



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 924 OF 2007**

**IN THE MATTER OF THE ESTATE OF JOSHUA JUMA MANDA (DECEASED)**

**AND**

**JOHN MANDA JUMA**

**GABRIEL MANDA CHUMA.....PETITIONERS.**

**VERSUS**

**MARY AMUKOWA WATAKO...1<sup>ST</sup> OBJECTOR/RESPONDENT.**

**FRIDAH ASHIOYA YWAYA.....2<sup>ND</sup> OBJECTOR/RESPONDENT.**

**RULING**

**INTRODUCTION.**

1. The deceased herein JOSHUA JUMA MANDA died interstate on the 23<sup>rd</sup> September, 1975. A NEW GRANT of Letters of Administration Intestate was then issued to JOHN MANDA JUMA, GABRIEL MANDA CHUMA, MARY AMUKOWA WATAKO and FRIDAH ASHIOYA YWAYA on the 10<sup>th</sup> of April, 2012 after the objectors herein applied for revocation.

**The application.**

2. By the Notice of Motion dated 16<sup>th</sup> September, 2013, brought under Order 10 Rule 11, Order 12 Rule 7, Order 45 rule 1 of the Civil Procedure Rules, sections 1A & 3A of the Civil Procedure Act and Rule 44 (3) of the Probate and Administration Rules, the petitioner through the firm of AKWAL & CO. ADVOCATES sought for leave for the said firm to come on record for them in place of M/s OCHARO KEBIRA & CO. ADVOCATES. They also sought for orders that the ex-parte proceedings, directions and/or orders of 26<sup>th</sup> April, 2010, 7<sup>th</sup> July, 2010 and 13<sup>th</sup> July, 2011 and the resultant ruling and/or judgment and all consequential orders be set aside, reviewed and/or vacated and that the petitioners be permitted to file affidavits and be granted an opportunity to defend the objection proceedings herein.

3. The petitioner also want fresh directions be given that the objection proceedings be determined by way of viva voce evidence and the objection proceedings herein be heard interparties and be determined on merit.

4. The application is based on the grounds that their (petitioner) advocates M/s. OCHARO KEBIRA &

CO. ADVOCATES did not file or notify them to attend court when this matter came up for hearing. They also claim that the objectors and their father now deceased have their own estate parcel No. L.R. NO. MARAMA/SHINAMWENYULI/806 but that they have not disclosed this information to the court and have thus obtained double inheritance irregularly, unlawfully and unjustly. The petitioners claim that they were condemned unheard yet they have a formidable case which they crave the courts leave to present. They claim that the nature of this dispute is such that it can only be properly adjudicated and determined after all the oral and documentary evidence has been tendered by the parties.

5. They also claim that there are errors and omissions on the face of the record and there is sufficient cause for granting the orders sought so that all the parties ventilate their case and be heard on merit. The application is buttressed by the supporting affidavit sworn by both the petitioners.

### **Respondent's case.**

6. The application is opposed. FRIDA ASHIOYA YWAYA one of the administrators has filed her affidavit dated 30<sup>th</sup> September, 2013. She explains in detail how her father was given land parcel No. Marama/Shinamwenyuli/806 as a token by his uncle and how he later returned to his parental home where he settled on Land Parcel No. S/WANGA/LUREKO/457 together with his family. She maintains further that this case proceeded way back in July, 2011 and the petitioner only brought this application two (2) years later. She adds that there are no draft affidavits which ought to have been annexed by the applicant and that the applicants have no case against them.

7. The applicants have also filed a replying affidavit to the response by the objectors which content this court has taken note of.

### **Submissions.**

8. The parties herein canvassed the application dated 16<sup>th</sup> September, 2013 by way of written submissions which they have exchanged. The main issue for determination is whether the exparte proceedings, directions and/or orders of 26<sup>th</sup> April, 2010, 7<sup>th</sup> July, 2010 and 13<sup>th</sup> July, 2011 and the resultant ruling or judgment and all consequential orders or proceedings can be set-aside, reviewed or vacated and the petitioner be permitted to file affidavits and be heard on the objection proceedings.

9. Having carefully considered the pleadings and submissions made herein, it is evident that the petitioners who are the applicants herein did not contest the objection. It is also true from the records that the firm of M/s. Ocharo Kebira and Company Advocates acted for them in this succession cause. The law provides under Order 9 of the Civil Procedure Rules that a party is at liberty to instruct an advocate of his/her choice to act for him/her in any court of law. A party is also not bound by the Advocate he/she chooses and may choose to change the said advocate if he so wishes under Order 9 Rule 5.

10. This court can therefore not choose for the parties their Advocates but will only listen to the Advocates they (Parties) choose for themselves. This court also notes that there was a ruling by this court made on the objection which is now being contested by the petitioners. The reason why the applicant wants to change their advocate have been noted and the prayer is granted.

11. On the question of setting aside exparte proceedings directions and/or orders of 26<sup>th</sup> April, 2010, 7<sup>th</sup> July, 2010 and 13<sup>th</sup> July, 2011 and the resultant rulings and/or judgments and all consequential order, the applicable principles as was held in SHAH VS. MBOGO [1967] EA 116 that the courts 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.

12. I am also guided by the holding by Odunga J. in Yusuf Gitau Abdallah vs. Building Centre (K) Ltd. & 4 others 2013 e KLR that a litigant should not be penalized 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.

13. I am satisfied from the record that the petitioner/applicants were not aware that the objection proceedings had come up for hearing on several occasions. It seems they were never notified of the same by their counsel. I also agree that the nature of this matter requires oral and documentary evidence to be tendered by parties to avail all necessary details and enable the court to properly adjudicate over the matter.

14. It is thus my view that even if the judgment delivered herein is to be set aside, the hearing of the objection 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.

15. This court is also alive to the fact that the above decisions were based on 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 also reminded that a constitutional imperative now applies that requires disputes be determined on the basis of merit and substance under article 159 (2) of the Constitution.

16. The upshot of all these is that the application dated 16<sup>th</sup> September, 2013 is allowed in the following terms:-

*(a) That the petitioners do file and serve their response to the objection within fourteen (14) days of this ruling;*

*(b) That the applicant/petitioner set the objection for hearing afresh and the same shall be heard by way of oral evidence within 60 days of this ruling;*

*(c) Upon default of (a) and (b) above the application herein shall stand dismissed and the matter shall proceed for confirmation;*

*(d) Each party shall meet their respective costs.*

**SIGNED, DATED and DELIVERED at KAKAMEGA this 12<sup>TH</sup> day of OCTOBER, 2016.**

**C. KARIUKI**

**JUDGE.**

**In the presence of:-**

.....**for the Petitioner.**

..... **for the 1<sup>st</sup> Objector/Respondent.**

..... **for the 2<sup>nd</sup> Objector/Respondent.**

..... **Court Assistant.**