



In re Estate of Sale Ali Chibore alias Salleh Ali Chibole (Deceased) (Succession Cause 745 of 2009 & 532 of 2011 (Consolidated)) [2025] KEHC 4448 (KLR) (2 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4448 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 745 OF 2009 & 532 OF 2011 (CONSOLIDATED)**

AC BETT, J

APRIL 2, 2025

**IN THE MATTER OF THE ESTATE OF SALE ALI
CHIBORE ALIAS SALEH ALI CHIBOLE (DECEASED)**

BETWEEN

ZUHURA SECHERE SWALE PETITIONER

AND

ALI MASIGA SALEH 1ST ADMINISTRATOR

ABDUL MWATURU SALEH 2ND ADMINISTRATOR

ZAMUZAMU SALEH 3RD ADMINISTRATOR

RULING

1. By a Notice of Motion dated 12th November 2024, the Interested Parties Ali Masiga Saleh, Abdul Mwaturu Saleh and Zamuzamu Saleh who are beneficiaries of the estate of the above-named deceased made an application seeking to be appointed as co-administrators alongside the Petitioner. They also prayed for orders restraining the Petitioner from intermeddling with the property of the deceased.
2. The application was premised on the grounds that it was more than two (2) years since Grant of Letters of Administration Intestate were issued yet the Petitioner had not taken any steps to have it confirmed. Moreover, the Applicants feared that the Petitioner was leasing out the property of the deceased to strangers hence denying the rightful beneficiaries of the deceased their enjoyment of the estate.
3. Despite being served, the Petitioner did not file any response.
4. When the matter came up for hearing of the application, I perused the file and established that on 13th July 2015, the court made an order closing the file under Rule 73 of the Probate and Administration Rules.



5. On 28th April, 2022, a fresh Grant of Letters of Administration was issued to the Petitioner. The Petitioner/Applicant did not take any step towards having the Grant confirmed since then. In view of the uncontroverted averments by the Applicants, I annulled the said Grant and issued a fresh Grant to the Applicants herein.
6. Through an application dated 21st November 2024, the Petitioner sought orders to set aside the orders made by the court on 20th November 2024 on the grounds that her Advocate was not served and that she became aware of the orders after they had been issued.
7. The gravamen of the Petitioner's application is that it was irregular for the Applicants to serve her when she had an Advocate on record. She deponed that she was served late on 12th April 2024 and handed over the application to her nephew with instructions that he forwards them to her Advocate who received it on 20th November 2024.
8. The application was canvassed through written submissions.
9. I have considered the parties' rival submissions. The Petitioner prays that the court exercises its discretion to set aside an order that was made after she had been served. The service was regular. The Petitioner did not contest service. She only claimed that her Advocate on record ought to have been served. This is a strange allegation from a party who has not filed any documents in the file since 28th April 2022. More so since on the date the Grant was issued to her, she had been granted thirty (30) days to file and serve Summons for Confirmation of Grant.
10. It is clear from the record that the Petitioner did not act diligently in her capacity as the administrator of the estate of the deceased. Moreover, she is accused of leasing out a portion of the estate of the deceased to the detriment of the other beneficiaries.
11. Having acted indolently in her role as administrator, the Petitioner is not deserving of this court's discretion. By her conduct, she is not keen on having the estate distributed as she did not comply with the orders of the court that directed her to file and serve the Summons for Confirmation of Grant within 30 days.
12. Whereas the court has an unfettered discretion to set aside ex parte orders, it has been held that the same ought to be exercised judiciously. In the case of *Pithon Waweru Maina v. Thuka Mugiria* [1983] KLR, the Court of Appeal held as follows:-

“2. The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:

- a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E.
- b) Secondly, this 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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo* [1967] EA



13. The Petitioner has not demonstrated what injustice she will suffer by the court not granting her the orders sought. Conversely, the Applicants have averred that the Petitioner has not come to court with clean hands and has blatantly abused her position as administrator to lease out land for commercial purposes and solely benefited from the lease.
14. That being said, I find that the Petitioner shall not suffer any prejudice as a result of her being removed from being an Administrator. Her interests as a beneficiary are intact, and in any event, she can file a protest in the event she will be dissatisfied with the Applicant’s proposed mode of distribution.
15. In the end, I dismiss the Petitioner’s application and direct that the Administrators do file and serve Summons for Confirmation of Grant upon her within sixty (60) days from today failure to which the Grant issued to them shall stand revoked.
16. Those are the orders of the Court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 2ND DAY OF APRIL 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. Mondia for Petitioner/Applicant

2nd Respondent/Administrator present in person

Court Assistant: Polycap

