REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 391 OF 2010

IN THE MATTER OF THE ESTATE OF HALIMA NASOOR (CHEBANDE) (DECEASED)

ABDALAH MUHAMED A. KASINDE……..…..1ST APPLICANT/RESPONDENT

MOHAMMED ALI.....2ND APPLICANT/RESPONDENT

MARIAM SALIM.....3RD APPLICANT/RESPONDENT

VERSUS

ANTHONY NGETICH SEUREY…….……..…..1ST RESPONDENT/APPLICANT

JOSHUA MZEE KITION…….....2ND RESPONDENT/APPLICANT

RULING

This ruling relates to the application dated 19th November, 2015 brought by Anthony Ngetich Seurey and Joshua Mzee Kition (hereinafter the applicants)

The prayers sought are:

(a) Spent

(b) Spent

(c) Spent

(d) That this Honourable court be pleased, to Review and/or set aside its *exparte* proceedings of the 23rd day of October, 2014, the ruling made by Honourable Lady justice Janet Mulwa (then sitting as the Family Court) on the 27th day of February, 2015 and the consequential orders issued on the 12th day of March, 2015 and in its stead; Order that this matter be heard a fresh *viva voce* on its own merits.

(e) That the Respondents be condemned to pay costs of this summons.

The application is grounded on the sworn affidavits of the applicants and on grounds:

i. THAT the 2nd Applicant was neither served with the Application dated the 5th day of August, 2013 nor a hearing Notice for the proceedings of 23rd day of October, 2014 which resulted in the

above stipulated ruing and/or order.

ii. That the Advocates instructed by the 1st Respondent never informed the 1st applicant of the hearing of the 23rd day of October 2014 when the matter proceeded and or any further proceedings in this cause.

iii. That there is an error on record as, though the 1st Respondent instructed the firm of Ms. Mongeri & Company Advocates to represent him in this matter, the said firm never filed a Notice of Appointment and/or change as required by the law.

iv. That the firm or Kiplenge & Kurgat Advocates being the Advocates still on record for the Applicant the said Firm of Advocates ought to have been the ones served.

v. That technically, service upon the firm of Ms. Mongeri & Company Advocates on behalf of the 1st Respondent is improper, ineffective in law, amounts to no service at all and therefore null and void.

vi. That the subject properties were under the management of the Public Trustees before the Applicants took over management after the Confirmation of Grant

vii. That it is therefore incomprehensible that the Respondents are claiming to have purchased the subject properties without involving the office of the Pubic Trustees.

viii. That it is the Applicant's contention the the Respondents grabbed the subject property and therefore if orders sought are not granted, the Estate of the Deceased CHEBANDE ALIMA shall be wasted and shall suffer irreparable damage and loss.

ix. That there are several cases pending in court relating to recovery of grabbed properties belonging to the Estate of the Deceased which *inter-alia* include:

a) Nakuru High Court E.L.C. No.454 of 2013

b) Nakuru High Court E.L.C. No.286 of 2014

c) Nakuru High Court E.L.C. No.99 of 2014

in which cases the Applicants are either Plaintiffs or Defendants; with a Counter-claim having sued or been sued as the legal representatives of the Estate of Chebande Alima.

x. That if the Orders sought are not granted the above stipulated cases shall be dismissed for incompetence hence the Estate of CHEBANDE ALIMA shall suffer irreparably.

xi. That this being a succession cause, the only way to determine and/or settle issues raised by both parties conclusively is by affording all the parties an opportunity to be heard.

xii. That a mistake committed by counsel ought not be visited on his client.

The gist of the grounds and the supporting affidavit is that both applicants are the only surviving beneficiaries of the estate of Chebande Alima (deceased) who died on the 26th February, 1985.

The 1st applicant is the 1st defendant in Nakuru High Court Environment and Land Court Case No.454 of 2013 in which suit Ms. Olonyi and Company Advocates appear for him.

This court had issued and confirmed a grant of letters of administration to the applicants. However by an order of court dated 27th February, 2015, the said grant had been revoked *exparte.* The applicants blame their erstwhile Advocates Ms. Mongeri & Company Advocates for their failure to represent them in the

matter.

It is urged that the applicants were not served with the application giving rise to the orders of 27th February, 2015. The affidavit of the process server Richard Kipkurui Kerich indicating that he served the applicants at Maili Tisa is challenged as false. The 2nd Applicant is said to be resident and working at Bukura-Khwisero, Kakamega County and the averment that he was served on 9th July, 2014 at Maili Tisa is not true.

It is the applicant's case that despite instructing Ms. Mongeri & Company Advocates to act on their behalf in this matter, the said firm never filed a Notice of Appointment or a Notice of change. No response was filed to the application dated 5th August, 2013 seeking revocation of grant. It is the applicant's case that service ought to have been on Ms. Kiplenge & Kurgat Advocates who were the Advocates on record during the confirmation of grant.

The properties, the subject of this succession cause have given rise to other suits being:

i) Nakuru High Court E.L.C. No.454 of 2013

ii) Nakuru High Court E.L.C. No.286 of 2014

iii) Nakuru High Court E.L.C. No.99 of 2014

in which the applicants herein are either plaintiffs or defendants with a counter-claim having sued or been sued as the legal representatives of the estate of Chebande Alima.

It is urged that if the prayers sought herein are not granted, the above case shall be dismissed to the detriment of the estate of Chebande Alima.

The applicants blame all errors resulting to this cause proceedings *exparte* on their erstwhile Advocates, Ms. Mongeri and Company Advocates.

The application is opposed and Abdalah Muhammed A. Kasinde with authority of the 2nd and 3rd Respondents to this application (hereafter the respondents) has sworn a replying affidavit in response.

It is the Respondents' case that the application is brought in bad faith and solely to defeat the respondent's application dated 13th July, 2015 for a review of the orders of court of 27th February, 2015.

It is deponed that the two applicants were duly served by Richard Kipkurui Kerich, a Process Server and upon their request travelled with both to the offices of Mongeri & Company Advocates for service. An affidavit of service to that effect is annexed.

It is urged that the applicants do not state any steps they took to find out from the firm of Mongeri and Company Advocates the progress of their case. The relationship between the applicants and Chebande Alima is questioned as unknown.

It is urged that the applicants cooked up records which they falsely presented to the succession court to facilitate obtaining letters of administration which were subsequently revoked. It is urged that the application be dismissed.

Both parties filed written submissions.

It is submitted for the applicants that they are heirs to the estate of Chebande Alima. The court did make a finding to that effect, issued a grant and even confirmed the same. It is urged that to prove service, the process server ought to have been called to swear an affidavit. This was never done. It is maintained that the 2nd Respondent was not served.

The firm of Mongeri and Company Advocates is blamed for failure to keep the 1st applicant posted on the developments in the matter or to represent him as required. Having failed to file a notice of appointment, it is stated that service on that firm on behalf of the applicants has a nullity.

For the respondents, it is submitted that the application is incurably defective. The power to set aside a decree is discretionary. Any application brought before court seeking those orders must quote the law relied upon. The application is premised under **Articles 25** and **26** of the **Constitution.** These provisions do not give the court the powers to review or set aside a decree or order in succession matters.

Section 47 of the **Law of Succession Act** is quoted. This too does not confer powers on the court to set aside or review decrees or orders. Rule 49 of the Probate and Administration rules does not confer the said power. Rule 73 ought to have been relied upon.

It is submitted that Rule 73 is the only lawful tool which empowers the court in a succession cause to review or set aside a decree or order. Failing to quote it is not a matter of technicality. It is the substantive law. I am referred to the decision in High Court of Kenya at Nyeri – Succession cause No.113 of 1994.

In the matter of the Estate of Mumenya Njogu (deceased) (2008) eKLR. At page 3 paragraphs 3 of that decision the judge stated:

> **"Rule 49 aforesaid does not provide for the setting aside of any order made in a Succession Cause. Neither does it provide for the setting aside a judgment..... the rule provides a procedural remedy.... The only rule that deal with exercise of discretion is rule 73 of the Probate and Administration rules. That rule was not cited in the application.....Unlike the Civil Procedure rules which have Order L rule 12 that deals with situation were there is failure to cite a proper order, rule or other statutory provisions under or by virtue of which the application had been brought which failure is not fatal, the law of Succession Act has not such equivalent provision and nothing can come to the aid of the applicant in the circumstances. The application is thus incompetent."**

On the question whether a review can be granted based on the grounds set out in the application it is the respondents case that **Rule 63** of the **Probate and Administration Rules** allows application of **order 45** of the **Civil Procedure rules** to succession matters. The threshold is set out under order **45 rule 1(b).**

It is urged that in our instant application, the application challenge service upon the 2nd applicant and service on the firm of Mongeri and company Advocates. Other grounds relied on relate to the applicant's entitlement to the suit properties. Those, it is urged are not grounds for review. Those are grounds for appeal. I am referred to the decision in Succession case No.133 of 1998. In the matter of **the estate of Johana Tatei Kagithi** (Deceased) (High Court of Kenya at Nyeri) [2015] eKLR where the presiding judge quoting a court of Appeal judgment stated that:

> **"It will not be a sufficient ground for review that another judge could have taken a different view of the matter.....not can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law …... Issues for appeal cannot be considered in an application for review."**

On service, it is urged that the process server met the applicants who directed him to the firm of Mongeri and company Advocates. The said firm received the process and the documents were duly stamped. The failure by the 1st applicant to follow upon the progress of his case is squarely laid at his door. I am referred to the decision of the Court of Appeal in Civil Appeal No.24 of 1978 where the court stated:

> **"A litigant cannot plead ignorance of his own cause. It is upon a litigant to keep himself informed as to what happened in his case."**

I am urged to follow the finding in Nairobi Civil Suit No.209 of 1974, **Ruth Kavindu** V. **Josiah Mbaya**

and Another where the court stated:

> **"A court should not be used or called upon to aid the indolent to cause injustice and hardship to blameless applicants"**

It is submitted that this is what the applicants are asking the court to do.

From the material before me, the issues for determination are:

1. Whether the application is incurably defective.

2. Whether the applicants were served with the application dated 5th August, 2013.

3. Whether the applicants have achieved the threshold for the review of the *exparte* proceedings of the 23rd October, 2014 and the consequential orders issued on 12th March, 2015

4. .Whether the applicants have a good defence/case on the merit against the application dated 5th August, 2013.

5. Who bears the costs of this suit?

Is the application incurably defective? Counsel for the Respondents has submitted in detail on this point.

The application is premised on **articles 25** and **26** of the **Constitution of Kenya, 2010**, **Section 47** of the **Law of Succession Act (Cap 160 Laws of Kenya)** and **Rule 49** of the **Probate and Administration rules**.

Articles 25 and **26** of the **Constitution** have nothing to do with the courts discretionary power to set aside its orders. The former relates to limitation of fundamental rights and freedom while the later relates to the right to life. It is baffling how these 2 provisions found their way as the provisions relied upon in these proceedings.

Section 47 of the **Law of Succession Act (Cap 160 Laws of Kenya)** provides for the general jurisdiction of the High Court to hear all matters brought under the provisions of that Act. It does not relate to the specific power to set aside orders of court.

Rule 49 of the **Probate and Administration rules** provides that a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit. As held by this court in **In the matter of the Estate of Mumenya Njogu (deceased)**, Succession Cause No.113 of 1994 at Nyeri, Rule 49 does not provide for the discretionary power to set aside a decree or an order of court. Justice M.S.A. Makhandia expressed himself thus:

> **"Rule 49 aforesaid does not provide for the setting aside of any order made in a Succession Cause. Neither does it provide for the setting aside a judgment..... the rule provides a procedural remedy.... The only rule that deals with exercise of discretion is rule 73 of the Probate and Administration rules. That rule was not cited in the application.....Unlike the Civil Procedure rules which have Order L rule 12 that deals with situation were there is failure to cite a proper order, rule or other statutory provisions under or by virtue of which the application had been brought which failure is not fatal, the law of Succession Act has not such equivalent provision and nothing can come to the aid of the applicant in the circumstances. The application is thus incompetent."**

Based on the above, the application as presented as incompetent and ought to be dismissed.

That finding would determine this application but I find it necessary to delve into the merits or lack

thereof of the grounds relied on in support of the application.

I now turn to issues Nos. 2 and 3. The power to set aside orders of court is a discretionary one. The power to review courts orders (in our case in succession) matters is premised under the parameters provided by virtue of **rule 63** of the **Probate and administration rules** which makes **order 45 1(b)** of the **Civil Procedures rules** applicable to succession matters.

I first deal with the issue of review and which I think on the material before me is straight forward. **Order 45(1)** of the **Civil Procedure Act** and which is applicable to succession matters by virtue of **rule 63** of the **Probate and Administration** rules clearly sets out the parameters for review:

1. Discovery of new and important matter or evidence

2. Mistake or error apparent on the face of the record

3. Any other sufficient reasons.

In our instant case, there is no discovery of new and important matter or evidence. Nor is there or shown to be a mistake or error apparent on the face of the record. There is no other sufficient reason given to warrant a review. The prayer for review was a misplaced one and is not available to the applicants.

Now onto the issue of setting aside the orders of court complained of. This prayer is premised on disputed service on the 2nd applicant and an error on the part of Ms. Mongeri and Company Advocates who were instructed by the 1st applicant but failed to act.

The principles on which the Court acts to set aside *ex-parte* judgment are now well known and settled. Harris J in the case of **Shah** V. **Mbogo & Another,** [1967] EA 116 had this to say at page 123:

> **"I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside judgment obtained exparte. This discretion is intended so 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 course of justice. In my opinion, applying those principles to the facts before me and taking everything into account, the Society has not made out a sufficient case on the merits to justify the setting aside of the perfectly regular order of July 8, 1966 and accordingly the motion must be refused."**

Where the court is persuaded that there was no proper service, the judgment (in our case ruling) will be set aside ex debito justitiae (i.e as a matter of right) and not judicial discretion. See **National Bank of Kenya** V. **Ndzai Katana Jonathan**, HCCC NO.755 OF 2002.

Other factors to consider is whether there is defence on the merit and whether there is inordinate delay in the bringing of the application to set aside.

In our instant suit, the denial of service by the applicants is manifestly a feeble attempt at obstruction of Justice. The applicants are less than candid in their assertions.

The first applicant blows hot and cold on the issue of service. He admits directing that service be effected and the firm of Mongeri and Company Advocates. He then goes ahead to state that the said firm failed to file a notice of appointment and he therefore asserts that without the notice of appointment, the service on that firm was a nullity.

Pray, one may ask, who was supposed to ensure that the applicants' Advocates filed a notice of appointment? Is it the Respondents' duty so to do? Once the Respondents were directed on which firm of Advocates to effect service on, their task ended when the process server, Richard Kipkurui Kerich

effected service on the firm of Mongeri and Company Advocates.

The 1st applicant indeed confirms that position by laying blame at the door of his erstwhile advocates.

As regards the 2nd applicant, his assertion is that he lives in Bukura-Kwisero in Kakamega County and was not at Maili Tisa on the date of the alleged service. To prove residency, he has annexed an abstract from police records in regard to loss of his identity card and an acknowledgement from the Registrar of Persons showing he applied for an identification card on the 11th August, 2011. These two (2) exhibits in no way prove that the 2nd Respondent could not have been at Maili Tisa on 9/7/2014. Again, the process Server was not sought to be cross-examined by the 2nd Respondent to shake his evidence of service.

Am persuaded there was proper service on the applicants. The inaction by their counsel and any resultant undesirable outcome cannot be visited on the Respondents. As stated by Law J.A. in Civil Appeal No.24 of 1978 (Nairobi):

> **"A litigant cannot plead ignorance of his own cause. It is upto a litigant to keep himself informed as to what happened in his case."**

Do the applicants have a good defence on the merits to the application whose orders are sought to be set aside? The ready answer is that on the material before me they don't. The application dated 5th August, 2013 had sought the revocation of the confirmed grant of letters of administration issued to the applicants herein.

The then applicants' grouse was that properties known as Nakuru Municipality/Block 13/314 and Nakuru Municipality/Block 13/320 and Nakuru Municipality/Block 13/321 had been included as forming part of the Estate of Chebande Alima (Deceased) yet these properties did not belong to the deceased but to the applicants. Indeed, there is pending litigation over the proprietary rights in Nakuru High Court Elc. Case no.354 of 2013. This fact is common ground.

Whichever way one looks at it, there cannot be a good defence to the said application for the simple reason that unless and until the proprietary rights in the said properties are finally adjudicate upon in the court clothed with jurisdiction so to do, they cannot possibly form part of the state of Chebande Alima (deceased).

The cumulative effect of the above is that the application herein must fail. I find for the respondents and proceed to dismiss the application dated 19th November, 2015.

I note that these orders and the orders of court of 27th February, 2015 expose the applicants to the potential danger of loosing whatever claim they may have on the properties in question given that the said orders now undress them of the capacity they had to represent the Estate of Chebande Alima (Deceased). All is not lost however, since the respondents lay no claim to the Estate of the deceased but lay a claim on specific property they state should not form part of the Estate of the said Chebande Alima.

Nothing stops the applicants from applying for a grant *ad colligenda bona* pursuant to **Section 67 Laws of Succession Act** and **rule 36** of the **Probate and Administration rules** for the purposes of defending the interests of the estate in the suits alluded to above.

On costs, I have considered the circumstances surrounding the application and other pending litigation between the parties. I direct that each party bears its own costs.

Dated, Signed and Delivered at Nakuru this 24th day of March, 2016.

A. K. NDUNG’U

JUDGE