REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 237 OF 2008

IN THE MATTER OF THE ESTATE OF MARY CHEMARUS TELE (DECEASED)

RAPHAEL ARAP CHEPKWONY…….....1ST APPLICANT

CHEPKEMOI ANGELINE.....2ND APPLICANT

VERSUS

ROBERT TANUI.....…….…….....RESPONDENT

RULING

This ruling is in respect of the application dated 14th February, 2014.

By way of a Chamber Summons, Raphael Arap Chepkwony and Chepkemoi Angeline, the administrators of the estate of Mary Chemarus seek orders:

1. That the ruling dated 25th November, 2011 and all the consequential orders be set aside

2. That the summons dated 3rd February,, 2011 be set down for hearing *inter-partes*

3. That the costs of this application be provided for.

The application is based on two (2) grounds viz:

1. That the Applicants were never served with a Hearing Notice for the hearing of the summons on 27th June, 2011.

2. That the Applicants have been condemned unheard.

It is supported by the affidavits of both applicants sworn on 1st November, 2013.

The gist of the grounds and the supporting affidavit is that the applicants were never served on 27/6/2011 with a hearing notice for the hearing of the chamber summons giving rise to the orders now sought to be set aside. It is the applicants' case that they were condemned unheard.

On her part, Chepkemoi Angeline depones that she was not at Nakuru on 3rd June, 2011 when it is alleged she was served with a hearing notice. Around the time, she was undergoing treatment as an outpatient at Kapkatet District Hospital and she did not travel to Nakuru. She exhibits a copy of a note

from the hospital showing that she was attending the mental health clinic at the hospital since April, 2011 to the date of the note – 25th October, 2012.

On his part, Raphael Arap Chekwony depones that he too was not served with a hearing notice on 3/6/2011. He lives at Olenguruone and that is where he was on 3/6/2011. He was never at Nakuru as indicated in the affidavit of service sworn by Nelson Kisoli.

He adds that upon confirmation of grant on 21/92010, the administrators sold tile NO.NAKURU MUNICIPALITY BLOCK 13/321 (BONDENI) to one Elseba Jebichi Mengich. A copy of a sale agreement is annexed.

Later the Respondent herein sued the administrators and the purchaser in Nakuru HCCC No.53 of 2011. A copy of the plaint and defence are annexed.

Both parties did however file written submissions on 5th October, 2015.

In his submissions, counsel for the applicants states states that the applicants' case is that they were not served. He goes on to challenged the service on the following reasons:

> (a) The Affidavit of service is sketchy on the details. It does not state the time that the service was effected. It does not state where, within TITLE NO.NAKURU MUNICIPALITY BLOCK 13/312, the service was effected. It does state exactly where the Applicants were as that is not their home.
>
> (b) The Affidavit does not state that the Process Server actually served the Hearing Notice. Service is effected by the Process Server tendering or delivering a duplicate copy and requiring the person being served to acknowledge on the original copy of the hearing Notice. This was not done in this particular case.
>
> (c) The Affidavit does not state each of the Applicants was served individually. The Process Sever just says *"they obtained copies"* proper service would have entailed the Process Server tendering a copy of the Hearing Notice specifically to each Applicant. This was not done.
>
> (d) The 1st Applicant denies that she was in Nakuru on 3/6/2011, the day the Process Server states that he served her. She says that she was at her home in Olenguruone where she was undergoing treatment. She has produced a Medical Report showing that she was attending Mental Health Clinic at Kapkatet District Hospital.
>
> (e) The 2nd Applicants, in his Affidavit declines that he was served at Nakuru on 3/6/2011. He states that he was not at Nakuru on that day. That he was at Olenguruone.

It is further urged that the applicants sold the subject property to Elseba Jebichi Mengich. The Respondent sued the applicants and 2 others in HCCC No.53 of 2011. That case is still pending the removal of the property from the certificate of confirmation of grant effectively dismantles defence in the civil case.

In her submissions, counsel for the Respondent states inter alia that there are 3 issues for determination viz:

> 1. Was the application served upon the applicants
>
> 2. Has there been inordinate delay in bringing the application.
>
> 3. Does the application merit to be allowed.

On service, counsel submits that both applicants denied being in Nakuru at the time of service but without providing any proof. The applicants have not sought to cross-examine the Process Server to verify the service. The question is posed that it is because the evidence that could have been adduced would be

adverse to them?

It is urged that the applicants appear to suggest that they only recently learnt of the application for the revocation of grant and its hearing. Yet there is an affidavit of service showing serve of the application. No issue of that service is raised. I am urged to find that service was proper. I am referred to the decision in Nairobi HCCC No.722 of 1999 **CFC Bank Ltd**. V. **Charles Arap Tanui.**

It is the Respondent's case that there is inordinate delay in the bringing of this application. The ruling under challenge was delivered on 25th November, 2011. The application to set aside the orders was filed on 18th February, 2014. This is about 2 years, three months after the ruling was made.

It is further noted that despite having been served with the application for revocation of grant, no reply or answer was filed to that application. Indeed todate no application has been made to file a reply out of time. This is five (5) years down the line. The court has no material before it that would enable it weigh whether the application for revocation does really merit being re-opened and heard *inter-partes.*

It is urged that this application lacks merit. There is a pending matter being Nakuru HCCC No.53 of 2011 which gives the applicants a chance to prove ownership of the property.

I have had occasion to consider the application dated 14th February, 2014, the supporting affidavit, the replying affidavit and the learned submissions by counsel.

The principles on which the court 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 case, the issues for determination crystalize into 3 namely:

1. Whether the applicants were duly served with a Hearing Notice in regard to the hearing of the application dated 3/11/2011

2. Whether the applicant's have a defence/response on the merit to that application.

3. Whether there has been inordinate delay in the filing of the present application.

On issue No.1 above, it is the contention by the applicants that they were not served. Of note is that they emphasize that they were not served with the hearing notice on 3/6/2011.

When service is disputed, the normal way of determining the issue would have been for the applicants to call the Process Server for cross-examination on his affidavit of service and the Respondents to have been

cross-examined on his replying affidavit. Unfortunately, no party requested for such cross-examination (See **National Bank of Kenya Limited** V. **Ndzai Katana Jonathan,** Supra).

A further perusal of the record has revealed a strange twist in the matter., Vide an affidavit of service sworn on the 17th February, 2011, Nelson Kisolei depones that his efforts to serve the application dated 3rd February, 2013 were futile as the applicants (then respondents) did not have a permanent home. He states that his visit to Bondeni where the applicants herein resided had revealed that they had shifted to a place known as Kaptembwa. It is then that his futile hunt began. I have painstakingly gone through the record. I have not come across any evidence of the service of the application giving rise to the challenged ruling. What I find are the 2 affidavits by Nelson confirming service of a Notice for Direction and a hearing notice.

On the balance of probability the revelations in the affidavit sworn by Nelson Kisolei on 17th February, 2011 raise doubts as to the service of the application at hand and the hearing notice.

Further, paragraph 3 of the affidavit of service by Nelson Kisolei falls short of the requirement of proper service in proceedings. He states:
"3 THAT on the same day, I proceeded to Bondeni upon being notified by the applicant that the respondents have visited the site, upon arrival I met them at the said property Nakuru Municipality Block No.13/312 and upon explaining the purpose of my visit to them they obtained copies but they declined to sign returned herein as duly served."

A reading of the above statement clearly offends the requirements of **Order 5 rules 15** as the service ought to have been personally on each of the applicants (then respondents). The reference to:

> **".....upon explaining the purpose of visit to "*them*, *they*" obtained copies but they declined to sign...."** (Emphasis mine)

leads to a lot of ambiguity as to how and onto whom the service was effected.

For the above stated reason, It appears to be more probable than not that the applicants herein were not served with the application and the hearing notice. Where there is no service, the judgment or ruling should be set aside as a matter of right.

As this finding resolves the application at hand, I need not delve into issues numbers 2 and 3 listed as the issues for determination.

What then is the way forward in this matter?

I note from the record that the property known as NAKURU MUNICIPALITY BLOCK 13/312 is claimed by two estates viz:

1. The estate of Mary Chemarus where the Applicants herein are the administrators.

2. The estate of Sawe Busienei where the Respondent and one Charles Tanui are the administrators.

The applicants herein transferred the property to one Lucy Chepngetich Yebei upon confirmation of grant to the estate of Mary Chemarus.

That state of affairs elicited a suit by the Respondent herein against the Applicants and 2 others.

The principal prayer in that suit is a declaration that parcel NO. NAKURU/MUNICIPALITY BLOCK 13/312 is the property of the Estate of Sawe Busienei.

There exists two (2) competing proprietary claims in the property in question and that matter should better be left for determination in HCCC NO.53 of 2011.

In any event, the alleged transfer of the property to a 3rd party by the applicants herein has sucked in other parties and the respective rights of all the parties need ventilation in HCCC NO.53 of 2011.

The import of the above is that even though I am inclined to set aside the ruling and orders complained of and in order to avoid a multiplicity of suits and a possibility of conflicting orders, it is only fair and just that any action in this succession cause be stayed awaiting the outcome of HCCC No.53 of 2011.

Since the effect of the setting aside the earlier orders would mean that the property in question reverts to the applicants/administrators as per the earlier confirmed grant, the wider interest of Justice would require that the applicants (administrators) of the estate of Mary Chemarus be restrained from distributing parcel NO.NAKURU/MUNICIPALITY BLOCK 13/312 pending the determination of HCCC NO.53 of 2011.

The plaintiff in HCCC No.53 of 2011 be at liberty to seek conservatory orders in the court trying HCCC No.53 of 2011 as they may deem necessary.

With the result that the ruling of court dated 25th November, 2011 and all consequential orders are hereby set aside, the chamber summons dated 3/2/2011 is hereby stayed pending the outcome in HCCC NO.53 of 2011. In the meantime, the Applicants herein (administrators of the estate of Mary Chemarus) are hereby restrained from distributing parcel NO. NAKURU/MUNICIPALITY BLOCK 13/312 pending the outcome of HCCC No.53 of 2011.

The Respondent herein be at liberty to seek any further conservatory orders as may be necessary in HCCC No.53 of 2011.

Each party to bear its own costs.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 19th day of November, 2015.

A. K. NDUNG'U

JUDGE