



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 193 OF 2002

IN THE MATTER OF THE ESTATE OF PHILIP NTHENGE MUKONYO (DECEASED)

**STEPHEN MUSEMBI NGUI.....1ST PETITIONER
(DECEASED)**

THOMAS MUTINDA NGUI.....2ND PETITIONER

JOHN NDONYE MUTUNGI.....3RD PETITIONER

VERSUS

DAVID MUTISO NTHENGE.....OBJECTOR

RULING

Introduction

This succession cause was filed in 16th August 2002, when the Petitioners who are the Executors of the will of Philip Nthenge Mukonyo (Deceased) (hereinafter referred to as “the deceased”), petitioned for Probate of Written Will. The Objector, who is a son of the deceased, subsequently filed a Notice of Objection dated 23rd October 2002 objecting to the grant of probate. He was also directed by the Court to file a Petition by way of Cross-Application of grant which he did on 21st March 2003.

The Objector thereafter filed several applications which do not appear to have been heard and determined, and it was not until 25th October 2012 that Makhandia J.(as he then was) directed that the Objector’s Objection dated 23rd October 2002 proceeds to hearing, and the Objector testified on that date. The hearing was adjourned, before the Objector could be cross-examined, and directions were taken on 12th June 2013 before Jaden J. that the cause proceeds from where it stopped.

The hearing proceeded on 31st July 2014 before Jaden J., after the hearing date was taken *ex parte* by the Petitioners at the Court’s registry. Service of a hearing notice on the Objector’s Advocate was effected on 3rd July 2014 as demonstrated by an affidavit of service sworn on 16th July 2014 by one Irene Masaku, a licenced process server, and the said hearing notice stamped as having been received by Wandugi & Company Advocates on 3rd July 2014 was attached thereto. The fact of this service was brought to the attention of the Court and the Honourable Judge ruled that the case proceeds.

The Petitioners called one witness to testify on 31st July 2014, and closed their case, whereupon the Honourable Judge directed that written submissions be filed within 30 days. Both parties filed

submissions including the Objector's Advocate, who filed submissions dated 30th January 2015, while the Petitioner's Advocates filed submissions dated 16th September 2016. Judgment was delivered by Jaden J. on 24th November 2015, when the Objector's Objection was dismissed.

The Applications

It has been necessary to give the foregoing background to provide the context of the applications that are presently before this Court for determination. The two applications are one filed by the Objector by way of summons dated 4th February 2016, and the second one is a Notice of Motion dated 16th February 2016 filed by the Petitioners on collection of rent from the deceased's premises. This Court directed on 22nd February 2016 that the two applications be heard and determined together.

The Objector in his application is seeking the following substantive orders:

1. Pending the inter-parte hearing and determination of this Application the Objector be at liberty to collect all the revenue and earnings in respect to property which are neither listed nor mentioned in the impugned will or codicil being Machakos Block 11/318 and Machakos Block 11/319.
2. Pending the inter-parte hearing and determination of this Application there be stay of execution of the orders made and Judgment delivered by the Court on 24th November, 2015.
3. The Court be pleased to review and set aside the Orders made and Judgment delivered on 24th November 2015, and to set aside the *ex parte* proceedings on 21st July 2014.
4. Pending the inter-parte hearing and determination of this Petition, the Objector be at liberty to collect all the revenue and earnings in respect to property which are neither listed nor mentioned in the impugned will or codicil being Machakos Block 11/318 and Machakos Block 11/319.
5. The Court to order and direct that the Objector to receive reasonable provision of the inheritance and the inheritance to proceed on equitable basis.

The main grounds for this application as stated in the said summons, and in a supporting affidavit and further affidavit sworn by the Objector on 4th February 2016 and 26th February 2016 respectively, were that upon partially testifying, the Objector was neither notified nor made aware that the proceedings in the matter had been adjourned to 21st July 2014, and that on that date the Court proceeded *ex-parte* with the proceedings and evidence of the Petitioners was adduced without any cross-examination scrutiny.

Further, that he was not informed of the hearing date by his Advocate and the Petitioners, and that he was not aware of the hearing nor the *ex parte* proceedings until he discovered that judgment had been delivered, and he had not waived any right to challenge the proceedings, that's why upon discovery of the omissions and commissions made he appointed a new Advocate. The Objector averred that the Court in its judgment noted that since the Objector's evidence was incomplete and the Petitioners evidence remained uncontroverted and unchallenged, the hotly contested objection failed on a technicality. The Objector also reiterated his grounds for challenging the validity of the deceased's will and codicil.

Lastly, the Objector stated that the basis for the Application is that the Petitioners illegally, fraudulently and contrary to mandatory legal provisions have been meddling in the estate, receiving all rental payments in form of cash, and distributing the cash without any court sanction, orders or grant. Further, that as the only son and first born of his father, the Petitioners who are his uncle and brother-in-law cannot rank higher than him.

The Petitioners in response filed Grounds of Opposition dated 17th February 2016, and a replying affidavit sworn by the 3rd Petitioner on the same date, wherein it was stated that the Objector's objection was heard and determined and has not been appealed from, and that the prayer for review and setting aside the Judgment of 24/11/2015 has no merits since the Objector and his Advocate were fully involved in the proceedings and even made submissions as regarding the validity of the will and codicil. Further, that the Objector's Advocate was duly served by the Petitioner's lawyers as regards the dates the objection was coming for hearing.

It was also contended that the Objector cannot be allowed to collect rent on the premises known as Machakos block 11/318 and Machakos Block 11/319, since these properties were referred in the will and the cordicil, when the Deceased stated that the Petitioners shall have a discretion to distribute the Deceased properties not mentioned in the will or the cordicil or any property that was to be acquired after the will.

The 3rd Petitioner denied that he had been collecting rent or inciting the tenants not to pay rent to the Account opened by the Advocates for the Objector and Petitioners, and stated that the beneficiaries of the deceased's Estate in the will instructed him to ensure that the two premises are taken care of and rent is paid to the joint account of the two beneficiaries who were authorized by the others to keep the money for the estate, which they can and are ready to account for.

The Petitioners on the other hand are seeking the following orders in their application:

1. That the Objector be restrained by an order of injunction from interfering with the management and the collection of rent in the Deceased's premises known as Machakos Town Block 11/318 and Machakos Town Block 11/319 or in any other manner interfering with the management of collecting of rent from the aforesaid premises pending the hearing and determination of the Petitioner's Application.
2. That the Objector be restrained by an order of injunction from entering or threatening the tenants or from collecting rent from the premises known as Machakos Town Block 11/318 and Machakos Town Block 11/319 until the Application filed by the Objector dated 4/2/2016 is heard and determined.

The Petitioners in a supporting affidavit sworn by the 3rd Petitioner on 14th February 2016 averred that as Executors of the will and codicil of the deceased, they were given discretion to distribute the properties that were not mentioned in the said will and codicil. Further, that they had together with the beneficiaries in the will and the codicil since 2002 while the Objection hearing was pending, established a management system to rent, and collect the rent from the tenants in the properties that were earning rent, including Machakos Town Block 11/318 and Machakos Town Block 11/319 which were not mentioned in the will and the codicil, and this system excluded the Objector who had not been willed any of the fixed properties of the Deceased.

It was alleged that the Objector had after judgment was delivered started to interfere with the management of renting and collecting rent from Machakos Town Block 11/318 and Machakos Town Block 11/319, by issuing demand notices to be paid rent and threatening the tenants with levying of distress if they did not pay rent to the Objector's account at Family Bank of Kenya Ltd Machakos Town.

The Objector in a replying affidavit he swore on 16th February 2016 stated that the Petitioners have for the past 14 years intermeddled in Machakos Town Block 11/318 and Machakos Town Block 11/319 comprising the deceased's estate, knowing very well that there is neither Grant of Letters of ad Coliggenda Bona nor any form Order or Grant issued in their name to demand, receive, collect, pay out, distribute and share the monthly rental revenue. He reiterated the arguments made in his application about the Petitioners not ranking higher than him, and the grounds as to why the deceased will and codicil is impugned.

The Issues and Determination

The Court at the hearing of the two applications on 22nd February 2016 and 14th March 2016 disposed of the temporary prayers sought by both the Petitioners and Objector, by ordering that the rent collected from the disputed properties namely, Machakos Town Block 11/318 and Machakos Town Block 11/319 shall with effect from 1st March 2016 be deposited in an interest earning account to be opened in the joint names of the Petitioners' and Objector's Advocates pending the hearing and determination of the two applications. Further, the Petitioners' and Objector's Advocates were granted leave to make such withdrawals from the said account as shall be necessary to pay expenses in relation to the maintenance of

the two premises.

The Court also directed that the two applications be canvassed by way of written submissions. Moses Odawa & Company Advocates, the learned counsel for the Objector filed three sets of written submissions, two of them dated 26th February 2016, and one 11th March 2016. Manthi Masika & Company Advocates, the learned counsel for the Petitioners, also filed three sets of written submissions two of which were dated 7th March 2016 and one dated 18th March 2016.

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided are firstly, whether the proceedings of 31st July 2014 and judgment delivered herein on 24th November 2015 are subject to review and/or setting aside. Secondly, whether the Objector should be allowed to collect rent and revenue from Machakos Town Block 11/318 and Machakos Town Block 11/319; and thirdly, if the Objector is entitled to receive a reasonable provision from the deceased's inheritance.

On the first issue, the Objector relied on various judicial authorities on the applicable principles in the exercise of the Court's discretion to set aside of an *ex parte* judgment, including the decision by Odunga J. in **Yusuf Gitau Abdallah vs Building Centre (K) Ltd & 4 Others (2013) eKLR.**, and the Court of Appeal decision in **Baraka Apparel EPZ (K) Ltd vs Rose Mbula Ojwang t/a Faida 2002 Caterers, (2007) e KLR.**

The Petitioners on the other hand submitted that the Objector has shown no basis for the setting aside of the judgment as his lawyer was served with a hearing notice and failed to attend Court. Further, that he was also served with the Petitioners' submissions and requested the Court on 17th November 2014 for more time to file his submissions which he did, and was present in Court when the judgment date was given. Therefore, that the Objector is estopped from complaining about his lawyer's failure to attend Court. Further, that no affidavit was filed by the Objector's previous lawyer as to why he did not attend court or file an application to set aside the *ex parte* proceedings and judgment in time. It was also pointed out that there are no *ex parte* proceedings on record that took place on 21st July 2014, to which the Objector replied that the said proceedings of 21st July 2014 were referred to in the judgment.

It is evident there is an error in the judgment in the reference to the further hearing having taken place on 21st July 2014. The court record shows that the further hearing took place on 31st July 2014. In order to determine the issue of setting aside of the impugned proceedings and judgment, this Court must first determine whether the proceedings of 31st July 2014 and judgment on 24th November 2015 were undertaken and given *ex parte*.

The record shows that the Objector's Advocate was served with the hearing notice for the hearing of 31st July 2014 in good time on 3rd July 2014. He however did not attend the hearing. In **Pithon Waweru Maina vs E.A. Cargo Handling vs Thuka Mugiria (1982-88) 1 KAR 171** it was held that an *ex parte* proceedings can arise either from non-appearance or a defence in a suit or failure by either party to attend a hearing after appearance. In both cases, the Court has discretion to set aside a default judgment arising out of the proceedings pursuant to the provisions of Order 10 Rule 11 of the Civil Procedure Rules.

In the present applications, the issue of whether the judgment delivered herein was *ex parte* is however muddled by the fact that after failure to attend Court for the hearing of the Objection on 31st July 2014, the Objector's counsel did attend Court during two mentions thereafter, namely on 17th November 2014 and 2nd February 2015, and did not challenge the *ex parte* proceedings. On the contrary he sought leave to file submissions which were on record when the Court delivered its judgment on 24th November 2015.

I am persuaded in this regard by the distinction made in **Remco Limited vs Mistry Jadva Parbat & Co Ltd & 2 Others, (2002) 1 EA 233** between an irregular judgment where there is no proper service of summons to enter appearance which the Court held must be set aside *ex debito justitiae* (as a matter of right), and a regular judgment where the Court has discretion to set aside the judgment upon such terms that are just. It is my view that the judgment in this succession cause was regular to the extent that the

Objector's counsel did participate in, and was aware of its delivery.

However, given the fact that the Objector was not given the opportunity to complete giving his evidence, and did not participate at the hearing held on 31st July 2014, it would be in the interest of justice that the said judgment be set aside. I am also in agreement with the holding by Odunga J. in **Yusuf Gitau Abdallah vs Building Centre (K) Ltd & 4 Others (2013) eKLR** that a litigant should not be penalised for the mistake of the Advocate where failure to appear in Court was attributed on the Defendant's counsel, and it is for this reason that the arguments made by the Petitioners as to acquiescence and waiver cannot apply to the Objector.

These observations notwithstanding, I have also considered the circumstances of the two applications as detailed out in the introduction to this ruling, and particularly the delay caused in determining the Objection and Cross-Application filed by the Objector, by the various applications he filed which were then abandoned. It was held in **Shah vs Mbogo, (1967) EA 116** that the Court's discretion to set aside *ex parte* judgments is to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake and error, but is not designed to assist a person who has deliberately sought to obstruct or delay the course of justice.

It is thus my view that even if the judgment delivered herein is to be set aside, the hearing of the Objector's Objection and Cross-Application must proceed with haste and expeditiously, to bring the litigation in this matter to an end. The Court will therefore provide conditions to be met by the parties in this respect.

Lastly on this issue, I am also alive to the fact that the afore-cited decisions were based on the provisions of the Civil Procedure Act which do not apply to succession causes. The principles enunciated in the foregoing have been relied upon to aid this Court in the exercise of its inherent powers 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 or necessary for the ends of justice or to prevent abuse of the process of the court. This Court is in this regard also reminded that a constitutional imperative now applies that requires that disputes be determined on the basis of merit and substance under Article 159(2) of the Constitution.

On the second issue as to whether the order sought by the Objector to collect rent from Machakos Town Block 11/318 and Machakos Town Block 11/319 can issue, the Objector firstly questioned the form of the Petitioner's application for an injunction against the Objector, and stated that neither Rule 63 of the Probate and Administration Rules or section 47 of the Law of Succession Act empowers the Court to proceed by way of Notice of Motion.

It was further submitted that the said properties are not mentioned in the deceased's will and codicil and their administration should proceed on an intestate basis. Further, that there is no grant whatsoever or any nature of orders which allow the Petitioner to set up a management system of the revenue of the deceased with respect to the two properties, and that any action by the intended administrators before granting of letters of administration is incompetent and amounts to intermeddling. Reliance was placed on the decisions in **Peter Makome Mutungu & Another vs Mary Wangari Mutungu (2013) e KLR** and **Alice Nthule Wambua vs Sera Katumbi Mulwa, (2014) e KLR** in this regard.

The Petitioners' position on this issue is that the prayer that the Objector collects the rent from the two disputed properties can only issue if the Objector accepts that the deceased's will and codicil are valid, and if they are not valid, he cannot collect rent to the exclusion of the other beneficiaries. It was also submitted that the two properties are clearly referred to in the codicil, and reference was made in this regard to the applicable paragraph of the codicil, and can therefore only be disposed of in accordance with the provisions of the codicil.

The Petitioners prayed that the orders already made by the Court that the funds collected from the said properties be deposited in an interest earning account do subsist, pending the hearing and determination of the Objector's Objection and Cross-Application on the validity of the deceased's will.

It was also submitted by the Petitioners that the 3rd Petitioner has locus by virtue of his appointment as executor of the will to file any application in relation to the deceased's estate, and lastly that this Court can treat the Notice of Motion filed as a Chamber summons as the issues therein are clear. Reliance was placed on section 72 of the Interpretation and General Provisions Act, Article 159(2)(d) of the Constitution, and decision in **R vs Chairman Matungu Land Disputes Tribunal ex parte Electina Wang'ona and Another, (2012) eKLR**

I will first address the preliminary issues raised as to the competence of the Petitioners application herein. While it is indeed the position that Rules 49 and 59 of the Probate and Administration Rules require applications in a succession cause not provided for to be by way of summons, and Rule 63 of the said Rules limits the application of the Civil Procedure Act and Rules to succession causes, the spirit of Article 159(2) of the Constitution now requires that substantive justice should not be sacrificed at the altar of technicalities, and the said rules must now be read as being subject to the Constitution. It is my view in this regard that the form of the application used by the Petitioners, namely a Notice of Motion, does not affect the substance of their application and can be heard and determined by this Court.

As regards the locus of the 3rd Petitioner to bring the said application, it is notable that unlike in the case of an administrator whose authority derives from a grant of letters of administration, and who has no authority or relation to the deceased's estate prior to the grant, the title and authority of an executor is derived from the will. The estate and interest in the deceased's property vests on an executor on the testator's death, and he can act before grant of probate. Probate in this regard is a mere authentication of the executor's title, and this was noted in **Kothari vs Qureshi and Another, (1967) EA 564 and Otieno vs Ougo & Another (Number 4) 1987 KLR 407.**

In the instant applications the 3rd Petitioner is an executor of the deceased's will and codicil, and also to the extent that there is reference in the said codicil as regards properties not disposed by the deceased's will, he has locus to bring proceedings in relation to the deceased's estate.

By dint of the same argument, the Objector is neither administrator nor executor of the deceased's estate and therefore has no locus of any kind to collect or preserve the estate of the deceased at this stage. The issues as to whether the two disputed properties are to proceed by way of testate or intestate succession is a substantive issue to be argued at the time of determination of the validity of the deceased's will and codicil, and on the construction of the said will and codicil in the event they are found to be valid. Likewise, the detailed arguments and submissions made by the Objector on his objections to the will and codicil will have to await the hearing on the validity of the said will and codicil.

This Court is therefore of the view on this issue that the temporary orders already given herein as to the collection of rent as regards the two disputed properties will adequately cater for, and provide for the appropriate balancing of the Objector's, Petitioners' and beneficiaries interests pending a determination of the substantive issues in the Objector's Objection and Cross-application.

The last issue in the instant applications is whether the Objector is entitled to receive a reasonable provision from the deceased's estate. The Objector submitted that he is seeking reasonable provision on the basis that the administration of the two disputed properties is proceeding on an intestate basis. The Petitioners on the other hand submitted that the Objector's request for reasonable provision accepts that the will and codicil is valid, as it can only be made on this basis.

The applicable law as regards reasonable provision is section 26 of the Law of Succession Act, whereby a person claiming to be beneficially entitled and who are totally disinherited or inadequately provided for, whether under the terms of a will or in intestacy, may move the Court for reasonable provision out of the estate. Rule 45 of the Probate and Administration rules provides for the form and content of such an application as follows:

“45. Application under s. 26 of the Act

(1) Every application to the court under section 26 of the Act shall, where a grant has been

applied for or made but not confirmed, be brought by summons in Form 106 in that cause, or, where no grant has been applied for, be brought by petition in Form 96; and the summons or petition and supporting affidavit shall be filed in the registry and copies thereof served upon the personal representative of the deceased:

Provided that, if representation has not been granted to any person, a copy of the petition and supporting affidavit shall be served upon the persons who appear to be entitled to apply for a grant under the Act.

(2) The application shall be supported by evidence on affidavit in Form 15 or 16 stating that no grant of representation to the estate of the deceased has been confirmed and containing, so far as may be within the knowledge of the applicant, the following information and particulars—

(a) the date of the death of the deceased and whether he died testate or intestate and, if testate, the date of his last will and whether oral or written;

(b) the relationship of the applicant to the deceased and the grounds upon which, having regard to the provisions of section 29 of the Act, the applicant claims to have been a dependant of the deceased at the time of his death;

(c) the name and address of every other dependant of the deceased at the time of his death;

(d) whether the deceased made any gift in contemplation of death (whether or not falling within the provisions of section 31 of the Act) and, if so, the nature, amount and value thereof;

(e) whether a grant to the estate of the deceased has been issued and, if so, to whom and upon what date;

(f) the nature, situation and amount of the deceased's property and the value of his net estate;

(g) any past, present or future capital or income of the applicant derived or expected to be derived from any source;

(h) the existing and future means and needs of the applicant;

(i) whether the deceased had during his lifetime made any advancement or other gift to the applicant;

(j) the conduct of the applicant in relation to the deceased;

(k) the situation and circumstances of the deceased's other dependants (if any) and of the beneficiaries under any will of the deceased; and

(l) the general circumstances of the case including the deceased's reasons for not making provision for the applicant.

(3) Copies of the proceedings shall be served upon such persons (if any) as the court may direct.

(4) The application shall without delay be set down by the registry before the court for hearing upon notice to the applicant and to such persons as have been served with the proceedings and to such other persons (if any) as the court may direct.

(5) At the hearing of the application the court shall have regard to the information and

particulars referred to in subrule (2) and also to such evidence as may be adduced as to the conduct of the applicant in relation to the deceased as required by paragraph (e) of section 28 of the Act.”

I have extensively reproduced the said provisions to illustrate the evidence and information required in an application for reasonable provision, and the circumstances to be considered. It is evident that these requirements are imposed so as to aid the decision whether to provide reasonable provision during distribution of a deceased's estate, and hence the requirement for such an application to be made before the issue of grant or confirmation of grant. In addition, an order for reasonable provision can only be made at the time of distribution as it is a final order of bequest.

In the present application, the issue of the distribution of the deceased's estate is yet to be heard, and parties are still at the application for grant stage, and it is therefore premature to make an order for reasonable provision at this stage.

This Court accordingly orders as follows arising from the findings in the foregoing, and pursuant to section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules:

1. The proceedings herein on 25th October 2012 and 31st July 2014, and judgment delivered herein on 24th November 2015 be and are hereby set aside subject to the following conditions:

a) The hearing of the Petitioners' Petition for Probate of Written Will dated 16th August 2002, the Objector's Notice of Objection dated 23rd October 2002 and Objector's Petition by way of Cross-Application dated 20th March 2003 shall start *de novo*, and shall all be heard together by way of oral evidence.

b) The Objector shall file and serve the statements and/or affidavits of witnesses he shall call during the hearing within 60 days of the date of this ruling.

c) The Petitioners shall file and serve the statements and/or affidavits of witnesses they shall call during the hearing within 60 days of the date of service of the Objector's witnesses' statements and/or affidavits.

d) The parties shall at the time of filing and serving their respective witnesses statements and /or affidavits, include a consolidated and paginated bundle of the pleadings being relied on for the said hearing.

e) Upon default by the Objector to file and serve his witnesses statements and/or affidavits within 60 days of the date of this ruling, the Objector's Notice of Objection dated 23rd October 2002 and Objector's Petition by way of Cross-Application dated 20th March 2003 shall stand dismissed, and the Petitioners shall be at liberty to proceed with the hearing of the Petition for Probate of Written Will dated 16th August 2002.

2. The rent collected from the deceased's properties known as Machakos Town Block 11/318 and Machakos Town Block 11/319 shall, pending the hearing of the Petitioners' Petition for Probate of Written Will dated 16th August 2002, the Objector's Notice of Objection dated 23rd October 2002 and Objector's Petition by way of Cross-Application dated 20th March 2003, be deposited in the interest earning account already opened in the joint names of the Petitioners' and Objector's Advocates. Further, the Petitioners' and Objector's Advocates are granted leave to make such withdrawals from the said account as shall be necessary to pay expenses in relation to the maintenance of the two premises.

3. The *status quo* obtaining as at the date of this ruling regarding the management, collection of rent, and preservation of all the other assets and properties of the deceased shall continue to apply

pending the hearing of the Petitioners' Petition for Probate of Written Will dated 16th August 2002, the Objector's Notice of Objection dated 23rd October 2002 and Objector's Petition by way of Cross-Application dated 20th March 2003

4. The prayer by the Objector for reasonable provision in the Summons dated 4th February 2016 is hereby denied.

5. Each party shall meet their respective costs of the Objector's Summons dated 4th February 2016, and the Petitioners' Notice of Motion dated 16th February 2016.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 28th day of July 2016.

P. NYAMWEYA

JUDGE