



**In re Estate of Manoh Kisame Aradi (Deceased) (Succession Cause 422 of 2006) [2025] KEHC 17 (KLR) (10 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 17 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 422 OF 2006  
SM MOHOCHI, J  
JANUARY 10, 2025**

**IN THE MATTER OF THE ESTATE OF MANOAH KISAME ARADI (DECEASED)**

**BETWEEN**

**ELPHAS ABASI NDUSU ..... APPLICANT**

**AND**

**BRIAN MUSANGA ARADI ..... 1<sup>ST</sup> RESPONDENT**

**HEBISIBAH MORAA ONDIEKI ..... 2<sup>ND</sup> RESPONDENT**

**MARY IRENE ATIENO ..... 3<sup>RD</sup> RESPONDENT**

**STEVE BIKO ARADI ..... 4<sup>TH</sup> RESPONDENT**

**CHARLES CHAYA ARADI ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. What is before Court for determination is a Notice of Motion dated 15<sup>th</sup> April, 2024 brought under Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#), Cap 21, Order 10 rule 11 of the [Civil Procedure Rules](#).
  1. Spent....
  2. Spent...
  3. That this Honourable Court be pleased to set-aside the said Ruling delivered by Hon. Justice Mohochi S.M on 30<sup>th</sup> January, 2024.
  4. That this Honourable Court be pleased to grant the Applicant/Interested Party leave to file his response and other documents to the Summons for Revocation of Grant of Letters of Administration dated 9<sup>th</sup> January, 2023.



5. That the costs of this application be provided for.
2. The Application is predicated on the following grounds and supported by the sworn Affidavit of Elphas Abasi Ndusu filed on the even date. That:
  - a. The Objector/Applicant herein filed Summons for Revocation of Grant of Letters of Administration dated 9th January, 2023 and supported by the sworn affidavit of Brian Musanga Aradi filed on 27th January, 2023.
  - b. The application was heard and subsequently a Ruling was delivered by Hon. Justice Mohochi S.M on 30th January, 2024. declaring the transfer of title number Isukha/Lubao/1024 effected on 28th November, 2012 to the Applicant/ Interested Party and the subsequent issuance of the title deed null and void, and the title so issued cancelled.
  - c. Despite the subject property being lawfully transferred to the Applicant/Interested Party by the Administrators of the Estate of the deceased on 28<sup>th</sup> November, 2012 thus being central to the suit the Objector/Applicant deliberately failed, ignored and or refused to serve the Applicant/Interested party with pleadings and, therefore, could not defend the suit. The Applicant/Interested party has been directly and adversely affected by the said Ruling hence the instant application.
  - d. The administrators of the estate of the deceased had full capacity under the law to execute the transfer of title Number Isukha/Lubao/1024 to the Applicant/Interested party.
  - e. His rights to be heard enshrined in the Constitution under Article 50 (1) continue to been infringed.
  - f. The Applicant has a good defence with triable issues both relating to law and facts and as such the suit should be determined on its merits.
  - g. It is in the interest of justice that the Applicant be given opportunity to be heard.
  - h. Unless this Court issues the orders sought as a matter of urgency, the Applicant will be greatly prejudiced hence this Application.
  - i. In his affidavit the Applicant depones of not having been served with the summons for revocation of grant dated 9<sup>th</sup> January 2023 as a basis of his Application.
3. The Court had on the 24<sup>th</sup> April 2024 directed that the Application shall be canvassed heard and determined on the basis of filed written submissions and by the 11<sup>th</sup> July 2024 Mr Onsongo for the Administrator had Complied filing a replying Affidavit and written submissions all evenly dated 19<sup>th</sup> April 2024, Mr Nyamumbo for the 5<sup>th</sup> Respondent confirmed filing their response on the 4<sup>th</sup> June 2024, Mr Milgo for the Applicant sought a further 3 days to file his written submissions, Mr Koome for the 2<sup>nd</sup> Respondent sought leave to file a further affidavit. The Court proceeded to reserve a ruling date.
4. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents elected not to file any pleadings despite Ms Obuya attending Court on the 14<sup>th</sup> November and 18<sup>th</sup> December 2024 dates scheduled for this ruling when the Court was not ready.
5. This Court further notes that since 30<sup>th</sup> January 2024 the 4<sup>th</sup> Respondent has since filed a Petition before the Judicial Service Commission against myself, alleging gross misconduct, compromise and partiality which I intend to attend to after this ruling.



## The Applicants Case

6. Revolves around the assertion of having not been served with the summons for revocation of grant to enable him participate and raise “triable issues”.
7. The Applicant submits that, his rights to be heard enshrined in the Constitution under Article 50 (1) have been infringed. Therefore, it is in the interest of justice that he be given an opportunity to be heard.
8. That Courts have held that, Orders made without hearing a party must be set aside ex debito Justitiae. He insists that he has a good defence with triable issues both relating to law and facts as such the suit should be determined on merit.
9. The Applicant has framed three (3) issues for the determination of the case namely;
  - a. Whether the judgment should be set aside;
  - b. Whether leave to file defence should be granted:

### a. Whether the judgment should be set aside;

10. It is submitted that this Court has the requisite Jurisdiction to grant the Orders sought under Section 47 of the Succession Act, Cap 160, which provides that;

“The High Court shall have jurisdiction to entertain any Application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”
11. Further Rule 73 of the Probate and Administration Rules provides a further cushion to the Court to expeditiously deal with its proceedings and the said rules provides that;

“Nothing in these rules shall limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”
12. Reliance is placed on the case of *Shah v Mbogo and another* [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid Injustice or hardship resulting from accident, Inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
13. The Applicant further urges the Court to exercise the discretion judiciously and be guided by the case of *James Kanylita Nderitu & another* (2016) eKLR, where the Court of Appeal stated thus:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the Court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the Court has unfettered discretion in determining whether or not to set aside default judgment, and will take into



account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See *Mbogo & another v Shah* (1968) EA 98, *Patel v E.A. Cargo Handling services Ltd* (1975) E.A. 75, *Chemwolo & another v Kubende* (1986) KLR 492 and *CMC Holdings v Nzioka* [2004] KLR 173.

14. It is submitted that, in an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justiae*, as a matter of right. The Court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the Court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."
15. The Applicant urges this Court to Set-aside the referenced Ruling on account of the 1<sup>st</sup> Respondent's deliberate failure to serve upon the Applicant herein with the Court pleadings to enable him file his Defence, to protect his interests. As a result of the 1<sup>st</sup> Respondent's failure to serve the Applicant with Court Pleadings and Notices his property might be unprocedurally, illegally and irregularly transferred to a 3<sup>rd</sup> Party.
16. It is further submitted that the Applicant has been condemned unheard contrary to the mandatory provisions of the Constitution of Kenya under Article 50 and that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.

#### **Administrator/1<sup>st</sup> Respondent's Case**

17. The Administrator/1<sup>st</sup> Respondent has opposed the application by way of a Replying Affidavit sworn on 19<sup>th</sup> April, 2024 by Richard Onsongo Advocate exhibiting (screen shot of WhatsApp message, text message from Safaricom for Kshs 10 sent to the Applicant and a Certificate of Official Search dated 21<sup>st</sup> March 2024 on LR No Isukha/Lubao/1024)
18. The Administrator/1<sup>st</sup> Respondent has set-out how he went about the entire matter, that upon establishing that LR No Isukha/Lubao/1024 was registered in the name of the Applicant/Interested Party, he sought for and obtained the telephone number which that was registered in the name of the Interested Party and he was given telephone number 0722 674 812 and that to confirm and establish that it was indeed so registered, he sent a sum of Kshs 10.00/- which returned a message confirming the registration.
19. That upon confirmation that the said telephone number was registered in the name of the Applicant/Interested Party, the Administrator/1<sup>st</sup> Respondent sent the Summons for Revocation of Grant, the Supporting Affidavit and copies of the documents attached thereto (29 pages in total) through WhatsApp and which documents were received and read by the Applicant/Interested Party as evidenced by the two blue ticks.



20. The Administrator/1<sup>st</sup> Respondent contends that service was effected upon the Applicant on 29<sup>th</sup> May, 2023 in line with the provisions of Order 5 Rule 22 of the *Civil Procedure Rules*.
21. That as at 19<sup>th</sup> April 2024, telephone number 0722XXXXXX was still registered in the name of the Applicant/Interested Party as per the text confirming receipt of Kshs 10.00 sent on the same day.
22. It is the Administrator/1<sup>st</sup> Respondent's considered view, that the issues for determination are; -
- a. Was the Interested Party/Applicant served with the Summons for Revocation of Grant of Letters of Administration?
  - b. What is the scope of the right to be heard?
  - c. Does this Court have the jurisdiction to entertain, hear and determine a dispute over proprietary rights on a parcel of land?
  - d. Has the Interested Party/Applicant made out a case warranting the grant of the orders sought for?
  - e. Who bears the costs of this application?
23. The Administrator/1<sup>st</sup> Respondent contends that there was service through electronic means which is now provided for under Rule 5 of the *Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic*, Gazette Notice No 3137 of 2021 which provides that:
- “During this period, parties are directed, whenever possible and unless otherwise directed by the Court, to serve Court documents and processes through electronic mail services and mobile enabled messaging applications as provided for under Order 5 Rules 228 and 22C of the Civil Procedure Rules ”
24. That. Rule 5 should be read with the applicable Rule in the *Civil Procedure Rules*, 2020. Order 5 Rule 22B of the Rules as follows;
- “Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
- (a) Service shall be deemed to have been effected when the Sender receives a delivery receipt”.
  - (b) Summons shall be deemed to have been served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
  - (c) An officer of the Court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.
25. The Administrator/1<sup>st</sup> Respondent submits that, Service of the Summons for Revocation of a Grant of Letters of Administration dated 9<sup>th</sup> January, 2023 upon the Applicant/Interested Party was effected by an Advocate of the High Court (Richard Onsongo) an officer duly authorized by the Court through. "... mobile enabled messaging applications..." which is WhatsApp application.



26. That there was proper service and the Applicant/Interested Party duly acknowledged receipt of the documents so served and read the same, It-behooved him to respond to the Summons by himself or through a duly appointed agent/advocate. He elected to do nothing. He cannot be heard to complain.
27. That it is a fundamental principle that a party to a litigation should be allowed to present his or her case in a public hearing under Article 50 (1) of the Constitution in an effective manner. This right is an expression of the audi alteram partem principle and part and parcel of the right to a fair trial. "In *Rex v Deferral* 1937 AD 370 and 373, the Court observed that the audi alteram partem principles literary means:
- “hear the other side’. This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity of expressing their views. The audi alteram partem principle is followed in judicial proceedings, in our country, along with the rights such as legal representation, the right to adduce and challenge evidence in cross examination and the right to present ones evidence to the dispute or claim” ..
28. Reliance is placed on the case of *Union Insurance Co. of Kenya Ltd. v Ramzan Abdul Dhanji* Civil Application No Na. 179 of 1998 where the Court of Appeal held:
- “Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the Court, the Court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the Court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”
29. That, from the foregoing, it is crystal clear that the Interested Party/Applicant was served with the Summons for Revocation of Grant, he was notified of it, he was accorded a chance to be heard and he elected not to attend Court to be heard. He is the author of his position. Neither the Court nor the Objector/Respondent could force the Interested Party/Applicant to attend Court.
30. Reliance is placed on the case of *Shah v Mbogo & another* (1967) EA 470 the Court of Appeal for Eastern African held: -
- “applying the principle that the Court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.”
31. That parties who approach the seat of justice ought to base their applications on facts which they believe are true. A party who sets out to twist the facts the way the Interested Part/Applicant has done herein is clearly contemptuous of the Court.



32. Reference is made to the case of *John Kiraga Mwangi v Ndegwa Waigwa* Civil Application No, Nai. 179 of 2000, the Court refused an application for extension of time and held that;
- “I am not satisfied that the application before me is made bona fide. Delay (simple inaction) is sought to be explained away by contrived grounds...”
33. The Applicant has sought to contrive the grounds on which they are seeking an extension of time. They do not deserve the exercise of the Court's discretion in their favour.
34. That, the Applicant has been economical with the truth bringing to the fore the lamentations bemoaning of Madan, J (as he then was) in *N v N* [1991] KLR 685 when he expressed himself in the following terms:
- “I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in Court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.”
35. That, a party who deliberately seeks to mislead in an attempt to explain away a delay deserves no equitable relief. Administrator/1<sup>st</sup> Respondent submit that the Applicants have sought to explain away a default by contrived grounds is not made bona fide. It is settled law that favourable orders cannot be sought and obtained on the basis of an affidavit that is less than candid and is meant to mislead. In that event, the application would be refused since default ought not to be explained away by contrived grounds.
36. The Applicant is engaged in a course of abuse of the Court process. The application is founded on untruths, falsehoods and contrived facts. Reliance is placed on the case of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No 25 of 2002 (2009) KLR 229, the Court of Appeal stated as follows; -
- “The term abuse of Court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive.”
37. That it is clear that as at the time of lodging his application, the said parcel of land had been transferred back into the name of the deceased, Manoah Kisame Aradi. Secondly, the Interested Party/Applicant has not demonstrated that the said parcel of land was lawfully, regularly and procedurally transferred from the name of the deceased to himself. He has not demonstrated that the parcel of land was the subject of the process of transmission, that transfer dorms were executed by all the Administrators working as a unit, that there is evidence of an agreement of sale in line with the requirements of Section 3 of the *Law of Contract Act* (Cap 23) and Section 38 of the *Land Act* (Cap 280) and that consideration was paid and passed.
38. That the evidence and assertions made in support of the Administrator previous Application and current pleadings have not been controverted and thus remain unchallenged.
39. It is thus submitted that the Application dated 15<sup>th</sup> April 2024 is without merit and that the same should be dismissed with costs.



## 2<sup>nd</sup> Respondent's Case

40. The 2<sup>nd</sup> Respondent in her brief submissions titled (Applicant Submissions) opposes the Application contending that the Applicant was duly served by the 1<sup>st</sup> Respondent, the subject matter land belonged to the deceased and that the Applicant never acquired any proprietary interest. That he has not controverted the evidence of service presented, he has not disputed being the registered owner of telephone number 0722XXXXXX which number was used in effecting the service.
41. That the Applicant has not satisfied the conditions for grant of the prayers sought.
42. She thus prays for the Dismissal of the Application.

## 5<sup>th</sup> Respondent's Case

43. In his sworn affidavit dated 4<sup>th</sup> June 2024 Charles Chahya Aradi opposes the Application contending that, the Application lacks merit as the Land in question belonged to the deceased and had been irregularly transferred to the Applicant and that as at now this is water under the bridge as the title has since refermented back to the name of the deceased.
44. That the Applicant has deliberately moved Court late in the day without any valid justification for the delay.
45. He prays that the Application be dismissed.

## Analysis and Determination

46. Having considered the pleadings in support of the Application and those in opposition, whether in the circumstances of this case the Applicant has made a case warranting grant of the prayers sought, the first issue for determination is whether the judgement in question is regular or an irregular one.
47. The Court of Appeal in *Bouchard International (Services) Ltd v M'mwereria* [1987] KLR 193 held that:

“The basis of approach in Kenya to the exercise of the discretion to be employed or rejected under either Rule 8 or Rule 10 (the latter dealing with judgement by default) is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside *ex debito justitiae*. If service of notice of hearing or summons to enter appearance has been served, then the Court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The Court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

48. The Court added that:

“A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular



judgement would not usually be set aside unless the Court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the Court has pronounced a judgement upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure.”

49. While it is appreciated that the decision to set aside ruling is an exercise of discretion, the Court of Appeal in the above matter held that:

“It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the Judge had jurisdiction and had all the facts before him the Court of Appeal cannot review his order, unless he has shown to have applied wrong principle. The Court must, if necessary, examine anew the relevant facts and circumstances, in order to exercise by way of review a discretion, which may reverse or vary the order. Otherwise in interlocutory matters, the Judge might be regarded as independent of supervision. Yet an interlocutory order of the Judge may often be of decisive importance on the final issue of the case, and may be one, which requires a careful examination by the Court of Appeal.”

50. What comes out clearly is that where a ruling irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the Court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise.

51. However, even where the ruling is regular, the Court still retains the wide discretion to set the same aside though if the Court decides to set aside the ruling, depending on the circumstances, it may do so on conditions that are just.

52. In the case of *Mbogo v Shah* [1968] EA 93, at page 95, Sir Charles Newbold P expressly approved Harris J’s test of the principles it was necessary to consider in the exercise of the judicial discretion as to whether to set aside a judgment or not, as follows:

“Whether ... 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 to be imposed.”

53. In this instance the Applicant was expected to demonstrate want of service as a basis of proving irregularity if the ruling, he was then expected to satisfy the conditions to set aside the ruling, with the 1<sup>st</sup> Respondents proof of service in the Affidavit by Richard Onsongo Advocate, the burden of proof was shifted back to the applicant to either denounce and controvert the same, the evidence of service by the 1<sup>st</sup> Respondent thus remains unshaken.

54. It is equally instructive that the Applicant was expected to showcase and demonstrate acts/omissions of negligence and misconduct on the part of the 1<sup>st</sup> Respondent, which he has failed.

55. This Court is thus unpersuaded that the Applicant was never served to enable him to participate, in fact the 1<sup>st</sup> Respondent had proactively included the Applicant as an interested party to enable his participation.



56. Finally this Court as a Succession Court is constantly alive to its role in protecting the interests of the deceased person and in this instance the Applicant had a duty to elaborate his involvement either in the succession or the impugned transfer and registration LR No Isukha/Lubao/1024 on the 28<sup>th</sup> November 2012 during pendency of the proceedings and notwithstanding his contention that the transfer in his favour was lawfully conducted by administrators authorized in law, he maintains a stealth silence as to whether the same was in a sale transaction and at what consideration? His silence on his actual interest is palpable.

57. It is for that reason, that I find the Application dated 15<sup>th</sup> April 2024 to be without merit. I thus make the following orders;

- a. That the Application dated 15<sup>th</sup> April 2024 is dismissed for want of merit.
- b. That Costs of this Application are awarded to the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents.

It is so ordered.

**SIGNED DATED AND DELIVERED AT NAKURU THIS 10<sup>TH</sup> DAY OF JANUARY, 2025.**

.....

**MOHOCHI S.M.**

**JUDGE OF THE HIGH COURT**

