



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA
MISC. SUCCESSION NO. 37 OF 2012
(FORMERLY 294 OF 1995 – NYERI)

MARGARET KAMORI KARUGA & ANOTHER.....APPLICANTS

V E R S U S

MIGWI KIRINGI.....RESPONDENT

RULING

The application before court is dated 18/05/2016 seeking to set aside the orders issued on 18/10/2011 and reinstate the summons for revocation of grant.

This is for the reason that the application dated 12/07/2011 wherein the respondent had the applicant's suit dismissed was never served upon the applicant or his advocate. In addition, the hearing date of 18/10/2011 was never served upon the applicant or his advocate. That Miss Muthike who appeared in the matter was never engaged by the applicant and neither was she holding brief for the applicant's advocate. Furthermore, the respondent lied to court that the applicant was deceased and proceeded to obtain grant. That the respondent had no capacity to file and prosecute the application since he has never been enjoined or substituted in the case.

The respondent responded by stating that he obtained orders from Succession Cause No. 285 of 1994 to effect sub-division of Inoi/Thaita/253. That the applicant had instructed a different counsel on 28/10/2011. That the applicant has lied on oath by claiming to have learnt of the dismissal order in March 2012 while his advocates had filed the application for review on 01/03/2012 which was voluntarily withdrawn. He refuted the claim that the applicant advocates were never served with the application. That there was no movement in the file ever since 19/09/200 and going upto 29/08/2008 and then later on 03/06/2010 through to 18/10/2011 where he was the one moving the file that the applicant cannot allege that in over 8 years there was never a time the court diary was opened for them to fix hearing date.

Godfrey Masaba v IEBC & 2 others [2013] eKLR

The court held;

Similarly, in *Nuh Nassir Abdi v. Ali Wario & 2 others (2013) eKLR EP No.6 of 2013 G.V. Odunga J.,* observed:- “A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve useful purpose...”

Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR

The Court of Appeal stated;

We agree with those noble principles which go further to establish that the court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

Ibrahim Athman Said v Ibrahim Abdille Abdullah & another [2014] eKLR

The Court in setting aside the court's order dismissing the plaintiff's suit and ordering the suit reinstated, stated;

My view is that before the court can proceed to make an order pursuant to the above provision the court has to make inquiry and has to be satisfied that indeed the notice issued was served on the parties....

As I have held that there is no evidence that the plaintiff's Advocate was served with the Notice to show cause it is my view that the order of dismissal of the suit made on 3rd February 2012 cannot stand as the essence of requiring a notice to be given is so that a party may be able to appear and if he is able demonstrate and show cause to the court why the suit should not be dismissed. The plaintiff was not afforded that opportunity and in my view an order ought to be made only after the parties have been afforded the opportunity to show cause, if it is shown that an affected party did not get the opportunity to show cause such an order will be set aside at the instance of the affected party.

The respondent has not adduced any proof that the application for dismissal or hearing notice was ever served upon the applicant's advocates. The hearing date was taken in court on 13/07/2011 but neither the applicant nor his advocate was present. The proceedings for 18/10/2011 shows Miss Muthike was appearing for the respondent and she did not object to the dismissal orders. The applicant has confirmed that they did not instruct the said advocate and the proceedings do not indicate she was holding brief of the applicant's advocates. This raises query on her appearance and further compounded by the fact that she did not oppose an application to dismiss her client's case for want of prosecution.

In my view, the applicant has proven that they were never served with the application or the hearing notice therefore not accorded an opportunity to be heard before their case was dismissed. I find that the application has merits. I order that the orders issued on 18/10/2011 shall be set aside. The summons for revocation of grant shall be reinstated and be heard and determined on merits.

The application be heard and determined on priority basis as this is an old matter.

Costs shall be in the cause.

Dated and delivered at Kerugoya this 19th Day of April 2018.

L. W. GITARI

JUDGE