



REPUBLIC OF KENYA



**In re Estate of Moses Nzai Nathaniel (Deceased) (Succession Cause
14 of 2020) [2025] KEHC 11389 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 14 OF 2020**

G MUTAI, J

JULY 23, 2025

IN THE MATTER OF THE ESTATE OF MOSES NZAI NATHANIEL (DECEASED)

BETWEEN

NATHANIEL FURAHA MOSES 1ST APPLICANT

FARAH JOEL MOSES 2ND APPLICANT

SHIDA MOSES 3RD APPLICANT

AND

ALICE MBODZE DZUYA 1ST RESPONDENT

DORA DZUYA MALOLI 2ND RESPONDENT

RULING

1. The application before the court is the Notice of Motion dated 6th March 2025. Vide the said application, the respondents/applicants seek to have the orders issued on 13th February 2025 by this court set aside and or varied, on the grounds that they were not served by the applicants/respondents with the summons and the hearing notice, and that they were condemned unheard, as the grant that had been issued to them was revoked in their absence and without their being heard, even though the same had been issued lawfully and procedurally.
2. The application is supported by the affidavit of Alice Mbodze Dzuya, sworn on 6th March 2025, in which she denied on oath that service was effected on them.
3. The application was opposed. The first applicant deposed to an affidavit on 26th March 2025, in which he solemnly asserted that service was effected on the respondents/applicants and that at all material times they were aware of the pendency of the application, but failed to defend themselves.



4. The application was canvassed by way of oral submissions on 23rd July 2025. Ms Mohamed, learned counsel for the respondents/applicants, reiterated that the summons and the hearing notice were not served as alleged and that the respondents/applicants were therefore denied a right to be heard, a right to which, under the Kenyan *Constitution*, there could be no derogation. She referred to Articles 25 (c) and 50 of the *Constitution* of Kenya, 2010, as well as to the decisions of the court in the case of *Alice Moraa Mokaya v Daniel Omwenga* [2021] eKLR and that *Pashito Holdings Limited & Another Vs Paul Nderitu Ndungu & 2 Others*[1197]eKLR in support of her contention.
5. The applicants/respondents, on the other hand, submitted that service was effected twice by their process server and that evidence of service by way of affidavit of service of the process server was filed. The service, as stated, was both personal and conducted via WhatsApp, a popular mobile messaging app. He prayed that the application be dismissed.
6. I have considered the application, the supporting affidavit and annexures thereof, as well as the response by the applicant/respondents, what orders should issue in the circumstances of this case?
7. I note from the court record that this matter came before me on 5th February 2025. Upon perusing the affidavit of Michael Isaiah Omollo Otieno, and not being sure that service had been effected, and also desiring to give the respondents/applicants a second chance, I ordered that service be effected on them once more and an affidavit of service filed. The process server averred that he served the respondents/applicants at their residence, at Makande Welfare Flats, Block A5, Door 205, but that they refused to sign.
8. The matter came for hearing on 13th February 2025 for the second time. Once again, an affidavit of service, sworn by Michael Isaiah Omollo Otieno on 12th February 2025, was filed. The process server stated that he called the 1st respondent/applicant on phone number 0705XXXXXX06 and the 2nd respondent/applicant on phone number 0723xxx, and that he served both of them personally, as well as the 2nd defendant/applicant, through WhatsApp. From the M-Pesa transaction, whose screenshot was provided, it is evident that phone number 0723xxx belongs to the 2nd respondent/applicant. Being satisfied that the service was effected, I issued the orders, as the subject application was unopposed.
9. From the evidence adduced, I do not agree with the contention that service wasn't effected. It is clear that the respondent/applicants were served with the application and the hearing notices, and that they chose to ignore them. My understanding of the right to be heard is that a party must be given an opportunity to be heard. That happened in this case. If the party, despite being given the opportunity of presenting their case, opts not to do so, then she/he has herself/himself to blame.
10. The respondents/applicants are the authors of their difficult situation. They want this court to aid them in their indolence. That should not be the case. Equity aids the vigilant, and not the indolent.
11. Setting aside a decision made *ex parte* is an exercise of discretion on the part of the Judge. Discretions are exercised judiciously, and not whimsically, and on sound principles. The said principles are now well settled. They are, firstly, as stated by Duffins, P in *Patel versus E. A Cargo Handling Services Limited* (1974) E.A 75:-

“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 order discretion given to it by the rules”



Secondly, as was stated by Harris J in *Shah versus Mbogo* (1967) EA 116:

“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.”

12. That said, and guided by the above decisions and in the interest of justice, I will allow the respondents/applicants' application on condition that they pay to the applicants/respondents Kes.25,000/- as thrown away costs, within 14 days of the date hereof. In default execution, to issue.

13. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 23RD DAY OF JULY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Mohamed, for the Respondents/Applicants;

Mr Ochieng, for the Applicants/Respondents; and

Arthur - Court Assistant.

