



**In re Estate of Luke Mushira Mukhavale (Deceased) (Miscellaneous Succession Application 14 of 2021) [2024] KEHC 3960 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3960 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS SUCCESSION APPLICATION 14 OF 2021  
SC CHIRCHIR, J  
APRIL 18, 2024**

**BETWEEN**

**SOPHIA NJICH MUKAVALE ..... ADMINISTRATOR**

**AND**

**GRACE MUSHIRA ..... OBJECTOR**

**RULING**

1. The Administrator's summons herein seeks for the following orders;
  - a. (spent)
  - b. Pending hearing interparties and thereafter pending the hearing and determination of the application herein the delivery of the court's judgment due for 21<sup>st</sup> September 2023 be stayed and or suspended.
  - c. The ex-parte proceedings conducted on 30<sup>th</sup> May 2023 and all consequential orders thereby arising be set aside.
  - d. The hearing herein do commence denovo and the parties do call their respective witnesses and produce documents in support of their respective cases.
  - e. Costs be in the cause.
2. The application is supported by the grounds appearing on the face of the Application and the an Affidavit sworn by the Applicant's counsel Mr. John Walter Wanyonyi.
3. The Counsel states that when the matter came up for directions on 1<sup>st</sup> March 2023 Mr. Mbaka Advocate held his brief and later informed him that the matter had been fixed for hearing on 31<sup>st</sup> may 2023, which was erroneous; that he attended court on that day but the matter was not called out and



that he later found out from the court's e-filing system that the hearing had been concluded and was pending judgment.

4. The counsel further states that he was not served with the mention Notice or submissions by the opposing counsel.
5. He further avers that the mistake or error leading to the *ex parte* proceedings was honest and requests for indulgence in the interest of all the parties in the matter.
6. The Applicant too swore an Affidavit along the same line of her counsel's averments. She further adds that she was in court on 31<sup>st</sup> may 2023 but she never heard her case being called out
7. She asserts that she has a plausible defence on record.
8. The Application is opposed. The Respondent asserts that there are no reasons given for the Applicants' failure to attend court; that there is no prejudice that the Applicant would suffer; that there was a delay in bringing the present Application; and finally that there Applicant has not demonstrated why the discretion should be exercised in her favour.
9. The parties filed their respective submissions which I have taken into consideration as well as the authorities in support.

## Determination

### The Law

10. The principles that govern the setting aside *ex parte* judgement or order were laid out in the case of *Shah -vs- Mbogo & Another* (1967) EA 116 as follows:-

“...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”.
11. In the case of *Patel v E.A Cargo Handling Services Ltd* ([1974] E.A 75), it was held that:

“There are no limits or restrictions on the judge's discretion to set aside or vary an *ex parte* judgment 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.”
12. In the case of *Philip Chemwolo & Another -vs- Augustine Kubede* (1982-88) KAR 103 Apaloo JA stated as follows:-

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.



13. In the case of *Belinda Murai & Another vs. Amoi Wainaina* [1978] KLR 278 CA per Madan JA, the court described what constitutes a mistake in the following terms:

“a mistake is a mistake. It is no less a mistake because it is an unfortunate slip though in case of senior counsel the court might feel compassionate more readily.

A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule .....”.

14. The Applicant’s case in brief is that she was mistaken on the date that was given for hearing; that this was a case of genuine inadvertence and this was a mistake of the Advocate whose consequences should not be visited on the client.

15. The Respondent has argued that no reasons have been given for non- attendance. This assertion is however not true as the reasons have been clearly given, namely a wrong entry on the diary was made.

16. The Respondent has argued that no prejudice will be suffered by the Applicant. But failure to be heard is a major prejudice as it goes as it raises the constitutional question of whether a fair trial has been conducted.

17. Am also of the view that there was no delay in filing the present Application and any prejudice suffered by the Respondent can be compensated by way of costs in any event.

18. Such lapses, which are admittedly common in the practice of law must not be allowed to override substantive justice unless they occasion prejudice to the opposing party.

19. Prayer(b) of the Application is already spent as the court withheld the writing of the judgment when this Application was brought to its attention.

20. The Application is merited and I hereby proceed to make the following orders:

- a). The proceedings of 30<sup>th</sup> may 2023 and all consequential orders arising therefrom are hereby set aside
- b). The hearing of this matter to start afresh.
- c). The Respondent is hereby awarded costs of ksh. 10,000 which should be paid before the hearing date.

**DATED , SIGNED AND DELIVERED AT NAIROBI VIA MICROSOFT TEAMS THIS 18<sup>TH</sup> DAY OF APRIL 2024.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of:

Godwin- Court Assistant

Mr. Mukavale for Ms Rauto for the Respondent

