



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

FAMILY CIVIL APPEAL NO. 37 OF 2017

IN THE MATTER OF THE ESTATE OF IBRAHIM GATHOGO MUGAMBI (DECEASED)

(Being an appeal from a Ruling of the SRM'S Court at Engineer Succession Cause No.129 of 2013)

ESTHER WAIRIMU GATHOGO.....APPELLANT/APPLICANT

-VERSUS-

GLADYS NJERI GATHOGO.....RESPONDENT

RULING

1. The lower court order(s) which this appeal challenges was issued in **Succession Cause Number 129 of 2013** filed at the Senior Resident Magistrate's Court, Engineer. Having lodged her appeal on 6th September, 2017, the Appellant filed a Motion on 19th September, 2017 seeking *inter alia* interim orders to stay, halt and/or nullify the lower court's impugned order. The Applicant was granted an ex parte interim order in the form of preservation of the *status quo*, and directed to serve the application for *inter partes* hearing on 3rd October, 2017.

2. On that date, the Applicant's counsel absented himself, and the court having had the objections by the Respondent's advocate, Mr. Waigwa Ngunjiri, including the advanced age of the Respondent who was carried into court, directed as follows:-

“No good reason why Mr. Kimani (Applicant's counsel) is not here today. Let him file and serve further affidavit and come back to court for oral argument of application on 9th October, 2017. Interim orders NOT extended.”

3. On 9th October, 2017 Mr. Kimani was again absent, and counsel holding his brief stated that he was “*held up in Milimnai seeks to rely on affidavits and submission.*” These submissions had been field on 6th October, 2017.

4. Citing previous directions of the court, Mr. Waigwa objected to the turn of events. In a brief direction the court stated:

“I directed that oral submissions be made. Let same be made at noon.”

Mr. Kimani was absent at noon and the court agreed with submissions by Mr. Waigwa Ngunjiri, dismissing the Applicant's Motion for non-appearance by the Applicant. Three days later, on 12th October, 2017, Mr. Kimani filed the present Motion primarily seeking to reinstate the dismissed application.

5. The instant Motion is expressed to be brought under Rule 73 of the Probate and Administration Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, as well as Articles 50 and 159 of the Constitution. Through the lengthy grounds, the Appellant's affidavit and submissions it is stated that the Appellant's advocate did not deliberately fail to attend court, and that prior to the date the application was dismissed, that a “gentleman's agreement” had been entered into between the two counsels in the case to canvass the dismissed Motion by way of written submissions.

6. In countering the Applicant's Motion, the Respondent filed a Replying affidavit, taking issue with the Appellant's alleged tardiness, and the vague and defective nature of her application. Submissions made at the hearing took cue from the respective affidavits.

7. Having considered all the matters canvassed in respect of the instant application, I do not hesitate in agreeing with the Respondent that the application before me ought to have invoked the appropriate provisions of the law providing for setting aside, stay or variation of the dismissal orders. And while I would not accept the Respondent's argument that Sections 1A and 1B of the Civil Procedure Act, which carry the important overriding objective principle are not applicable herein, it is clear from a cursory reading of Section 47 of the Law of Succession Act, and Rule 63 of Probate and Administration Rules that the Applicant could have hinged her application on Order 12 Rule 7 and Order 45 Rule 1 of the Civil Procedure Rules.

8. These provisions of the Civil Procedure Rules (as read with the definition of suit in the Civil Procedure Act) have been applied to the Law of Succession Act by Rule 63 of the Probate and Administration Rules.

9. The vagueness that clearly attends the prayers in the dismissed Motion is also evident in the prayers contained in the instant Motion. The Applicant appears unable to decide whether she desires an order for stay, review or setting aside of the dismissal order. Such an omnibus application borders on abuse of the process of court and is to be discouraged.

10. That said, neither defect justifies a peremptory dismissal of the instant application, in the circumstances of this case. In order to do justice, the court has to consider the application on its merits. The words of **Duffus P.**, though relating to the setting aside of an *ex parte* judgment are pertinent here concerning the discretion this court is being asked to exercise.

11. In **Patel -Vs- EA Cargo Handling Services Ltd [1974] EA 75 at page 76**, **Sir William Duffus P** observed in an application for setting aside an *ex parte* judgment that:

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

12. The Court of Appeal (**Duffus P.**) in **Shah -Vs- Mbogo [1967] EA 116** stated of the exercise of the court’s discretion to set aside:

“I have carefully considered, in relation to the present application, the principles governing the court’s discretion to set aside judgment obtained ex parte. This discretion is intended to be so exercised to avoid injustice or hardship from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who as deliberately sought whether by evasion or otherwise to delay the cause of justice.”

13. On this score, it is undeniable that no proper reason has been advanced for the failure by Mr. Kimani to attend court on two occasions, for the hearing of an application filed under certificate of urgency. All parties are bound to assist the court in furthering the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of civil disputes.

14. Section 1B of the Civil Procedure Act which undoubtedly applies to proceedings of this nature states:

“(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.”

15. Therefore, this court having determined that oral submissions on the dismissed application best served the above purpose, the Applicant’s advocate had no authority upon which to file without leave, his submissions of 6th October, 2017. It matters not that there was a “gentleman’s agreement” between him and Mr. Waigwa for the Respondent. The said agreement at any rate has not been established. It does appear however, that the Appellant herself is not to blame for the events of 9th October, 2017.

16. Concerning the principles involved in the exercise of discretion to set aside an order made pursuant to a mistake or blunder by counsel *inter alia* **Apaloo JA** (as he then was) in **Philip Keipto Chemwolo & Another -Vs- Augustine Kubende [1982-88] KAR [1986] eKLR** stated:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits’.

I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.

In Ngome -vs- Plantex Company Limited [1984] KLR 792, Chesoni Ag. J.A. as he then was in allowing an appeal against an order refusing to set aside an *ex parte* order of dismissal of a suit held at page 798 as follows:

‘By dismissing the appellant’s application as incompetent in that it could not be preferred under rule 8, both the magistrate and learned judge, did not consider its merits and consequently, they failed to take into account matters they ought to have taken into account, which is an essential consideration in the exercise of a discretion:

..... and as said by Hancox JA in Herman Mugachia, supra, by visiting the error of his advocate on the unfortunate appellant, the two lower courts denied him the right of having his case heard at all. That, as said by Ainley J (as he then was) in Sodha vs Hemraj [1952] Uganda L.R. Vol. 7 p. 11 should be the last resort of any court”.

17. This being a dispute concerning the inheritance of the estate of a deceased person, the court ought to give a chance to the Applicant to prosecute the merits of her intended application in connection with the decision of the lower court, about which she is aggrieved and has filed an appeal.

18. However, in order to bring clarity, this court, rather than reinstating the application filed on 19th September, 2017 directs that the Applicant does file an amended application within 14 days, stating precisely, the specific orders sought in each prayer. Secondly, submissions filed on 6th October 2017, in respect of the said application, without leave of the court, are hereby struck out. All the costs occasioned by the present application are to be borne by the Applicant in any event.

Delivered and Signed at Naivasha this **8th** day of **December, 2017**.

In the presence of:

Miss Kithinji holding brief for Mr. Kimani for the Appellant

Mr. Waigwa Ngunjiri for the Respondent

Court clerk - Barasa

.....

C. MEOLI

JUDGE