



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Mwanaiti Munyanya Wandanyi (Deceased) (Succession Cause 26 of 1989) [2023] KEHC 23864 (KLR) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23864 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 26 OF 1989
PJO OTIENO, J
OCTOBER 13, 2023**

BETWEEN

ISMAEL TABUCHE HAMISI PETITIONER

AND

HASSAN MUNYANYA MANGO 1ST OBJECTOR

ABDALLAH SHIKUNYI MANGO 2ND OBJECTOR

KASSIM MANYASA MANGO 3RD OBJECTOR

RULING

1. When this matter came to Court on the 27.6.2022 for the hearing of an application dated 1.4.2023 seeking revocation of the grant was revoked in the absence of the petitioner who did not attend.
2. When the Petitioner got wind of those orders, and after the grant had been issued in the joint names of himself and the Objectors, he filed the Notice of Motion dated 5.7.2022 and sought that the exparte orders be set aside so that he gets leave to respond to the application seeking revocation of the grant.
3. The grounds disclosed on the face of the application and on the Affidavit of the Petitioner were that on the scheduled date he did attend Court, was within the precincts but not in the Court room the matter was listed only for him to be notified that the same had been dealt with and exparte orders issued.
4. He then went into the merits by asserting that before the deceased died she had disposed of most of the estate to disclosed people. He equally filed a Replying Affidavit to the Summons dated 1.4.2022 in which he disclosed the relationship between him and the Objectors hence the connection between the Objectors and the deceased. It is disclosed that the Petitioner is a grandchild while the Objectors are step children.



5. For the Objectors, instead of responding to the application to set aside, they opted to file an Affidavit entitled 'Further Affidavit' essentially responding to the Replying Affidavit. In the Court's opinion, the two Affidavits are preemptive and of little assistance towards the resolution of the dispute at hand.
6. That notwithstanding, what is before the Court for determination is an application to set aside a default order. The principle, applicable is that such are set aside to avoid hardship or injustice but not as a way of rewarding a party who has set to delay and obstruct the course of justice¹. The other consideration is whether there would be a valid point to be argued if the order is set aside² which is not to say a point that must succeed.
7. There being no denial by the Respondents to the assertion by the Applicant that he was in fact in Court premises on the material day but was unable to locate the court room where his matter was to be handled, added to the fact that the Objectors are not blood children to the deceased, I do find that a valid reason for failure to attend Court has been proffered coupled with an arguable point whether the Objector stand in *pari passu* with the Petitioner.
8. The two thresholds having been made, I do find merit in the application dated 5.7.2022 which is therefore allowed. There shall be no orders as to costs. Let the application dated 1.4.2022 be heard on the by oral Submissions.

DATED, SIGNED AND DELIVERED IN KAKAMEGA THIS 13TH DAY OF OCTOBER 2023.

PATRICK J. O. OTIENO

JUDGE

¹ Shah –vs- Mbogo [1968] EA 93

² Olympic Escort International Co. Ltd –vs- Parminder Singh Sandhu [2009] eKLR

