

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 1661 of 2011

**IN THE MATTER OF THE ESTATE OF STEPHEN MUCHERU WAWERU alias MUCHERU
WAWERU STEPHEN - DCD**

RULING

The Petitioner in this cause filed an application by Chamber Summons dated 10th November, 2011. She thereby sought an order that the court be pleased to order that all the rent collections relating to Ruiru Township/596 which is registered in the name of the deceased be made, preserved and managed by the Petitioner pending the conclusion of the Succession Cause herein. Alternatively, she prayed for an order that the rent collections relating to the said property be made to an estate managing agent to be appointed by the Petitioner or the court and that the same be deposited in court pending the conclusion of the Succession Cause herein.

When the matter was called out for hearing on 19th November, 2011, Mr. Kinyanjui appeared for the Petitioner/Applicant. However, there was no appearance for the Respondent, either in person or by counsel. An affidavit of service on record shows that P.K. Njoroge & Company, Advocates for the Respondent herein, were duly served on 11th November, 2011 with a copy of summons showing that the matter was coming up for hearing on 19th November, 2011. Since they had been served in sufficient time to attend court, but failed to do so, the court proceeded *ex parte* and thereafter granted the orders in a ruling delivered on 23rd February, 2012. This application now seeks to set aside the said *ex parte* orders.

The grounds advanced for the application leave a lot to be desired. One of the most salient of those grounds is that counsel for the Petitioner in this matter proceeded to get *ex parte* orders without involving the objector's counsel. That is not correct. The Objector's counsel were duly served eight days before the hearing date. How else were they supposed to be involved? The second ground is that the *ex parte* orders were in effect ordering a status quo which had obtained for over ten years, and they were injurious to the Applicant. Whereas that may be so, what else was the court supposed to do when a matter fixed for hearing is called out and one of the parties who has been duly served, fails to attend court? The court's hands were simply tied. The third ground is that the Petitioner has not paid costs awarded to the Objector in a judicial review judgment which amounts are claimed to be over Kshs. 1 Million. With tremendous respect, that was not a licence for the Applicant herein to fail to attend court on the appointed day. At any rate; it has nothing to do with this matter. In sum, I am constrained to observe that no reasonable grounds have been advanced for the setting aside of the *ex parte* orders, and this court would be on firm ground to reject the orders sought.

However, this court has an unfettered discretion to set aside *ex parte* orders and there are no limits or restrictions on the discretion of the judge except that if the orders are varied, it must be on terms that are just. This is a sensitive matter pitting mother against daughter, and revolving round some property which might or might not be part of the estate of the deceased. Whereas, the Petitioner claims that it is part of the estate, her own daughter claims that it belongs to her exclusively as she was the one who sent all the money for its construction. In such circumstances, I would find it fair and proper that the Applicant be accorded an opportunity to prove her claim. If she is not given that chance, and if it is indeed her property, an injustice will have been committed against her, and that would be inequitable.

For those sentiments, the orders made in this matter on 23rd February, 2012 are hereby set aside. Parties to take a fresh hearing date at the registry for the hearing of the application by summons dated 10th November, 2011.

The Applicant, who was the unhappy cause of all this mess, will pay the Petitioner's costs of this application in any event.

DATED and **DELIVERED** at **NAIROBI** this 11th day of October, 2012.

L. NJAGI
JUDGE