



**In re Estate of Iyadi Kalabati (Deceased) (Succession Cause
711 of 2014) [2023] KEHC 2276 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2276 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 711 OF 2014
PJO OTIENO, J
MARCH 17, 2023**

BETWEEN

ZABLON JEREMIAH INGUSU PETITIONER

AND

CHARLES MUKEDI KATAMBILE TOMAS OBJECTOR

RULING

1. Before the Court for determination is the Chamber Summons pursued pursuant to the provisions of Section 73 of the *Law of Succession Act*. It essentially prays that the proceedings taken on the August 3, 2022 be set aside and the Affidavit of Protest be deemed duly filed and the Applicant/Protector/Petitioner given the opportunity to oppose the mode of distribution given by the Objector. The grounds preferred to support and ground the application are that on the date set for hearing of the Protest, the Protector was indeed in Court but the Advocate was not there and the Court proceeded to hear the Advocate for the Objector and granted the application for confirmation of grant.
2. On that basis it is contended that the Court was unable to determine all the issues in controversy. Those facts are reiterated in the affidavit filed in support which then exhibits the affidavit of protest together with revenue receipts and contends that it was never his mistake that the affidavit was never put in to Court file and that the affidavit raises strong objections to the proposed mode of distribution.
3. The application was resisted on the grounds of opposition dated November 8, 2022 and filed in Court on the November 14, 2022 whose tenure is that it is frivolous and an abuse of the Court in that there was never attempt at consultation till after the final order on distribution was made and that the proposal by the Applicant is solidary and non-consensual.
4. Parties canvassed the application by written submissions filed by the Applicant on the Petitioner/Applicant on the November 29, 2022 and by the Objector/Respondent on the January 15, 2023.



5. In his submissions, the Applicant pleads with the Court to grant him a chance to urge his proposal on distribution a claim founded on the fact that the land parcel No N Kabras/Malava/631 was occupied by him and his mother who was married to the deceased and with whom the deceased sired the four named children. He concedes to the fact that he is not a child to the deceased. He however does not make any allusion to the deceased having taken him in as his own child but asserts that since the other children of the deceased have not stayed or lived on that parcel of land, he is entitled thereto solely. He then adds that he filed the Succession Cause while his mother was alive and she did not contest his entitlement to the land.
6. Counsel then cited to Court *Owino Ger -vs- Marmanet Forest Cooperative Credit Society Ltd [1987] eKLR* and others for the proposition of the law that wrongs committed by an Advocate ought not be visited upon the innocent litigant.
7. The decision in *Mureithi Charles & Another -vs- Jacob Atina Nyagesuka [2022] eKLR* was cited for the proposition of the law that the discretion upon the Court to set aside default orders is intended to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error but not intended to assist a person who has deliberately sought to obstruct or delay the cause of justice. *Murai -vs- Wainaina (No 4) [1982] KLR 38* was cited for the proposition of the law that the doors of justice do not close merely because a mistake has occurred but the Court always does everything, it can, to rectify the error if the interests of justice dictates so.
8. For the Objector/Respondent the position taken is that as at the date the matter proceeded the Affidavit of protest was not in the file, the Advocate was equally absent and no explanation had been offered. To the Respondent, no mistake was ever committed but the Counsel merely failed to attend Court and is yet to offer any explanation for such failure.
9. It was then underscored that the beneficiaries had agreed on the mode of distribution fairly and equitably and that the only recourse available to the Applicant is to lodge and pursue an appeal against the decision distributing the estate.

Analysis and determination

10. Even though expressed to be premised upon the provisions of Section 73 of the Act, the Court views the application as one seeking the simple order for setting aside. It deems the application to properly fit for determination by the Court pursuant to the provisions of Section 47 as read with Rule 73 of the Rules. It definitely does not lie pursuant to Section 73 of the Act and Court shall thus deal with it pursuant to its inherent powers and its very existence to do justice.
11. Setting aside is a task available to Court as a discretionary power and intended to achieve the ends of justice by ensuring that an order made purely on account of a default is not maintained purely because a default or mistake was made. This, however, is not to say that every order made on account of default shall stand impugned as of right. No. The object of that power is to ensure that justice is served and the objects and essence of just is met so that hardship and injustice or just prejudice is obviated. The remedy is due to the litigant who owns up to a mistake, error or inadvertence and gives an explanation for the delay to the satisfaction of the Court.
12. On top of the considerations by the Court is the question whether something went into record which ought not have gone in, if not for the default, and if that which ought to have been brought to the attention of the Court was never so brought courtesy of the same default.
13. In this matter, while preparing this decision, I have noted that an Affidavit of Protest was indeed filed on the July 29, 2022 a few days before the matter came to Court but as fastened in the Court file, it was



so fastened after the application for setting aside had been so fastened. On the date the order sought to be set aside was made, the Applicant indeed informed the Court that an Affidavit had been filed but when asked for a copy he gave to Court a copy without Court receiving stamp and was unable to avail a copy of the Court revenue receipt.

14. It then became apparent to Court that the document shown to Court had not been filed and the Court having given a timeline within which the document had to be filed, inferred that it had not been so filled and proceeded with the matter that was on the business list of the Court. The Court considered an application for confirmation of grant, which was supported with a consent on distribution, and made the orders it considered appropriate and expedient. The grant was confirmed and the estate distributed.
15. It is as old as the law itself that a mistake of Counsel should not be visited upon litigant but that general rule is equally not absolute. It has its known exceptions and it is now recognized that with the development in the regulation of the law profession and communication including the ability to attend Court's virtually without the need for physical presence, the dynamics have since changed that at times it would serve the interest of justice best to let the mistake of Counsel be visited upon client so that the course of justice be not obstructed but achieved, and the process of the Court not abused.
16. In this matter, the Applicant has always been represented by Counsel who appeared in Court on the two consecutive occasions preceding the date the impugned order was made.
17. Counsel did intimate to Court his client's desire to protest the proposal on distribution by the Objector. On the June 27, 2022 Counsel was in Court and told the Court:-

' Let Mr Ombito file the application then we shall protest.'
18. The Court did set timelines for the Applicant to file and serve any such protest within 15 days after service. When the matter was next in Court, the Counsel for the Applicant confirmed having been served with the application for confirmation of grant but he had not filed his protest. He was then directed to file and serve the same before the close of day that day.
19. Therefore, when the matter was in Court on the August 3, 2022, Counsel for the Respondent protested to Court that the Affidavit of Protest had not been filed nor served upon him. The Court struggled with the question whether the Counsel was answering to his duty to Court to help Court discharge its mandate. Without even a copy of the filed Affidavit the Court was convinced that there had been failure to comply with directions by the Court as a means to expedite the disposal of the matter and that justice was being obstructed and delayed.
20. It has however emerged that the affidavit was indeed filed but not placed in the Court file. That is the gap the presence of Counsel would have cured. The Advocate failed to attend Court the whole day and when the opportunity came to give an explanation and reason for failure to attend Court, on a date given in his presence, Counsel chose to say nothing. The effect is that there is no reason nor explanation offered why Counsel did not attend Court. Because discretion to be judicial must be grounded upon reasons, where there is no reason or explanation the Court hands get tied without a discretion to exercise.
21. To this Court, the choice of Counsel is constitutional and the Court has no business questioning the choice a litigant makes on Counsel to represent him. Coupled with the development in the law practice that now requires that Counsel take out professional indemnity cover to protect members of the public that may suffer injury on account of negligence or failure by an Advocate, and in the absence of any attempt to explain the failure to attend Court, this is one of those cases that it would serve best interest of justice that the loss lies where it falls and any undoing by a Counsel left to rest on his client. In that



eventually the client then get the opportunity to evaluate his choice and does not remain without a remedy. In coming to this conclusion the Court is guided by the decision of the Court of Appeal in [Tana Athi River Development Authority –vs- Jeremia Kimigbo \[2015\] eKLR](#) where the Court held:-

' From the past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic.'

Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client. This is to be found in the case *Ketteman & others v Hansel Properties Ltd* [1988] 1 All ER 38; in which an application was brought for belated amendment of the defence; an amendment which had been necessitated by mistake of counsel.

In his judgment, Lord Griffith stated that

'Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings.'

22. The Court would dismiss the application on the basis of failure to explain the failure to attend Court but it is nevertheless compelled to consider what case the Applicant would present if the setting aside is granted.
23. In a succession cause, a certificate of confirmation of grant once issued may only be upset and revoked for good reason as coded in section 76 of the [Law of Succession Act](#). The good reason must be one that points to unfair or unequitable distribution, exclusion of a person entitled or substantial defect in the procedure and proceedings leading to the confirmation of the grant.
24. My reading of the papers filed show that the Applicant does not assert being a child of the deceased to be entitled to a share of the estate in inheritance. He asserts his claim to be grounded on the fact that the subject land, North Kabras/Malava/631 initially belonged to his grandfather, one Jeremiah Ingusu, who passed it on to his father but upon the father's death, the deceased had the land registered in his name on the basis that he had married the Applicant's mother. That claim is not an inheritance claim but rather a claim alleging an impropriety in the process by which the land became part of the deceased's estate. It is a claim on title to land. Such a claim is outside the mandate and jurisdiction of this Court sitting as a family Court and is in fact excluded by the [Constitution](#) itself at article 165(5) of the [Constitution](#).
25. The Court finds that it has no jurisdiction to adjudicate the claim to be pursued by the Applicant once the order for setting aside is granted. It would thus serve no useful purpose to set aside only for the Court to find itself unable to deal with the matter on account of lack of jurisdiction. Lack of jurisdiction is the second reason I find to militate against the prayer that the proceedings and directions of the Court dated August 3, 2022 be set aside.
26. In conclusion therefore, the application dated August 8, 2022 is adjudged to lack merits and is therefore dismissed. On costs, the Court appreciate the consanguinity between the parties and direct that each party shall bear own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF MARCH 2023.

PATRICK J. O. OTIENO



JUDGE

In the presence of:

No appearance for Petitioner/Applicant

No appearance for the Objector/Respondent

Court Assistant: Polycap

HC. Succession Cause No. 711/2014 – Ruling Page | 3

