



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**SUCCESSION CAUSE NO. 159 OF 1990**

**IN THE MATTER OF THE ESTATE OF**

**THE LATE JOSEPH BENSON NYAMWAYA (DECEASED)**

**AND**

**IN THE MATTER OF AN APPLICATION BY**

**DAMAR ONYANDO NYAMWAYA, SARA NYAMWAYA,**

**EZEKIEL OWIRA & RISPER OTIENO NYAMWAYA**

**RULING**

The application dated 28<sup>th</sup> May 2020 was brought by **TOM NYAMWAYA** and **JUDITH OKONJO**, seeking the review, variation or setting aside of the Directions which the court issued on 20<sup>th</sup> May 2020.

1. The record of the proceedings shows that the case first came up before this court on 5<sup>th</sup> May 2020. On that date, the court granted Directions with regard to the hearing and disposal of the application dated 4<sup>th</sup> May 2020.
2. On that date, I handled the matter *ex parte*; neither the Applicants nor the Respondents were in Court.
3. I did indicate that due to the outbreak of the Corona Virus Pandemic, the application would most probably be canvassed by way of written submissions.
4. I further ordered that the Tenant in the premises located on **L.R. NO. KISUMU/MANYATTA "A"/774**, namely **DR. PHILIP KAI CHEK** Trading as NIGHTINGALE HOSPITAL shall remit all Rentals payable in respect of the premises, to the Applicants.
5. In the spirit of complete transparency and accountability, I direct the Applicants to issue a receipt in respect of each payment received. I further directed the Applicants to notify each of the Respondents, all the other beneficiaries, and the Court, about each payment they received from the tenant.
6. Finally, bearing in mind the fact that the Orders and Directions had been given *ex parte*, and that therefore there could be a possibility that the Respondents could be prejudiced, the court granted liberty to the Respondents to move the court.
7. I then set down the application for **MENTION** on 20<sup>th</sup> May 2020.
8. When the matter came up on 20<sup>th</sup> May 2020, the Applicants demonstrated to the court that they had effected service upon the Respondents.
9. Considering that the Respondents had not lodged any response to the application, the Court went ahead to grant orders in terms of the reliefs sought.
10. It is in reaction to the said orders that the Respondents have now asked the court to review, vary or set aside.
11. It has now been brought to my attention that there is a separate civil case, being **NIGHTINGALE MEDICAL CENTER LTD. Vs SARAH MUGA NYAMWAYA, KISUMU CMCC NO. 222 OF 2019**, in which the issues concerning rent is pending determination.

12. The Respondents herein have conceded that that case does exist. However, they hold the view that the existence of that case cannot be a bar to the administrators from collecting rents which are payable to the Estate of the late **JOSEPHAT BENSON NYAMWAYA**.
13. I have run my eyes over the Plaintiff in **CMCC NO. 221 OF 2019** and I noted that the Applicant herein asserted that there were no rental arrears due to the Estate of Josephat Benson Nyamwaya.
14. Meanwhile, in the application dated 4<sup>th</sup> May 2020, Sarah Muga Nyamwaya swore a supporting affidavit stating, inter alia, that the tenant owed to the Estate of Nyamwaya, the sum of Kshs 1,200,000/=.
15. I find that by failing to disclose to this court that there was a separate case in which the dispute over rent was pending determination, the Respondents were guilty of material non-disclosure.
16. It must be borne in mind that the requirement for a full and honest disclosure of all material facts is cardinal in the quest for objective justice, and even more so when a party moved the court ex parte, as the Respondents herein had done.
17. When there has been either a deliberate concealment or a failure for full and honest disclosure of material facts, the court ought to immediately set aside any orders it had given ex parte. In those circumstances, it would then not matter that even if the said material facts had been disclosed, the court could have come up with the same orders as had been made.
18. It is well settled that the fundamental duty of the court is to do justice between the parties. That duty can only be met when each party is accorded an opportunity to put forward their respective cases, so that the court can determine the dispute on merit.
19. I find merit in the Applicant's contention that by making substantive orders during a Mention, this court deprived the Applicants herein from being accorded an opportunity to be heard.
20. As the court had scheduled the case for Mention on 20<sup>th</sup> May 2020, the Applicants herein would have been right to reasonably conclude that on the said date, the substantive application would not be heard.
21. But I also note that the Applicants had already instructed their advocates on 12<sup>th</sup> May 2020: that fact is stated in the affidavit sworn by Advocate Rayola Ochieng Olel.
22. Considering that on 5<sup>th</sup> May 2020 the court had directed that the Applicants herein should file and serve their response within 7 days of service, it follows that by 20<sup>th</sup> May 2020, the Applicants ought to have already filed and served their response to the application dated 4<sup>th</sup> May 2020.
23. It is within that context that the court concluded that there was no response to the application dated 4<sup>th</sup> May 2020. But nonetheless, that cannot justify the making of substantive orders on the application, when the matter had been scheduled for Mention.
24. Accordingly, the orders made on 20<sup>th</sup> May 2020 are hereby vacated forthwith.
25. Although the Application is successful, I order the Applicant to pay the costs thereof, because it was their absence from court, (after they had been served), which deprived the court the benefit of their input on 20<sup>th</sup> May 2020.

**DATED, SIGNED at DELIVERED at KISUMU This 27<sup>th</sup> day of July 2020**

**FRED A. OCHIENG**

**JUDGE**