



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 414 OF 2015**

***In the matter of the Estate of NGARI NGURU (Deceased)***

**CYRUS KARACHI MACHARIA.....1ST APPELLANT**

**V E R S U S**

**SICILY MWENDIA.....1ST RESPONDENT**

**MARY WAWIRA.....2ND RESPONDENT**

**R U L I N G**

1. This is a ruling on the application dated 2/07/2017 seeking to set aside orders and proceedings of Bwonwonga, J. arising from an application to vary/renew a limited grant issued on 22/04/2016 to Igoki Nguru and Sicily Mwendia.
2. The applicant was aggrieved by the orders of Bwonwonga, J. for the following reasons. Firstly, the counsel for the applicant Ms. Wangari Chege contends that she was served with the wrong hearing notice for the application. It indicated that the date for hearing of the respondent's application was 19/07/2016. The counsel attended court on that day but the matter was not cause listed. She then left the court awaiting to be served with another notice by the applicant's counsel.
3. Ms. Chege was to later learn that the matter was heard on 20/07/2016 and prayer No. 1 granted for review/variation of the court's order made on 22/04/2016. The court had directed that prayers (b) be heard inter parties at a later date.
4. The applicant's counsel contends that she was not served with a hearing date for 20/02/2017 being the date the application was heard. She also expressed surprise that the court agreed to hear the application and the judge granted the orders given the circumstances surrounding the date.
5. The application was opposed by the respondent's counsel on grounds that both counsels attended court on 19/02/2017 on the date the matter was to be heard. It was not cause listed and each made their way to the registry to inquire. The respondent's counsel said he was informed by the registry that the application was to be heard on 20/07/2017 and not 19/07/2017. The counsel left and attended court the following day when the judge allowed prayer 2.
6. Ms. Chege contends that the court did not exercise its discretion judicially when it granted the orders *ex parte* and that the judge failed to satisfy himself that the application had been served on that day.
7. A perusal of the court file shows that the date for the application dated 6/06/2016 was fixed by the counsel of the respondent/citees (herein) for it was their application. Ms. Chege for applicant/citor did not attend the fixing of the date for she was not invited as per her letter to the Deputy Registrar High Court dated 10/07/2016. It appears the letter was received on the same date, was filed but not acted on by the deputy Registrar, or even brought to the notice of the judge presiding in this case at that time.
8. The court record shows that the date fixed by Mr. Muraguri for the application dated 6/06/2016 was 20/07/2016. The date of 19/07/2016 does not appear in the file. Although Mr. Muraguri says that 19/07/2016 is the date he was given for hearing, this is not supported by the record.
9. It therefore follows that the hearing notice served by Mr. Muraguri on the office Ms. Chege for the applicant/citor was wrong. The correct date for hearing in the court file was 20/07/2016. It was wrong for Ms. Chege to blame the judge who gave the order because he followed the date in the court file and proceeded to hear Mr. Muraguri and granted prayer (a) of the application.
10. As I have already noted, the letter addressed to the Deputy Registrar was not brought to the attention of the learned judge. The only mistake the judge may have made was to fail to ensure that there was service of the hearing notice of 20/07/2016 on the applicant's counsel.

Had he done so, he would not have heard Mr. Muraguri on the application. The orders were therefore granted irregularly or based on an oversight by the court. It was also wrong for Mr. Muraguri to proceed to prosecute his application without serving Ms. Chege with the date of 20/02/2016.

11. Mr. Muraguri also tended to blame the judge by saying that the judge gave the orders without being asked to do so. This was a reckless comment on part of the counsel because he appeared in court and prosecuted his application specifically prayer (a) which was granted. There is no indication that the learned judge had any other interest in this matter apart from doing his duty.

12. In view of the foregoing, I come to the conclusion that the orders of 20/07/2016 were irregularly issued and are prejudicial to the applicant/citor who was not heard.

13. I hereby allow the application and set aside the said orders.

14. The cost of this application shall be born by Mr. Muraguri counsel for the respondent personally.

15. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF OCTOBER, 2017.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Ms. Chege for applicant**