REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO. 417 OF 2010

IN THE MATTER OF THE ESATE OF DAUDI OWUOR AWUOR.....DECEASAED

AND

IN THE MATTER OF AN APPLICATION BY: JAMES OBANDE OWUOR.....APPLICANT

RULING

The petitioner has approached the seat of justice by way of an application dated 5th day of October 2009. It is brought by way of Notice of Motion under Order IXB Rules 5 and 8 of the Civil Procedure Rules, Section 3 A of the Civil Procedure Act Rule 73 of the Probate and Administration Rules. It seeks two (2) reliefs:-

(1) That the Court do set aside the proceeding and its Order of the 15th day of October 2008 and the Order dated 23rd January 2009.

(2) That costs be provided for.

The grounds in support are set out in the body of the application and the supporting affidavit and in a summary form, these are that:-

(i) The applicant had counsel on record who had conduct of this matter.

(ii) The said counsel suffered a crippling stroke and was unable to do duties in his office as per

the content of the affidavit deponed by the said advocate annexture JOO1 together with medical documents showing that he was admitted on 6th August 2008 and discharged on 15th August 2008.

(iii) Further that the sickness not withstanding his office was never served with the hearing notice.

(iv) That the petitioner himself did not attend the hearing because he had been advised by his advocate, then on record not to attend court because his advocate then on record had advised him that his attendance in court would not be necessary.

(v) That upon learning of the sickness of his former advocate and that advocate inability to attend court ,him applicant went ahead to hire another advocate who agreed to attend court and did in fact engage the service of another lawyer who agreed to attend court and seek an adjournment but he had a mechanical breakdown on the way to court as per the content of this other advocates affidavit annexture JOO2.

(vi) That on this occasion too, the said advocate had also advised the applicant not to attend court.

(vii) That by reason of matters afore said, the applicant has made out a case to warrant him being granted the relief sought.

(viii) That the objector will not suffer any prejudice.

The Respondent to the application filed grounds of opposition dated 30th day of October 2009, and in a summary form these are that:-

- **The application was filed by the firm of M/s K'owinoh & Advocates who were not advocates on the record for the applicant on the one hand, and on the other hand they have not sought leave to come on record for the applicant in accordance with the provision of Order III Rule 9 A of the Civil Procedure Rules.**

- **The courts jurisdiction under Order IXB Civil Procedure Rules is ousted by the provisions of Rule 63 of the Probate and Administration Rules.**

- **The delay in bringing the application is inordinate and unexplained and inexcusable.**

- **The application is an abuse of the court process and it is intended to create a legal morass, elevate expenses frustrate and deny the plaintiff the fruits of a deserved judgment.**

- **Contends that the defendant and his advocates have all along been aware of the hearing dates.**

- **The best recourse for the applicant is to seek indemnity from his counsels.**

The applicant puts in a further supporting affidavit deponed on the 13th day of April 2010. Vide paragraphs 3, 4, 5, 6, 7, 8, 9 10, 11, 12, 13 and 14. That he takes issue with the Return of Service filed which to him is a forgery and that is a criminal offence has been committed as a result and for this reason he would be happy if the matter was handled by any other person other than a judge from Kisumu. Parties elected to file written skeleton submissions. Those for the applicant petitioner are dated 8th day of June 2011, and filed on the 9th day of June 2011. The following have been highlighted.

- **The court is urged to set aside the said orders because the matter proceeded exparte without proper notice to the applicant.**

- **That a party should not be condemned unheard.**

- **That the advocate who appeared and argued the matter for the respondent was not properly on record.**

- **That the afore said matter, notwithstanding the grounds put forward by them are sufficient and they warrant the issuance of the relief sought as the failure to attend court on the part of the applicant and his counsel was not deliberate.**

The respondents' submissions are filed on the 20th June 2011 and the following have been high lighted:-

- **Maintains the advocate who filed the application had not properly come on the record and for this reason the application is an abuse of the due process of the court.**

- **Contends that on the basis of their own deponement, the applicant and his advocate were aware of the hearing dates.**

- **Allegations that counsel who was to attend court had a breakdown in route to Kisumu does not hold because the alleged advocate a Mr. Makokha has never been an advocate for the applicant**

- **There has been no explanation of how the applicant got to know about the judgment of 23rd January 2009.**

- **The fore going not withstanding, the applicant is under serving of this court's discretion because he has been frustrating the progression of the matter to finalization and has so far changed lawyers atleast eight to nine (8-9) times all aimed at derailing the cause of justice.**

- **No explanation has been given as to why the application for setting aside was filed nearly a year after the entry of the judgment.**

- **The court is invited to hold that setting aside of the exparte judgment will not assist the applicant because he had deponed in his affidavit in support of the petition that he was the only surviving relative and a nephew a matter he knew was false. The Respondent filed objection to issuance of the said grant and sought its revocation arguing that him Respondent was the son of the deceased along one Carolyne Achieng a daughter Enock Onyuro son, John Odhiambo a son, Daniel Ouko Opondo a brother and Rhoda Ochieng mother, facts which the applicant had not objected to or filed a response to controvert and for this reason the applicant has no cause of action and hence the reopening of the matter will not serve any useful purposes.**

On case law the court was referred to the case of **Shah =vs= Mbogo & Another [1967]EA 116** where it was held inter alia that:- **"The court's discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident in advertence or excusable mistake or error, but not to assist a person who has deliberately sought whether by evascan or otherwise to obstruct or delay the cause of justice……"**

The case of **Girado =vs= Alarn & Sons (U) Ltd [1971] EA 448** where it was held inter alia that:-

(i) Sufficient reason for non appearance at the hearing had not been shown.

(ii) Nevertheless that there will be no injustice to the applicant. The judgment could be set aside in the exercise of the courts inherent jurisdiction

This court has given due consideration to the rival arguments herein and in its opinion the following do not appear to be in dispute:-

(1) That the applicant is the one who moved to this court to initiate the proceedings by way of a petition for letters of Administration to the estate of the deceased subject of these proceedings.

(2) That in the said proceedings, he had described himself as a nephew and only known surviving relative of the deceased and was indeed granted a grant of representation on that account.

(3) That the Respondent became aggrieved on learning of the said issuance of said grant, moved to this court and filed an application for revocation claiming to be a true son of the deceased subject of these proceedings, and went ahead to name other siblings of both gender and a mother as the true dependants of the deceased

(4) The court has been in formed that the applicant herein did not put in a deponement to controven those facts.

(5) That the record bears witness that the matter has been adjourned ,on numerous occasions on account of the applicants failure to attend court or changing advocates without a view to delay the hearing of the matter.

(6) That on the date leading to the exparte hearing both the applicant and his counsel then on record were aware of the hearing date but chose not to attend court and the court being satisfied that they had due notice allowed the Respondent to proceed and thereafter judgment was entered.

(7) That it is nearly after almost a year later that the applicant filed the application subject of this Ruling.

(8) That the stand of the Respondent is that the application is incompetent by reason of it having been presented under provision of law not applicable on the one hand and on the other hand that it was filed by counsel who had not placed himself properly on the record and thirdly, that even if this court were to find that the same has been procedurally placed on the record, then it has no merits and is undeserving of the courts exercise of discretion for the relief of setting aside.

(9) Whereas the stand of the applicant is that he is within the rules and on the basis of the fact s he is deserving of this court's discretion and that the same should be exercised in his favour.

From the arguments herein, it is clear that issue had been raised about the procedurality of the application having been filed by Mr. K'owinoh but this court's perusal of the record has traced an application dated 3rd June 2009, whereby the said Mr. K'owinoh was seeking leave of court to come on to the record in the place of Mr. Clifus Oyoo and Airo Advocates. It is noted that a consent letter was filed between the participating counsel and endorsed by the Deputy Registrar on the 22nd September 2009. It is after that, that the application subject of this Ruling was filed on 5th October 2009. It therefore follows that the application is procedurally placed before this court and the court is entitled to make a pronouncement on the same on its own merit.

The yard stick that the court is to apply when considering the merits is that it is within the courts discretion. This court has judicial notice of case law on the exercise of the courts discretion which are that:-

(a) The exercise of the said discretion is unfettered

(b) The only fetter on the exercise of the said discretion is that it has to be exercised judiciously, not capriciously but with a reason.

Applying that to the rival arguments herein, it has to be demonstrated that there is an issue which the applicant seeks to be reheard or argue in the interest of justice. A perusal of the supporting affidavit inclusive of the further supporting affidavit as well as the grounds only complain of him having not been granted an opportunity to be heard. There is no mention that his proprietary rights have been infringed in any way in the wake of assertion by the respondent that rightful dependants are the ones who have been given a judgment on the basis of information which the applicant had not controverted, reopening of the matter will not aid the ends of justice herein as it has not been demonstrated that the applicant has a superior claim or right of inheritance crystallized by the judgment on the Respondent and his grounds and other siblings.
Lastly, the applicants is silent as to when he learned of the delivery of the judgment and why he moved the court almost a year later and after he had in fact filed a notice of appeal. In the absence of explanation on these two grounds the exercise of the court's discretion in favour of the applicant is not available to the applicant.

For the reason given in the assessment, the applicant's application dated 5th October 2009 and filed on the same date is dismissed on the grounds that:-

(1) The applicant has not stated what issues he wishes to raise if the matter is reopened for him considering that he failed to controvert the respondent's deponements that it is him Respondent and his siblings of both gender and their mother who are the rightful beneficiaries of the estate of the deceased which assertion has been crystallized by the judgment sought to be set aside.

(2) There has been no demonstration that him the applicant intents to assert a superior right of inheritance superior to that of the Respondents and his mother and siblings of both gender.

(3) There has been no explanation given as to why he took almost a year to seek setting aside.

(4) The respondent will have costs of the application.

Dated, signed and delivered at Kisumu this 23rd day of September 2011.

R. N. NAMBUYE

JUDGE

RNN/aao