ground to say they were not given a chance to be heard. The cited decision of ***Justice Mbogholi Msagha -vs- Chief Justice of Kenya [2006] eKLR*** is not relevant to the present circumstances because in the instant scenario the Applicant was given adequate chance to be heard and was duly heard. She got the opportunity to cross-examine the Respondent in her testimony and did cross-examined her.

12. The Applicant has invoked **Article 159(2)(d)** of the Constitution but she has not elaborated how the said provisions is applicable to her application or prayers sought. This court certainly in deciding to proceed to hear the matter on 12th February 2020 did so for the interest of justice. The Applicant has not stated that the decision to proceed was based on any technicality. So I do not see how **Article 159(2)(d)** comes to her aid.

13. The applicant has invoked her right to access justice under **Article 48** of the **Constitution of Kenya** and as I have observed that right was granted to the Applicant. The fact that the counsel for insufficient reasons failed to turn up does not mean that the Applicant right to access justice or be heard was violated in anyway. In any event as I have already observed this matter is really old and it is one of those matters flagged by this court to be given priority for the interest of justice because it must be noted that justice delayed is justice denied. The parties in this cause are both over 80 years old and have been waiting for justice for the last 20 years. The record of proceedings show that in the past this court has had to proceed and make orders to facilitate disposal of this matter due to lack of diligence by the Applicant to have this matter concluded. The orders issued by this court on 27th April 2017 and 29th November 2017 is clearly an illustration of indolence on the part of the Applicant. This application has been brought 2 months after parties closed their respective cases and the Applicant has not explained the reasons for the delay.

In the end this court find no merit in the application dated 5th May 2020. The same is dismissed but I shall make no order as to costs. I will give the Applicant 7 days to put her written submissions. She is at liberty to file her written submissions online through the platform already in existence in courts. This

court shall fix the matter for mention on 4th June 2020 to fix a date for judgment.

Dated, signed and delivered at Chuka this 27th day of May 2020.

R.K. LIMO

JUDGE

27/5/2020

Ruling signed, dated and delivered in presence of Matiri for Applicant and in presence of Muriuki for Respondent who joined later via zoom.

R.K. LIMO

JUDGE

27/5/2020