



REPUBLIC OF KENYA



**Waweru v Kamure (Civil Appeal 160 of 2018)
[2024] KEHC 8656 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 160 OF 2018**

**AC BETT, J
JULY 12, 2024**

BETWEEN

ELIZABETH MARION WANGARI WAWERU APPELLANT

AND

TERESIAH NYAMBURA KAMURE RESPONDENT

(Being an appeal from the Ruling and Order of the Senior Resident Magistrate's Court at Limuru [Hon. K.M. Njalale] dated 20th November 2018 in Limuru SPM Succession Cause No. 83 of 2011)

JUDGMENT

1. On 5th August 2016, the appellant filed summons for revocation of Grant of Letters of Administration intestate issued to the appellant in 19th September 2011 and confirmed on 19th May 2015. In the alternative, the appellant prayed that the Certificate of Confirmation of Grant issued on 19th May 2015 be rectified in regard to L.R. No. Tigoni/mabroukie/block/2xxx So That L.r. No. Tigoni/mabroukie/block/2xx devolves to the appellant. The application was supported by the appellant's affidavit and the main ground was that the subject property was matrimonial property belonging to the deceased and his first wife (also deceased), who was the appellant's mother and in allocating the property to herself, the respondent obtained the Grant by means of untrue averments and misrepresentation and without the appellant being accorded a chance to be heard during the confirmation. The summons of revocation was heard by the subordinate court that had issued the Grant.
2. The application was fixed for hearing on 4th April 2017 when the court noted that there was no affidavit of service in the file although the respondent had filed a replying affidavit. The court directed that a date be taken at the registry. The appellant's advocate fixed a date for hearing as directed. On 20th November 2018, when the matter came up for hearing, the respondent was absent. Ms. Rachier for the appellant made two applications. The first application was for leave to serve the respondent by substituted service



on account of the difficulties they had encountered on serving her because she only filed a reply with a postal address and could not be traced physically. Her second prayer was for revocation of the Grant on the ground that in her replying affidavit, the respondent conceded rectification but not revocation. On the issue of service, Ms. Rachier said that she did not know how the summons for revocation was served as they came on record later. The trial magistrate noted that parties were before him on 21st February 2017 when the respondent was represented, directions were issued on 4th April 2017 and as the appellant did not seem to have taken any step towards serving the respondent since April 2017 and due to the age of the matter, he would not give a further date. He therefore dismissed the appellant's application.

3. Being dissatisfied with the decision of the trial magistrate to dismiss its summons for revocation and/or rectification of grant, the appellant filed a memorandum of appeal listing six grounds of appeal. The main ground of appeal is that the trial magistrate erred in law and in fact in dismissing the application without considering its merits and thereby condemning the appellant unheard.
4. After the appeal was admitted, the appellant sought and was granted orders to serve the respondent by way of registered post using the address that she had provided in the subordinate court.
5. On 27th August 2023, the court issued directions that the appeal be heard by way of written submissions. The parties were given 14 days each within which to file their written submissions. The respondent was duly served with the court's directions by registered post. On 26th September 2023, the appellant served written submissions upon the respondent by way of registered post. Thereafter the matter has been mentioned severally in absence of the respondent despite being served.
6. The matter came out for mention on 4th June 2024 after the court had notified the parties. The respondent was absent and had not filed her submissions. The appellant requested for a judgement date on the ground that despite effecting service, the respondent has never appeared in court.
7. I have carefully considered the appellant's submissions on the appeal. I find that the only issue is whether there was delay in prosecuting the summons for revocation of Grant. As at the time the application was dismissed, it had come up for hearing twice. Both hearing dates were given by court at the instance of the appellant. On the day of dismissal, the appellant's advocate expressed her inability to proceed due to failure to trace the respondent for service. This was only two months after the hearing date had been taken. She therefore applied for leave to serve by the substituted service. She was well within her rights in the application for the courts have held that service by postal address is not proper service. See *Benjamin K. Kipkulei v County Government Of Mombasa* [2016]eKLR where the court rendered itself thus:

“In the matter giving rise to this petition, summons to Enter Appearance was issued on 26th June 2006 and the affidavit of GK Meenye at page 161 of the record of the petition says it was sent by pre-paid registered post on 7th July 2006 some eleven days thereafter. There is no attempt to explain why personal service could not be effected. Equally there is no evidence that substituted service was ordered by court pursuant to Order 5 Rule 17(1) of The Civil Procedure Rules. To this court, even if the postal address was a correct one, it would still be a questioned service.”

8. In light of the ruling in the Benjamin K. Kipkulei case (*supra*), the appellant had no option but to seek the leave of the court to serve by way of post. Instead of the trial magistrate understanding the appellant's predicament and granting the prayer for substituted service, he dismissed the same and proceeded to dismiss the primary application on account of delay in prosecution of the same.



9. As earlier pointed out, the application had been set down for hearing twice. Both times, the appellant's advocate was present and the only reason the matter could not proceed was the absence of the respondent who could not be traced for service. Was there a delay in prosecution? Yes. Was the delay inordinate and inexcusable? No. The appellant was able to explain the reason for the delay. It was a reasonable explanation. The respondent is in person. In her replying affidavit, she did not state her physical address. She only gave a postal address. The learned trial magistrate chose to overlook the explanation on the lack of service and which led to the request for adjournment and proceeded to dismiss the appellant's application notwithstanding the existence of a replying affidavit filed by the respondent dated 1st March 2017 in which she had stated in paragraph 8 that she was ready to have the Grant rectified so as to enable the appellant inherit L.R No. Tigoni/Mabrouke/Block/2xxx. In dismissing the appellant's application, the trial magistrate denied the appellant an opportunity to be heard. The circumstances of the case were such that the trial magistrate ought to have exercised his discretionary powers in favour of the appellant.
10. Article 48 of the Constitution guarantees every person's right to access justice. The appellant had a right to be heard and in dismissing her application casually, the court violated her constitutional right.
11. Article 59 of the Constitution obligates the courts to do substantive justice to parties. Substantive justice can only be done after the parties are accorded a fair hearing. Although the court has power to dismiss a suit for want of prosecution, the power is discretionary and ought to be exercised judiciously.
11. In dismissing the appellant's application without regard to the totality of the circumstances surrounding the same, the court condemned the appellant unheard. Nyarangi in *Savings And Loan Kenya Limited v Odongo* [1987]eKLR had this to say:-

“The very foundation upon which our judicial system rests is that a party who comes to court shall be heard fairly and fully. A judge who does not hear a party before him or the party's advocate offends that fundamental principal and then, it becomes the duty of this court to tell him so. People come to court as a last resort, and we Judges are employed to hear them and determine their cases.”
12. From the record of the proceedings, the trial magistrate erred in denying the appellant's application for leave to serve the respondent by way of substituted service then dismissing the appellant's application for want of prosecution.
13. I therefore find that the appeal has merit and must therefore succeed.
14. I allow the appeal and set aside the order of dismissal dated 20th November 2018.
15. I remit the file of the subordinate court for hearing of the application dated 13th July 2016.
16. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 12TH DAY OF JULY, 2024.

A. C. BETT

JUDGE

In the presence of:

Ms. Mutua for the appellant

No appearance for the respondent



Court Assistant: Polycap Mukabwa

