



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (FAMILY DIVISION)

SUCCESSION CAUSE NO 635 OF 1995

IN THE MATTER OF THE ESTATE OF NAOMI WANJIKU

(DECEASED)

DANIEL KIREHU MURAL.....ADMINISTRATOR/RESPONDENT

VERSUS

GODWIN WANGONG'U.....RESPONDENT/APPLICANT

RULING

1. Before Court is an application by the Respondent/Applicant (Applicant) dated 7th February 2018 seeking several orders. Some of which are now spent. For consideration are prayers 3 & 4; seeking for the orders issued by this court on the 24th of January 2018 be set aside and or discharged and the Administrator/Respondent (Respondent) to bear the costs of this application.
2. The application is predicated on grounds that; the hearing date was fixed *ex parte* and no hearing notice was served, secondly that there was an application dated 20th June 2017 for reconstruction of the file still pending; further that the Administrator/Respondent failed to disclose to the court the ruling of Kimaru J of the 17th of March 2014 and the findings of the law society pursuant to the said order and the genesis of the issue in court was **H.C.C.C NO. 845 OF 1986** a matter that was heard and determined.
3. The application was opposed by way of an undated affidavit by the Respondent filed in Court on the 7th of May 2018 & a supplementary affidavit of 27th June 2018. The first affidavit gave the history of the matter that culminated in the Applicant being enjoined to this succession Cause which I must say has no relevance to the application before court currently. The supplementary affidavit is most relevant to the matter at hand and it explains that a hearing notice was served upon the applicant's counsel. A stamped copy of the same signifying service was annexed as an exhibit.
4. The supplementary affidavit by the Respondent attracted a supplementary affidavit by the Applicant's counsel **Mr Martin Omulama** dated 5th September 2018 where Counsel admits that the hearing notice was indeed served upon his law firm. He further deposed that he was on leave at the time and due to an inadvertence, the matter was not diarised. He tendered an apology and urged that his innocent client ought not to be punished for mistakes of Counsel.
5. In the ordinary course of things parties invite each other for fixing of dates in the registry. The Respondent did not invite the Applicant's counsel and therefore a date was fixed *ex parte*. However, the Respondent served a hearing notice which is admitted. The Applicant's Counsel Nonetheless failed to appear at the hearing.
6. The Applicant and the long history dating to 1996. It also appears that the record as currently constituted is incomplete such that there is pending an application for reconstruction as previously proceedings and orders are not on record. That as it may, due to the absence of Counsel adverse orders were issued against the Applicant.
7. The issue before Court for consideration is whether or not to set aside the orders issued by court on the 24th of January 2018 for the reasons stated above.
8. Courts shy away from shutting a litigant from ventilating his case. It does so, if at all, sparingly and on rare occasions. Case law is evident on this and more so when the issue at hand is mistake of counsel on record.
9. In the case of **Patriotic Guards Ltd versus James Kipchirchir Sambu, Civil Case No. 24 of 2016**, decided of 18th February 2018, which is on all fours with this matter, the judges of Appeal excused the mistake of counsel who had not attended court on behalf of his client. The court of Appeal quoted several authorities in support of its decision with approval some of the authorities are:-

Mbogo v Shah (1968) E.A 93 where it had been stated; -

“...the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR,

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”

MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206, at page 210, where the Court of Appeal stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

10. Apart from case law the Constitution of Kenya 2010 is explicit on the right of each litigant to be heard. See **Article 50(1)**

11. I do appreciate that the pending issue between the parties has been long outstanding. I equally appreciate that the *ex-parte* orders against the Applicant resulted in an order requiring him to pay a large sum of money without the court having the opportunity to hear his side of the case for a mistake not of his making.

12. I further considered the reasons for non-attendance by counsel which I find excusable in the circumstances of this case. And taking into account that Natural Justice and fair hearing require the Court to consider both sides of a case I am of the opinion that it will be unjust to condemn the Applicant unheard.

13. Consequently,

- i. The order of the 24th of January 2018 be and is hereby set aside.
- ii. The application dated 5th June 2017 be argued *inter partes* on a date to be fixed.
- iii. The Respondent be paid costs of the application in any event, assessed at Kshs 10,000/- before hearing of the said application.

Dated and Delivered in Nairobi on this 20th day of December 2018

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ALI-ARONI

JUDGE

In the presence of; -

Counsel for the Applicant.....

Respondent/Administrator in Person.....