



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**SUCCESSION CAUSE NO. 169 OF 2011**  
**IN THE MATTER OF THE ESTATE OF**  
**NYANGARESI OSORO SUNDA – DECEASED**

**AND**

**MELLEN BARONGO OMOKE.....1<sup>ST</sup> PETITIONERS**

**GEORGE ENOCK GONCERA.....2<sup>ND</sup> PETITIONERS**

**VERSUS**

**THOMAS MAGERI MOCHUMBE.....OBJECTOR**

**RULING**

**Background**

1. The deceased herein NYANGERESI OSORO SUNDA died intestate on 29<sup>th</sup> November 2010 after which a grant of letters of administration intestate was issued to the Petitioners herein MELLEN BARONGO OMOKE and GEORGE ENOCK GONCERA.

2. The applicant herein, THOMAS MAGERI MOCHUMBE, filed an application dated 23<sup>rd</sup> January 2012 seeking the revocation of the said grant issued to the petitioners on grounds, inter alia, that he had been excluded from the said succession cause despite the fact that he was the son of the deceased and therefore a beneficiary of his estate.

3. The applicant's objection was listed for hearing on 15<sup>th</sup> March 2012 when the applicant, who was then represented by Mr. Miencha Advocate, testified before calling 2 witnesses who testified on 12<sup>th</sup> May 2014 and 1<sup>st</sup> February 2016 after which he closed his case and a hearing date for the petitioners' case was, by consent, fixed for 18<sup>th</sup> April 2016. Neither the applicant nor his advocate on record attended court for hearing on 18<sup>th</sup> April 2016 even though one Mr. Sagwe Advocate, off the record, informed the court that he was aware that Mr. Miencha Advocate for the applicant was unwell.

4. The case however proceeded for the hearing of the petitioners' case on the same day (18<sup>th</sup> April 2016) after which parties were ordered to file written submissions before judgment with a rider that Mr. Miencha advocate was to be notified of the mention date. Mr. Miencha Advocate did not file any submissions and upon considering the petitioners written submissions and the evidence tendered by both parties, this court delivered a ruling on 12<sup>th</sup> October 2016 in which it dismissed the objection upon

finding that it had not been proved to the required standards.

### **The application**

5. It is as a result of the said ruling of 12<sup>th</sup> October 2016 that the applicant herein filed the instant application dated 20<sup>th</sup> February 2017 wherein he seeks orders inter alia, that:

- **The exparte proceedings conducted on 18<sup>th</sup> April 2016 be set aside.**
- **The honourable court be pleased to review, set aside and/or vary the judgment delivered on 12<sup>th</sup> October 2016.**
- **That the status quo on LR. NO. BASSI/BOGETAORI II/5441 and 5442 (hereinafter, the suit land”) be maintained and further,**
- **That an order of injunction be issued to restrain the respondents from evicting the applicant from the suit land.**

6. The main grounds for the application, as highlighted in the body of the summons and the applicant’s supporting affidavit sworn on 20<sup>th</sup> February 2017, are that the applicant’s former lawyer on record M/s. Richard Miencha was ailing at the time the case was heard on 18<sup>th</sup> April 2016 and that he eventually died in late 2016. The applicant contended that he was not made aware of the subsequent proceedings and did not therefore participate during the hearing of the petitioners’ case as he only became aware of the outcome of the case much later on 4<sup>th</sup> January 2017 after the ruling had been on 12<sup>th</sup> October 2016. The applicant states that his failure to attend court was neither his mistake nor that of his counsel as the said counsel was ailing, a fact which the respondents’ counsel did not dispute.

7. The petitioners’ response was presented through the 1<sup>st</sup> petitioner’s replying affidavit sworn on 3<sup>rd</sup> April 2017 in which she averred that the applicant had already presented and closed his case as at 1<sup>st</sup> February 2016 when the hearing date of 18<sup>th</sup> April 2016 was taken, by the consent of the parties advocates in the presence of their clients and that therefore, the applicant’s claim that he was not made aware of the hearing date of 18<sup>th</sup> April 2016 was far from the truth. He further stated that the applicant did not furnish the court with a good explanation for his failure to attend court and further that the claim that the applicant’s lawyer was unwell was neither here nor there.

8. The petitioner further stated that the case was considered on its merits after hearing the evidence of both parties and therefore, the applicant’s claim that the proceedings were conducted ex-parte was equally not true.

9. It was also the petitioner’s case that the applicant’s application had been overtaken by events in view of the fact that the grant had already been confirmed and the suit land distributed to the various beneficiaries as shown in the certificate of official search which was attached to the replying affidavit and marked “MBO-02 (a) and (b)”.

### **Written submissions**

10. Parties canvassed the application through their respective written submissions. The applicant argued that there exists a legitimate, genuine and valid reason to warrant granting of the orders sought as his lawyer’s illness and subsequent death are matters that were out of his control.

11. The applicant relied on the findings by Odunga J. in the case of **Yusuf Gitau Abdalla vs Building Centre (K) Ltd and 4 Others** in which it was held:

***“A litigant should not be punished/penalized for the mistake of his advocate where failure to attend court was attributed on his counsel.”***

12. The applicant also cited the opinion of Azangalala J. (*as he then was*) in the case of **Stephen Ndichu**

vs **Monthy's Wines and Spirits** when he stated:

***“The principles governing the exercise of judicial discretion to set aside ex-parte judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it.”***

13. On her part, the petitioner submitted that the application was not brought in good faith as it was aimed at delaying the finalization of the case. The petitioner cited the celebrated case of **Shah vs Mbogo [1967] E.A. 116 at 123B** wherein it was stated:

***“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”***

14. It was the petitioner's position that in view of the fact that the deceased's estate had been distributed and new titles issued, there was no estate left for sub-division on which the orders sought in the objection proceedings could be anchored. The petitioner maintained that the application is frivolous and made in bad faith. She also cited the case of **Shabir Din vs Ram Parkash Anand (1955) 22 EACA 48** in which it was held:

***“...the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.”***

#### **Analysis and determination**

15. I have carefully considered the pleadings and the submissions made herein. The main issues for determination are; firstly, whether the proceedings of 18<sup>th</sup> April 2016 and judgment delivered on 12<sup>th</sup> October 2016 can be subjected to setting aside, variation/review, whether the application has been overtaken by events following the confirmation of the grant and the subsequent subdivision of the suit land and lastly whether the applicant is entitled to the orders of injunction sought.

16. On the first issue, it was not disputed that the hearing date of 18<sup>th</sup> April 2016 was taken by the consent of both parties and that therefore, the issue of service not being effected on the applicant's counsel does not arise. It was not also in dispute that neither the applicant nor his advocate on record attended court on the said hearing date thereby leading to the petitioners' case being heard in their absence.

17. This court however notes that on the said hearing date one Mr. Sagwe advocate informed the court, albeit off the record, that Mr. Miencha, advocate for the applicant, was unwell and that the case then proceeded for hearing of the petitioners' case in the absence of the applicant and his advocate. It has been stated by the applicant that the said Mr. Miencha advocate unfortunately eventually died following his said illness and this is a factor in this case that has not been disputed and that this court cannot overlook or wish away. This court is of the view that the death of the counsel for the applicant places this case beyond the realm of the circumstances under which a party should not be penalized for the mistakes of his counsel as envisaged in the **Yusuf Gitau Abdalla case (supra)** to another different higher level of a party being hit by the unfortunate and unforeseen calamity of the death of his counsel. It was not disputed that Mr. Miencha advocate died following his illness and the question which then arises is whether the applicant should suffer another misfortune of his case being heard and determined in his absence because of the death of his counsel. The answer to the above question is a definite negative.

18. My finding is that the applicant has demonstrated that there was a genuine reason why his lawyer was not present in court at the time the petitioners' case was heard on 18<sup>th</sup> April 2016. Prior to that date, the

applicant and his two witnesses had already presented their case to court which was a clear demonstration that he had an interest in pursuing his case to the logical conclusion. I find that the right of a party to a case to be represented an advocate of his choice is a fundamental right which cannot be denied under any circumstances.

19. This court has inherent jurisdiction, under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to make such orders as may be expedient and necessary for the ends of justice to be met or to prevent the abuse of the court process. The court is also alive to the provisions of **Article 159 (2) (d)** of the Constitution which stipulates that it must dispense substantive justice without undue regard to procedural technicalities. It is for the above reasons that I find that the instant application to set aside the proceedings of 18<sup>th</sup> April 2016 and the judgment of 12<sup>th</sup> October 2016 is merited and I allow the said prayers.

20. On the issue of whether or not the instant application has been overtaken by events following the distribution of the estate of the deceased, I note that Section 76 of the Law of Succession, under which the application, the subject of the ruling of 12<sup>th</sup> October 2016 was made stipulates as follows:

**“76. Revocation or annulment of grant**

**A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—**

**(a) that the proceedings to obtain the grant were defective in substance;**

**(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**

**(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**

**(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—**

**(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court may order or allow;**

**or**

**(ii) to proceed diligently with the administration of the estate; or**

**(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or**

**(e) that the grant has become useless and inoperative through subsequent circumstances.”**

21. From the above provision, it is clear that an application to revoke grant may be filed at any stage whether before or after the confirmation of the grant and for that reason, I find that the instant application is well founded and not overtaken by events.

22. On the last issue of whether the applicant is entitled to the orders of injunction sought, I note that the applicant sought orders to restrain the respondents from evicting him from the suit land. The applicant did not however tender any evidence to prove that he resided on the suit land or that there were

attempt/moves by the respondents to evict him. Under the above circumstances this court is of the view that on order to maintain the status quo currently obtaining on the suit land will be appropriate in the circumstances of this case.

23. In conclusion, this court makes orders that the application dated 20<sup>th</sup> February 2017 is hereby allowed in the following terms:

**a) The status quo obtaining in regard to the occupation, title and possession of LR. NOs. BASSI/BOGETAORIO II/5441 and 5442 be maintained pending the hearing and determination of this suit.**

**b) The ruling/judgment delivered on 12<sup>th</sup> October 2016 is hereby set aside.**

**c) The petitioners' case shall be opened for hearing but limited only to the cross examination of the petitioner on the evidence she tendered on 18<sup>th</sup> April 2016.**

**d) The costs of this application be in the cause.**

**e) Hearing on 7/2/2018**

**Dated, signed and delivered in open court this 19<sup>th</sup> day of December, 2017**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

- Miss Momanyi for Petitioner
- Mr. Osoro for the Objector
- Omwoyo: court clerk