



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Onkware Maosa (Deceased) (Succession Cause
66 of 2007) [2025] KEHC 3449 (KLR) (11 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
SUCCESSION CAUSE 66 OF 2007**

TA ODERA, J

MARCH 11, 2025

IN THE MATTER OF THE ESTATE OF THE LATE ONKWARE MAOSA – DECEASED

BETWEEN

JOSEPH NYANGARESI OMOA PETITIONER

AND

WILKISTER BWARI ONGUBO 1ST OBJECTOR

ZACHARIA ONSONGO MOSETI 2ND OBJECTOR

JOSEPH NYAMBOGA 3RD OBJECTOR

RULING

1. On 7.3.19 the summons for revocation of grant date 2.7.09 case came up for hearing and Mr. Sagwe who was holding brief for Mr. Masese for the Objector sought to withdraw the said summons. The same was allowed with costs and the file closed.
2. On 23.2.2020 Wilkister Bwari Ongubo and Zakaria Onsongo Moseti the objectors herein filed the notice of motion dated 21.2.22 seeking to set aside the orders made on 7.3.19 and all the consequential orders. The same is based on the grounds that the application was withdrawn under a fraudulent scheme without instructions of the applicant and that it raised triable issues and unless the same is reinstated the applicants will suffer miscarriage of justice and that it is in the interest of justice that the application be allowed.
3. The application is based on the annexed affidavit of Zakaria Onsongo Moseti who told this court that they filed objection proceedings on 2.7.19 and instructed Mr. Masese advocate to prosecute the application. Further that the application was withdrawn without their consent or knowledge and they were slapped with costs in the sum of Kshs. 250,000/= . Also, that the advocate started avoiding them



and stopped attending court and hence they appointed the instant advocate to act for them herein. He deponed that they paid the costs and they are now desirous of having the application reinstated.

4. The respondents opposed the application vide the replying affidavit of Joseph Nyangeresi Omosa who termed the application as misconceived, incompetent, vexatious, frivolous, abuse of the process of the court and bad in law. Also, that his counsel had advised him that the court lacked jurisdiction to deal with the matter as the application has been brought under the wrong provisions of law. Also, that the allegations in the application are false and baseless, that the order sought to be reviewed is not annexed to the application, the application is an afterthought and is meant to avoid payment of costs. Also, that the allegations of fraud are malicious as no particulars of the same have been stated.
5. The respondents faulted the applicants for bringing the application under the wrong provisions of law. The application was brought under Section 47 of the *Law of Succession Act*. Section 47 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.

It is clear that the application is within the law.

On whether mistake of counsel should be visited upon a litigant. The applicant said;

Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others
[2015] KECA 674 (KLR)

In the case of *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] KECA 799 (KLR) the Court of appeal held that;

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

And in *Mbaki & others v Macharia & another* (2005) 2 EA 206, at page 210, this Court stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

I find merit in the application and I proceed to allow it as prayed.

T.A ODERA

JUDGE

11.3.25

11.3.25

Coram: T.A Odera - Judge

Court Assistant - Oigo

Ombachi for Petitioner

Mochiemo Gichana - Absent

Ombachi: We seek that the application dated 2.7.2009 be listed for directions. The objector fully testified and hence the consent for withdrawal.



Order:

1. Application 8.5.24 & 2.7.2009 be mentioned on 15.5.15
2. Proceedings be typed.
3. No further application be filed without leave of this court.

T.A ODERA

JUDGE

11.3.25

