



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 286 OF 2007**

**IN THE MATTER OF THE ESTATE OF SOLOMON M' TUMBNIRI M' MUNYUA  
(DECEASED)**

**GEOFFREY MURITHI M' ITUMBIR.....PETITIONER**

**-VERSUS-**

**CATHERINE KIENDE MBAYA.....INTRESTED PARTY**

**RULING**

[1] The live orders sought in the Chamber Summons Application dated 20<sup>th</sup> December 2016 are:

- 1. Orders of this court dated 23/11/2016 confirming the grant in this matter and all consequential orders be set aside;***
- 2. THAT the honourable court be pleased to make any further or other orders it may deem necessary in the circumstances of this matter; and***
- 3. THAT costs be provided for.***

[2] The Application is premised on Section 47 of CAP 160 and Rule 72 of the Probate and Administration Rules and on grounds;

1. That the said orders dated 23/11/2016 were made in the absence of the Petitioner and his Advocate.
2. That the absence was not deliberate but was occasioned by innocent inadvertence and breakdown of communication with his advocates and should be excusable.
3. That the Petitioner was not aware of the application dated 20<sup>th</sup> June 2016, and that was why no response was filed thereto.
4. That he was also not aware of the date for 23<sup>rd</sup> November 2016.
5. That although it was not disputed that the Interested Party's application was served, it was, however, misplaced and inadvertently not diarized in his Advocates master diary- this explained why there was no response to the said application.

[3] The Interested Party submitted that vide a ruling delivered on 18<sup>th</sup> April 2016, the court gave explicit orders. But, the Petitioner/Applicant failed to cooperate with the Interested Party in furtherance of the said ruling, thus, forcing the Interested Party to file an application for Confirmation of Grant dated 20<sup>th</sup> June 2016. Accordingly, the Grant was confirmed on 23<sup>rd</sup> November 2016. It was argued that, therefore, the reasons given in the application and affidavit in support thereof were evasive, dishonest and did not raise any relevant issue to be considered by the court. It was urged that the application was merely a misuse of court process as the Applicant was served with the application.

**ANALYSIS AND DETERMINATION**

[4] This is an application to set aside a judgment obtained upon failure by the Applicant to attend the hearing. The court has unfettered discretion except in the exercise of the discretion, the court's main concern is to do justice to the parties; to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. But, the discretion is not designed to assist the person who has

deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. See **SHAH vs. MBOGO [1967] EA 116 AT 123B, SHABIR DIN vs. RAM PARKASH ANAND (1955) 22 EACA 48** and **MAINA vs. MUGIRIA CIVIL APPEAL NO. 27 OF 1982 (unreported)**.

[5] Applying the test, the following matters are important. On 15<sup>th</sup> August 2016, the court directed that Summons for Confirmation of Grant herein be heard on 28<sup>th</sup> November 2016. It also directed all the parties to abide by the order of the court lest the offending party should be cited for contempt or intermeddling with the estate of the deceased. In abundance of caution, the court further gave a general direction for any party to apply for appropriate orders in the event any party acted contrary to the orders issued herein. On 23<sup>rd</sup> November 2016, when the application for Confirmation of Grant was scheduled for hearing, the Petitioner and his advocate were absent. Mr. Rimita for the Interested Party intimated to court that he had served all parties but they were absent and subsequently urged the court to allow the application. The court, being satisfied of service, allowed the application. But, the court did not fail to note the conduct of the parties which had already been subject of observation by the court on 15<sup>th</sup> August 2016.

[6] It is admitted by the Petitioner and his legal counsel that the application for Confirmation of Grant was served. Except, the Petitioner contended that his absence and of his legal counsel during the hearing of the application was not deliberate but was occasioned by inadvertence on part of counsel and breakdown in communication between counsel and his client. Further explanation was given; that the application was misplaced and inadvertently not diarized in the advocate's master diary- this smacks of sheer negligence and carelessness on part of the Petitioner and his advocate. The Petitioner and his advocate were fully aware that the said application was to be heard on 23<sup>rd</sup> November 2016. Notably, the court had noted that the Petitioner had previously disobeyed court orders. Yet again, another disobedience. No any good or reasonable reason as to why the Petitioner and his advocate failed to attend court has been given to the satisfaction of the court. And, I find myself having to state what Kwach JA stated in the case of **MAWJI vs. LALJI LLR NO 2778 (CAK)** that;

*“...All said and done, the bottom line is that the applicant finds himself in this unfortunate position of negligence, pure and simple, on the part of his Advocates. I do not regard what happened in this case as a genuine error or mistake on the part of the Advocates....This is one of those cases where I agree entirely with the remarks of Lord Griffiths in his speech in the case of **KETTEMAN v HANSEL PROPERTIES LTD [1988] 1 ALL E.R. 38 AT PAGE 62** where he said:*

*“...another factor that a judge must weigh in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very late stage of the proceedings.”*

[7] This is an old case; it was filed in 2007. The Petitioner and his counsel have not acted in accordance with their statutory obligation to assist the court dispense justice without delay as commanded by the Constitution. He is merely temporizing this case for no good reason and any further delay should be resisted by the court. I agree, sometimes, justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads. For those reasons, I decline to exercise my discretion in favour of the applicant and dismiss the application. This being a succession matter, there will be no order as to costs.

**Dated, signed and delivered in open court at Meru this 21<sup>st</sup> day of May, 2018.**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

**M/s. Nyaga advocate for Petitioner**

**Mr. Rimita advocate for interested party**

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**F. GIKONYO**

**JUDGE**