



**Mbuthia v Mwangi (Succession Cause 696 of 2012)
[2023] KEHC 23633 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 696 OF 2012
SM MOHOCHI, J
OCTOBER 17, 2023**

IN THE MATTER OF THE ESTATE OF BENARD MBUTHIA MWANGI (DECEASED)

BETWEEN

MARGARET WAMBUI MBUTHIA APPLICANT

AND

NJERI MBUTHIA MWANGI RESPONDENT

RULING

1. Before me is a Notice of Motion dated May 12, 2022, brought pursuant to rule 63 of the *Probate & Administration Rules* & section 68 (1) of the *Land Registration Act* supported by a sworn Affidavit of Njeri Mbuthia Mwangi dated May 20, 2022 seeking the following prayers;
 - i. That this Application be certified as urgent and services of the same be dispensed with in the first instance. (Spent)
 - ii. That pending hearing and determination of this application inter-partes, the Honourable court be pleased to direct the Land Registrar-Nakuru to place an inhibition order against parcel title no Bahati/Kabatini Block 1/2XXX. (Inforce)
 - iii. That pending hearing and determination of this application inter-partes the Honourable Court be pleased to stay execution of the orders granted on May 31, 2021 confirming the grant of letters of administration. (Spent)
 - iv. That pending hearing and determination of this application this honourable court be pleased to direct the Land Registrar-Nakuru to place an inhibition order against parcel title no Bahati/Kabatini Block 1/2XXX.



- v. That the honourable court be pleased to review the orders granted on May 31, 2021 Confirming the grant of letters of administration and upon review the orders granted on May 31, 2021 be set aside.
- vi. That cost of this application be provided for.

2. The Application is based on the following grounds: -

- i. That the orders granted on May 31, 2021, were granted *ex-parte* without the participation of the objector/applicant;
- ii. That the objector/applicant was completely unaware of the hearing of this matter as the objector's/applicant's advocate failed to inform the objector/applicant of this position of this matter;
- iii. That the objector/applicant is a daughter of the Deceased who has been unfairly locked out of the inheritance herein;
- iv. That the administrator/respondent maliciously failed to include the objector/applicant as a dependant/beneficiary of the Deceased;
- v. That the objector/applicant only discovered very recently in the month of March, 2022, that the letters of administration herein were confirmed and the objector's /applicant case was dismissed;
- vi. That the delay in filing the present application was not deliberate as the objector/applicant discovered the recent developments in the Month of March, 2022; and
- vii. That unless the orders granted on May 31, 2021 are set aside objector/applicant will suffer an injustice hence it is the best interest of justice that the prayers sought in this application are granted.

3. The matter came up for directions on March 9, 2023 and the applicant confirmed filing Written Submissions on the March 8, 2023 while the respondent was granted 21 day to file her written submissions on the May 26, 2023 the matter came for hearing and the Respondent elected to rely on her Replying Affidavit dated June 13, 2023, without filing any written submissions.

Applicant's Case

- 4. In an Application dated May 12, 2022 the protestor/applicant has mainly sought that the orders given on May 31, 2021 confirming the grant of letters of administration be reviewed and set aside. Other prayers are spent.
- 5. Via Affidavit of protest sworn on April 11, 2016 and filed in Court on the same day, the protestor/applicant protested against the proposed mode of distribution suggested by the Administrator. Prior to the protest, the applicant had taken out summons for revocation of grant dated September 30, 2013 citing that being a daughter to the deceased; she had been left out of the petition.
- 6. On January 30, 2014, the Court directed that this matter be heard by way of *viva voce* evidence.
- 7. Unfortunately, the matter proceeded *ex-parte* and the grant was confirmed. The applicant has explained in her Supporting Affidavit sworn on May 20, 2022 circumstances leading to her non-attendance in Court.



8. That there is only one main issue for determination: Whether the court should review and set aside the *ex-parte* orders given on May 31, 2021.
9. That whether or not to allow the protestor's applicant's application is a matter squarely within the Court's discretion. It is the protestor's/applicant's assertion on oath that she was never informed of the hearing date by her previous advocate on record. If this be the case, question to ask is whether such a litigant should suffer for the error and/or omission on the part of counsel.
10. Reliance is placed on the case of *Burbani Decorators & Contractors v Morning Foods Ltd & another* [2014] eKLR Court adopted the holding of *Phillip Chemwolo & another vs Augustine Kubede* [1982-88] KAR 103 AT 1040, Apaloo J (as he then was) and cited with approval in the Nyeri CA 18 of 2013 (*ibid*), the learned Judge of Appeal posited as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.
11. In the case of *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co.Ltd & 2 others* [2018] eKLR Court adopted the holding of *Martha Wangari Karua -vs- IEBC* Nyeri Civil Appeal No 1 of 2017 the Court of Appeal held as follows:-

“The rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.”
12. It is submitted that, owing to the nature of the case it is only fair and just that the protestor/applicant be accorded the opportunity to heard and prosecute her claim. Should the Court fail to set aside the said orders, then the Protestor/Applicant will be condemned unheard contrary to the rules of natural justice.
13. In the case of *Lucy Bosire v Kebanacha Div Land Dispute Tribunal & 2 others* [2013] eKLR

“It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognised that 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 determined in its merits.”
14. The Court went on further to state that ...

“The law is now that it is the business of the Court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice.”
15. That, from the foregoing failure on the part of protestor/applicant to attend Court was not deliberate. It is our submission that the mistake of counsel should not be visited on the protestor/ applicant who is still desirous in prosecuting her claim to its logical conclusion.



16. In the case of *Burbani Decorators & Contractors v Morning Foods Ltd & another* (2014) eKLR (*supra*) court held
- “A mistake is a mistake, and as long as sufficient explanation is given showing good faith like in this case, it should be excused and a party given an opportunity to be heard on their grievances on merit.”
17. In the case of *Burbani Decorators & Contractors v Morning Foods Ltd & another* [2014] eKLR (*supra*) court held
- “That a court’s discretion to set aside an ex-parte judgment or order, 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.”
18. In conclusion the applicant submits that, the Court in setting aside as the orders of May 31, 2021 the same shall not be injurious to the Respondent and humbly implores the court to exercise its unfettered discretion and set-aside the said orders and allow her to prosecute this matter for the court to arrive at a fair and just decision.

Respondent’s Case

19. In opposition to this application and in reliance to her Replying Affidavit dated June 13, 2023, it is deponed that, the application is incompetent because under the *Law of Succession Act* and the *Probate and Administration Rules* all Applications should be by way of Summons in Chambers and Notices of Motion are not applicable.
20. That prayers 2,3 and 4 of the Notice of Motion dated May 12, 2022 are now “water under the bridge”, moot and superfluous because they have been overtaken by events: -
- a. That the Grant of Letters of Administration intestate and the Certificate of Confirmation of the Grant have been fully implemented and that Land Parcel No BAHATI/KABATINI BLOCK 1/2XXX no longer exists.
 - b. That it will be an academic exercise to place an inhibition on a parcel of land that no longer exists in the Number cited and Further, there would be no judicial utility of staying implementation of the Certificate of Confirmation issued on May 31, 2021 when that implementation took place long before the present motion was filed.
21. Evidence of a copy of the Green Card (an extract of the Title) to show that this parcel of land has since ceased to exist was annexed and marked “A”.
22. The respondent invites the Court to find on prayer 5 that the application does not meet the required elements for reviewing the orders of May 31, 2021 in that: -
- a. No error or mistake apparent on the record has been pointed out by the applicant.
 - b. There is no discovery of any new and important matter of evidence which the applicant could, not by exercising due diligence have come to the attention of the Applicant before May 31, 2021.



- c. That there exist no other special sufficient reasons to allow a review of May 31, 2021.
23. That surprisingly the applicant has not bothered herself with the dismissal of her protests on January 23, 2020.
24. That a protest is in itself an objection to the Grant being confirmed and once the protest is disallowed by the Court, then the Application for Confirmation of the Grant proceeds to disposal as un-resisted Application.
25. That the applicant's protests to the confirmation of the Grant came up for hearing on January 23, 2020 at 9:00 a.m she was ready for the hearing but the Applicant (then Protestor) did not show up.
26. That Miss Githae Advocate was present for Miss Ngugi Advocate for the protestor (now applicant) and she applied for adjournment on the basis that despite the protestor being aware of the hearing date and even assuring her "Wakili" that she would attend the Hearing, this Applicant could not be reached on phone by her own lawyer.
27. That the Court was magnanimous enough and instead of allowing the requests for adjournment it placed aside the file to 11:15 a.m with expectation that the protestor (now Applicant) will emerge from some place ready for the Hearing.
28. That the Court was even more generous by extending the time to 11:30 a.m when it finally emerged that alas this protestor and her witnesses were, after all nowhere.
29. That a protestor whose protest was dismissed on January 23, 2020 coming to Court for review on May 12, 2022 (Two years and about Four months) is making a mockery of the judicial process of how courts operate.
30. That a protestor/ applicant who is not interested in reinstating her dismissed protests but is keen to set aside a Certificate of Confirmation does not depict a serious but malicious applicant:
- “If the Certificate of Confirmation of the Grant is set aside and the applicant's protest remains dismissed, what gain is such a Protestor aiming to get other than to vex the Administrator?”
31. That from the context of the Notice of Motion dated May 12, 2022 it is very clear that the Applicant has lost interest in her dismissed protest or she has accepted the dismissal.
32. The respondent contends that, the Notice of Motion dated May 12, 2022 has no merits and should be disallowed.

Analysis and Determination

33. A unique feature of this Application is that, it seeks review and setting aside of Court orders on the basis of alleged malpractice, incompetence and professional negligence of previous advocates representing the applicant while the instant Application similarly disregards the *Probate and Administration Rules*, imports *Civil Procedure Code*, ignores submitting on this gross procedural lapse with express elements of want of correct and historic facts of events.
34. This succession cause relates to Benard Mbutia Mwangi deceased whose estate the respondent informs the Court has been fully settled and the only asset has been transmitted.



35. Section 83(g) of the *Law of Succession Act* mandates administrators of an estate to, within six months of confirmation of grant or longer period as the court may allow, complete the administration of the estate, and to produce to the Court a full and accurate account of the complete administration.

36. Review of decisions of a Probate Court is governed by rule 63 of the *Probate and Administration Rules*, which provides as follows:

“63. Application of *Civil Procedure Rules* and *High Court (Practice and Procedure) Rules*

(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the *Civil Procedure Rules*, namely orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the *High Court (Practice and Procedure) Rules* (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these rules.”

37. It is, therefore, clear that any party seeking review of orders, in a probate and succession matter, is bound by the provisions of order 45 of the *Civil Procedure Rules*.

38. The substantive provisions of Order 45, state as follows:

“1.

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time



when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) ...”

39. Order 45 provides for three circumstances under which an order for review can be made. To be successful, the applicant must demonstrate to the court that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed. A party may successfully apply for review, secondly, if he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.
40. The applicant on her part seeks to set aside a certificate of confirmation without even seeking reinstatement of her own protest dismissed and this demonstrate an insensitive party in a succession cause that cares for no one rather than self. The estate of the deceased cannot under the court’s watch, be driven by a party, into a state of limbo or in auto pilot mode that would negate and undermine the entire essence of a probate process and human respect for our departed.
41. This Court is not persuaded by the Applicant for the following reason:
- a. The applicants protest was dismissed on January 23, 2020 she has not challenged this dismissal.
 - b. The administration of the estate is complete.
 - c. The Application before Court has been presented on a procedure and form not provided for under the law and it was expected that the applicant to submit on this question let this court concurs with the respondent.
 - d. Allegations of misconduct on the part of an advocate are serious allegations that cannot just be deponed to in passing, it would thus be expected that she did protest to her advocates, she had an option to complain of this conduct by the advocate. Interestingly the applicant has not qualified her assertions on the gross allegations made on Raydon Mwangi Advocate.
 - e. The Court concurs with the respondent that seeking review of the Courts orders after two years and four months is an abuse of the process amounting to mockery to be abhorred and condemned.
 - f. Tardiness and want-of diligence on the part of the Applicant was the hall mark prior to her protest dismissal on January 20, 2020, where the court in refusing



the adjournment being sought observed that four (4) previous adjournment were on the Applicants instigation.

- g. The Grant was issued orders sought to be reviewed and set aside are those dated May 31, 2022 on a date the Respondent sought to rectify a grant confirmed on the February 22, 2021, the application attacks the granted orders to rectify a confirmed grant without attacking the issue of grant and its confirmation.
- h. The application substantively fails to meet the principals for review established under order 45 the Civil Procedure Code.

- 42. The Court finds that the applicants assertion that the orders of 31st May 2022 by Matheka J were *ex-parte* orders is incorrect, in that the rectification proceedings were not restrained unless the applicant participates.
- 43. In the upshot, the applicant has utterly failed to provide sufficient grounds to justify grant of the orders sought in the application, dated May 20, 2022, and the same is hereby dismissed.
- 44. The inhibition order dated May 20, 2022, placed parcel title no. Bahati/Kabatini Block 1/2469 is hereby lifted.
- 45. This being a family matter, there shall be no order on costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 17TH DAY OF OCTOBER, 2023.

.....

S. MOHOCHI
JUDGE

