



**In re Estate of Omulando Amatonye (Deceased) (Succession Cause 381 of 1996) [2024] KEHC 7587 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7587 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 381 OF 1996  
SC CHIRCHIR, J  
JUNE 20, 2024**

**IN THE MATTER OF THE ESTATE OMULANDO AMATONYE (DECEASED)**

**BETWEEN**

**DAUDI NANDWA ..... 1<sup>ST</sup> APPLICANT**

**MUSA MOKINA OMULANDO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOHN AMATINYE MANAJALA ..... RESPONDENT**

**RULING**

1. Through the Notice of Motion Notice dated 7<sup>th</sup> July 2021 the Applicant is seeking for the following orders:
  - a). That this suit be reinstated
  - b). That the orders made by this honourable court on 4<sup>th</sup> November 2020 dismissing this suit be and are hereby vacated
  - c). That costs of this application be provided for.
2. The application is premised on the grounds appearing on the face of the Application as well as the supporting affidavit of Musa Mokina Omulando, the objector/ Applicant

**The Applicant's case**

3. The Applicant states that he filed summons for revocation revocation of the certificate of confirmation of grant vide the Application dated 13<sup>th</sup> July 2015 , and the court gave directions for the hearing of the summons to proceed by way of viva voce evidence.



4. He further states that on 17 . 8. 2020 he was served with an Application to dismiss the suit for want of prosecution by counsel for the respondent/ beneficiary . That Application was scheduled to be heard on 4.11.2020. He further states that unfortunately the grounds of opposition , in response to the Application ,which his advocate had drawn was not filed and the firm’s clerk never diarized the hearing date of 4<sup>th</sup> November 2020.
5. That , consequently when the matter was being heard, his advocate was not aware and hence did not attend court. This led to the dismissal of the summons for revocation of grant.
6. The Applicant further argues that the mistakes of the Advocate should not be visited on him.
7. The Applicant further states that from the time the court gave directions on 30<sup>th</sup> July 2015 for the hearing to proceed by way of oral evidence , the file went missing and that it was later found out that the file had been transferred to the archives. The Applicant further attributes the delay in prosecution of the said summons to the covid 19 outbreak , which he says , caused the closer of the courts, and hence the matter could not be fixed for hearing.
8. The Applicant avers that he is a senior citizen; he has been sick for several years , and that the sickness had impaired his hearing , which in turn, has become a communication barrier.
9. He further states that the respondent is not a son of the deceased and therefore has no claim in the Estate, and seeks for a chance to prove it.

#### **The Respondent’s case**

10. The beneficiary/ respondent filed grounds of opposition in which he states as follows:
  - a. That there was proper service throughout through the advocates on record.
  - b. That litigation has to come to an end on a matter which has already been decided severally as per the ruling of honourable Sitati dated 11<sup>th</sup> June 2015
  - c. That there is evidence of service as per the affidavit of service dated 14<sup>th</sup> November 2020 in the bill of costs attached.
  - d. That the decree was served upon Namatsi and Co. Advocates as per the copy attached.
  - e. That the current application is an abuse of the court process the same is scandalous and frivolous and ought to be dismissed with costs.
  - f. That costs follow the event.

#### **Applicant’s submissions**

11. The applicant reiterated the facts as set out in the affidavit and submits that the Application was dismissed on mere technicalities and therefore should be reinstated within the spirit of Article 159 (d) ( 2) of the Constitution.
12. He further submits that the mistake of the advocate should not be visited on his client. He has relied on on the case of Lucy Bosire v Kebanacha Division Land Dispute Tribunal & 2 others in Miscellaneous Application No 699 of 2007 in this regard.
13. He does not agree with the ruling by Hon. Ruth Sitati which bequeathed the deceased’s estate yes he was not a direct beneficiary, and hence not entitled to any portion of the estate.



14. The respondent did not file any submission.

**Determination;**

15. The only issue for determination is whether the summons for Revocation of grant should be reinstated.

16. Order 12 Rule 7 of the Civil Procedure Rules under which the Application is brought provides as follows:

“Where under this Order, judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”.

17. In an application for reinstatement of a dismissed suit or application, an applicant appeals to the discretion of the Court. The Court must however caution itself not to exercise its discretion in a manner that will result in an injustice.

18. In *Patel v E.A Cargo handling Ltd* ( 1974) EA 75 , the court had this to say about the exercise of this discretion : “There are no limits or restrictions to the judge’s discretion to set aside or vary an exparte 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 to it by the rules”

19. The other guiding principles in the exercise of the aforesaid discretion has been a subject of many decisions of the court. In *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, the Court of Appeal stated:

We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

20. Looking at the facts and circumstances of this case, the counsel has not attached the relevant page of his diary to show that the matter was not indicated on the relevant date. Further the court clerk who is alleged to have been given the responsibility to file the grounds of opposition and diarize the matter has not sworn an Affidavit to explain the alleged failure to insert the entry of the case in the diary.

21. Further the Applicant has failed to demonstrate that indeed the file was missing. I would have expected the applicant o attach any correspondences with the Deputy registrar making inquiries on the alleged loss.

22. The Suit was dismissed on 4.11.2020 and the present Application was filed on 19.8.2021, close to a year later. The delay is inordinate and is unexplained.

23. In short , the Applicant’s reasons for failing to attend court and failing to prosecute their Application dated 13<sup>th</sup> July are not plausible.

24. However, in the case of *Philiph & another v Augustine Kubende* (1982-1988) KLR 103 , the court had this to say about the blunders that are so attendant to the practice of law: Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case heard on merit. I mind the broad equity approach to this matter in that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs”



25. Duly guided by the above decision in *Philip's case* (*supra*), I hereby allow the Application herein.
26. The Application dated 13<sup>th</sup> July 2021 is hereby reinstated
27. The Applicant will pay costs of Kshs 10,000 to the respondent before taking any further steps on this matter

**DATED , SIGNED AND DELIVERED THIS 20<sup>TH</sup> DAY OF JUNE, 2024.**

**S. CHIRCHIR**

**JUDGE**

**In the presence of :**

Godwin- Court Assistant

Ms . Lugulu for the Applicant.

