



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 488 OF 2007

IN THE MATTER OF THE ESTATE OF MBITHI NZUKI (DECEASED)

RULING

Introduction

1. This is a ruling on an application for reinstatement of a petition for a Grant of Letters of Administration to the Estate of the Deceased herein which was dismissed apparently for want of prosecution under the Justice at Last Initiative of the Judiciary in July 2015. Notice for that purpose entitled **Justice@Last Initiative** Notice dated 23rd June 2015 was given in the following terms:

“TAKE NOTICE THAT the above mentioned matter has been pending in court since its last action on

YOU ARE HEREBY notified to take the necessary steps to have the same fast tracked or else the same will be placed before the Honourable judge between 6th July to 25th July, 2015 for further necessary action/and or dismissal.”

2. The matter came up before Njuguna, J. on the 6th July 2015 when the petitioner did not attend and the learned Judge in a standard form order made the following Order:

“COURT: Notice having been issued to the parties herein under section 73 of the Law of Succession Act and in the absence of any steps taken by the parties to further prosecute this matter, the grant issued herein on the day of is hereby revoked under section 76(d) (i) of the said Act and the matter is marked as closed.”

3. The Petitioner, who was self representing, apparently learnt of the order of the court and made an application for reinstatement of the Petition seeking specific orders on the grounds set out in the application as follows:

“NOTICE OF MOTION DATED 29TH JULY, 2015

ORDERS

1. ***That this Honourable Court be pleased to set aside the order made on 6th July, 2015 Succession Cause No. 488 of 2007 dismissing the Petitioner’s/Applicant’s cause hearing for want of prosecution.***
2. ***That upon grant of prayer I hereinabove this Honourable Court be pleased to reinstate the Petitioner’s/Applicant’s Succession Cause herein for hearing and final disposal.***
3. ***That costs of this application be in cause.***

Grounds

- a. *That the Petitioner's/Applicant's Succession Cause herein was dismissed in between 6th and 25th July for want of prosecution which notice did not specify a particular date to attend court.*
- b. *That failure to take the necessary action to prosecute the Succession Cause herein filed in court on 30th August, 2001 was occasioned by lack of knowledge on the part of the applicant herein.*
- c. *That upon filing of the Succession Cause herein, the Petitioner/Applicant did not know whether it was her duty to take further steps to have the Succession Cause herein be finalized.*
- d. *That if the Petitioner/Applicant was aware of necessary steps and rule requiring of her to take, she could have taken action immediately after the matter was gazetted and obtain a grant.*
- e. *That the Petitioner/Applicant is now eager to and anxious of having her matter herein be concluded and obtain the necessary orders from this Honourable Court.*
- f. *That failing to prosecute the matter herein for lack of knowledge is forgivable and as such the failure was not deliberate.*
- g. *That the end of justice to be met the prayers sought herein ought to be granted."*

Principles for the setting aside of judgments and orders

4. The Court of Appeal for East Africa in *Mbogo v. Shah* (1968) EA 93 approved the test for exercise of discretion to set aside a judgment or order made *ex parte* propounded by Harris J. in *Kimani v. McConnell* (1966) EA 547, 555G that –

"... in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms imposed."

Determination

5. The Court has power to revoke a grant for want of prosecution by failure to seek confirmation of Grant under section 76 (d) (i) of the Law of Succession Act on the ground that-

"that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;"

6. Section 73 authorizes the court to give notice to an administrator to an estate to apply for confirmation thereof in terms as follows:

73. Duty of court to give notice to holder of grant to apply for confirmation

*The court shall within **one year** from the date of any grant of representation, give notice to the holder of the grant to apply for confirmation thereof.*

7. As no grant had been made in this cause, the power of court to issue a notice pursuant to section 73 of the Law of Succession Act did not arise. The Court's power to revoke a grant similarly did not apply. There was no Grant so there could be no revocation of Grant.

8. Moreover, the Notice given under the **Justice at Last Initiative** did not give a specific date when the matter would come up before the court for the petitioner who was unrepresented to attend court and show cause why the petition should not be dismissed. The second part of the Standard form Order format which was to be used where the parties expressed desire to proceed with prosecution of the cause implied a notice of the date of hearing and opportunity to attend court prior to an order for dismissal of the cause or revocation of grant. The part provides:

“Court:

*Notice having been issued to the parties herein under section 73 of the Law of Succession Act and **the parties having expressed a desire to further prosecute this matter** this case is hereby fixed for hearing on*

.....

JUDGE”

As the Notice given herein did not given the specific date when the matter was to come up in Court, the petitioner was denied an opportunity to express her ‘desire to further prosecute this matter.’

9. This is the kind of situation where the setting aside of an order may be made **ex debito justitiae**. See the dictum of Lord Diplock in **Isaacs v. Robertson**, [1984] 3 All E.R. 140 at 143:

*"[T]here is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside **ex debito justitiae** in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts **ex debito justitiae** the right to have it set aside, save that specifically **it includes orders that have been obtained in breach of rules of natural justice.**" [Underlining mine]*

ORDERS

10. For the reasons set out above, the Order of the Court made on 6th July 2015 is set aside. The Petitioner’s Petition herein dated 30th August 2007 will proceed to hearing and determination. As the petition had been published in the Kenya Gazette Notice No. 9289 of 30th August 2007, the next step in the process of the Court, in the absence of any objection filed, is the Grant, which is hereby made, of the Letters of Administration intestate as prayed in the petition. The petitioner, who is now appointed administrator to the Estate of the Deceased herein, will cause an application for confirmation of the grant to be filed upon expiry of the period of six months prescribed under section 71 of the Law of Succession Act. Costs in the Cause.

DATED AND DELIVERED THIS 18TH DAY OF NOVEMBER 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Mbithi Nzuki son to the Petitioner Ms Syomiti Mbithi Nzuki for the Petitioner

N/A for the Respondent

Ms. Doreen- Court Assistant.