



REPUBLIC OF KENYA



**In re Estate of Edward Oyuga Andriko (Deceased) (Succession Cause
126 of 2006) [2023] KEHC 20035 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20035 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 126 OF 2006**

PJO OTIENO, J

JULY 7, 2023

**IN THE MATTER OF THE ESTATE OF EDWARD OYUGA ANDRIKO
(DECEASED)**

BETWEEN

SAMWELI VUDOHI ISINDU PETITIONER

AND

JOSEPHINE NYABATE ORIBO 1ST INTERESTED PARTY

ESTHER BOSIBORI ORIBO 2ND INTERESTED PARTY

AND

EVANS KHALWALE OYUGO OBJECTOR

RULING

1. Before me is the applicant's notice of motion application dated April 19, 2022 brought pursuant to sections 3A, 3 and 80 of the [Civil Procedure Act](#), articles 50(1) and 159 of the [Constitution of Kenya, 2010](#) seeking one substantive order that the Honourable Court be pleased to review, set aside, discharge or vacate orders issued on 16/2/2022 and all consequential orders thereof.
2. The application is supported by the affidavit of Esther Bosibori Oribo sworn on April 19, 2022 in which she reiterates the ground shown on the face of the motion and avers that this matter was coming up for mention for directions on February 16, 2022 during which day she failed to attend court as she fell sick and that her mother was too elderly to attend. She claims that counsel for the objector proceeded with the matter and allowed the applications dated 7/9/2020 and 12/3/2021 in total disregard of the replying affidavits filed and served opposing the applications. It is her contention that the said applications were pre maturely allowed since the same was coming up for mention for directions.



3. The application was opposed by the objector by the grounds of opposition dated 14,10,2022 which fault the motion for being strange in law and incurably defective; that the interested parties claim offend sections 55 and 82 (b) of the Act and is merely meant to waste court's time and delay the distribution of the estate.
4. Parties were directed to file submission in canvassing the application and have filed their respective submissions. For the interested party/applicant it is submitted that the grounds for setting aside an ex parte order and the definition of what constitutes sufficient cause were elucidated in the cases of *Philip Ongom, Capt Vs Catherine Nyero Omwota* Civil Appeal No 14 of 2001(2003) UGSC 16 (20 March 2003) and The *Registered Trustees Of Arch Diocess Of Dar Es Salam Vs The Chairman Banju Village Government & Others*, Appeal No 147 of 2006 to be either that the respondent was not properly served with summons or that the respondent failed to appear in court at the hearing due to sufficient cause. The expression sufficient cause was settled to attract liberal interpretation in order to advance substantial justice. The interested parties thus argue and contend that they have met the sufficient cause threshold since the 2nd interested party was able to prove her non-attendance through medical records.
5. For the 2nd administrator, it was the submitted that the interested parties' claim is based on alleged purchase of the estate land does not fall for resolution as an inheritance dispute but whose resolutions lies with the environment and land court. The decision *in Re estate of Alice Mumbwa Mutua(deceased)* (2017) eKLR was cited for the proposition that the *law of succession act* is tailored for resolution of disputes between family members and administrators and never for resolution between the estate and third parties. Based on such submissions that administrator prays that the application be dismissed with costs.

Issue, Analysis and Determination

6. Having perused at the application, replying affidavit and the submissions filed the only issue that arises for determination by the court is whether the application for upsetting the decision of February 16, 2022 is merited to be allowed. In settling on that issue, the court observes that even though worded as an application for review, the law cited and grounds set out are clearly those known to ground setting aside.
7. Even though no provision of the *Law of Succession Act* is cited to found the application, Rule 63 of the *Probate and Administration Rules* import the application of the provisions of the Civil Procedure Rules including the provisions on setting aside default orders.
8. The interested parties argue that they have met the sufficient reason threshold in that they produced medical records to show that the 2nd interested party was unable to attend court as she fell ill. There is also the un-highlighted assertion that on the date the substantive orders were made the matter was listed for directions only and that the applications were treated as unopposed when the interested parties had in fact opposed both by Replying Affidavits sworn on the February 11, 2021 and that of September 27, 2021. it is the learning of this court that a default should not be the only reason a citizen is driven away from the seat of justice unless such default be shown to have been intended to obstruct the cause of justice. The court should be more inclined to set aside a default judgment unless it be shown that there is no justice to be achieved by such order like where there is no dispute to dealt with on the merit such in situations that setting aside is merely intended to vex the opponent and to waste judicial time.
9. The foreign decisions cited by the applicants in deed asserts the same position of the law as in Kenya where it is now trite that the discretion of the court in an application for setting aside is wide and unfettered and intended to meet the course of justice so as to avoid hardship and injustice on the party whose only mistake is the default to take a step at all or in time. For example, in *Ceneast Airlines Ltd*



versus Kenya Shell Ltd [2000]2EA (Supra) the Court of Appeal quoted with approval the following remarks of Duffus P in *Patel versus EA Cargo Handling Services* [1974] EA 75:

“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. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue”, that is an issue which raises a prima facie defence and which should go to trial for adjudication”.

10. The orders of this court made on 16/2/2022 were made on a date the parties were to get directions from the court and when the matter was not due for the substantive consideration of the two applications. From the address by the 2nd administrators advocate, the court was misled to believe that no responses had been filled to the applications and therefore that the applications were unopposed. The court finds that had counsel properly directed the court on the purpose of the appearance and the fact that responses had been filed, the court would have been reluctant to make the orders it made on that day.
11. The interested parties claim that the application dated 7/9/2020 and 12/3/2021 were considered in total disregard of their replying affidavits. It is equally glaring that the consent was made between the two brothers with the effect of defeating a title that had been passed to a third party by the first administrator in his capacity as such administrator. Justice demanded that the interested parties as the persons to be adversely affected by the order restoring the estate property to the deceased deserved to have been heard. Now that they were not heard despite the fact that they had resisted the application, the court discerns an injustice that cries out for remedy by an order for setting aside.
12. The upshot is that the court exercises its unfettered discretion to do justice, allows the application dated April 19, 2022 and sets aside the orders made on the February 16, 2022 with the consequence that the two applications September 7, 2020 and March 12, 2021 are reinstated to be heard on the merits.
13. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF JULY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:-

No appearance for Kadeinyi for the Objector/Applicant

No appearance for Okali for the Interested Parties/Applicants

Petitioner present in person

Court Assistant: Polycap

