



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 319 OF 2011

IN THE MATTER OF THE ESTATE OF KARONGOI CHOMBA (DECEASED)

SALAVINAH MUTHONI KAROGOI.....ADMINISTRATOR/APPLICANT

V E R S U S

JOEL NJOGU GITHINJI.....RESPONDENT

R U L I N G

1. In the application dated 6/10/2015 the applicant seeks for orders to vacate or set aside the orders made on 5/10/2015 and that the applicant be allowed to file his response to the application dated 31/08/2015. The grounds supporting affidavit and on the face of the application.
2. It is deposed that the orders complained of were granted ex-parte in the absence of the applicant and his counsel. The counsel was under the mistaken belief that the matter was in Kerugoya where the response had mistakenly been filed earlier. The applicant's plea is that the orders be set aside and that he be allowed to ventilate his case in the interests of justice.
3. The respondent opposes the application on grounds that it is not merited. Firstly the applicant failed to comply with the orders on 5/10/2015 although he knew that the matter was in Embu and not in Kerugoya. The applicant has not attached any documentary evidence to prove that he filed his replying affidavit and the notice of appointment in Kerugoya. As for the counsel, it would be outright professional negligence to file the case papers in another court. Save for a receipt.
4. The application was argued by way of submissions filed by the advocates for the parties, Ms. Kahuthu & Co. for the applicant and Ms. Kinyua Kiama for the respondent.
5. The issue arising from this application is whether the applicant has sufficiently explained his failure to attend court on 5/10/2015 when the orders were granted. The main ground is that the replying affidavit was filed in the wrong court and this caused the non-attendance on 5/10/2015.
6. On perusal of the court record, I note that on 3/09/2015 before Bwonwonga, J. the respondent attended court in person for hearing of the application dated 31/08/2015. On his request he was given 30 days to engage a lawyer.
7. During the next date on 5/10/2015 before this court, the respondent did not attend and had not filed his replying affidavit. The court allowed the application since it was unopposed.

8. The applicant has annexed a receipt dated 5/10/2015 showing filing of a document referred to as F/A in Kerugoya Succession Cause No. 319 of 2011. The copy of the replying affidavit and the notice of appointment were not annexed to the supporting affidavit. The two documents were relevant and would have strengthened the case of the applicant.

9. The applicant, having been given 30 days to engage a lawyer and file his papers, did not comply with the orders. This indolence led the court to allow the unopposed application. Had the applicant acted on time, this application would not have been necessary.

10. The replying affidavit was filed on 6/10/2015 a day after the orders were given. This application was filed on the same day. It cannot be said that there was delay in responding to the issue of the orders given.

11. Interlocutory orders have never been the best in the administration of justice and courts will be forced to grant them may be because one party has neglected the enforcement of his rights to be heard. It is in the interest of justice and in conformity with the right to a fair hearing that both parties be heard before the court can give its determination on any issues at hand.

12. There was no contention from the respondent that the filing receipt was a forgery. This court takes it to be genuine and the confirmation comes in the act of the filing of this application the following day.

13. I find the application merited and allow the same as prayed.

14. The applicant is hereby directed to file his replying affidavit within 14 days.

15. Due to his indolence and the non-compliance of the orders made on 3/09/2017, the applicant will meet the costs of the application.

16. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF JULY, 2017.

F. MUCHEMI

J U D G E

In the presence of:-

Ms. Wambugu for Kahuthu for respondents