



REPUBLIC OF KENYA



**In re Estate of Kipserem arap Kiptiony (Succession Cause 083 of 2020)
[2024] KEHC 16873 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16873 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 083 OF 2020
JRA WANANDA, J
NOVEMBER 15, 2024
IN THE MATTER OF THE ESTATE OF KIPSEREM ARAP KIPTIONY**

BETWEEN

**AIRENI CHEMOTOS CHEBWOKO 1ST OBJECTOR
MARRY JEROP KIPCHO 2ND OBJECTOR
SALINA JEMAIYO SEREM 3RD OBJECTOR**

AND

**DAVID ARAP SIELE 1ST PETITIONER
NEHEMIAH KIPLIMO SEREM 2ND PETITIONER**

RULING

1. The Application before the Court for determination is the Objectors' Notice of Motion dated 4/12/2023 and filed through Messrs Rotich, Langat & Partners Advocates. It seeks orders as follows:
 - i. [.....] spent
 - ii. That this Honourable Court be pleased to reinstate the Summons for Revocation dated 18/05/2023 and set aside and or vary its orders issued in this matter on 23rd November 2023 and set down the same for hearing on priority basis.
 - iii. Costs of this Application be in the Cause.
2. The grounds of the Application are as set out on the face thereof and it is supported by the respective Affidavits sworn by the 1st Objector, Aireni Chemotos Chebwoko and by the Objectors' Counsel, Moses Kipyego Rotich.



3. In her Affidavit, the 1st Objector deponed that she is the 3rd widow of the deceased and the 2nd Petitioner is her 1st born biological son, that on 23/11/2023, her Application dated 18/05/2023 was dismissed for non-attendance by her Advocates, that she sought explanation from the Advocates and they explained to her that on the said date, they inadvertently mis-diarized the matter as a Kapsabet High Court case, instead of Eldoret High Court, that on the said date, the Kapsabet High Court was not sitting and thus the Advocates did not attend Court, and that on the same date, the Law Society of Kenya (LSK) was conducting elections for its North Rift Region Branch and the proprietor of her said Advocates' law firm, Moses Kipyego Rotich was one of the persons seeking the seat of General Member but inadvertently overlooked the Court date leading to the dismissal of this case. She deponed further that the Grant issued to her son, the 2nd Petitioner was obtained by means of untrue allegation of a fact essential in point of law and as such, she will greatly suffer big loss and will be rendered homeless by her own blood related son, that the 2nd Petitioner has also filed other cases to evict her and other beneficiaries and if the instant Application is not allowed, she will be evicted and rendered destitute, that the Application has been brought expeditiously and that allowing it will not in any way prejudice the Petitioners who will still have a right to ventilate their case in the main application on merit.
4. On her part, the said Moses Kipyego Rotich deponed that he is the Advocate on record for the Objectors herein. He then echoed the matters deponed by the 1st Objector, including the allegation of inadvertent mis-diarizing of the matter as a Kapsabet case instead of Eldoret, and the conducting of the LSK North Rift Region elections. He deponed that the non-attendance was the mistake of Counsel which should not be visited on his clients, that the Objectors are willing and ready to prosecute the Summons for Revocation to its logical conclusion and have made efforts to stay the existing land matter at the Kapsabet Magistrate's Court pending determination of this Cause. He, too, urged that the Application has been filed expeditiously and that allowing it will not prejudice the Petitioners.

Respondent's Response

5. The Application is opposed vide the Replying Affidavit sworn by the 1st Petitioner and filed on 6/03/2023 through Messrs Kalya & Co. Advocates. He deponed that the Objectors filed the Application dated 18/05/2023 seeking Revocation of the Grant, that the Petitioners filed respective Replying Affidavits, and that the Application came up on several occasions before the Judge, on which dates the Objectors and/or their Counsel were absent despite being fully aware of the dates, and that it was only when a related case involving the parties herein came up before the Magistrate's Court at Kapsabet and the Petitioners raised the issue of the dismissal that the Objectors acted. He deponed further that contrary to the averments made in the Objectors' Supporting Affidavits, the Objectors and/or their Counsel were fully aware that this matter was coming up on 23/11/2023 at Eldoret since they used the same as an excuse to adjourn the hearing of related case involving the parties herein, namely Kapsabet CMEL E066 of 2022, on 20/11/2023. She attached the proceedings of the said date and stated that therefore the non-attendance was deliberate and cannot be excused.
6. She questioned why the Objectors have not also explained the non-attendances on the previous Court sessions before 23/11/2023. She further denied that the Kapsabet High Court was not sitting on 23/11/2023 and pointed out that the Notice exhibited by the Objectors only communicates closure of the Magistrate's Courts and not the High Court, that although the LSK North Refit elections were conducted on that said date, there was no notice issued that the Courts would not be sitting and that Advocates attended Court and later voted. She also deponed that the Appellant's Counsel's post was uncontested as is evident from the annexure exhibited and hence Advocates were not voting for that position, that the Objectors' said Advocates' law firm has 5 Advocates and there is no valid reason why one of them could not attend Court. According to him, the Objector's conduct depicts dishonesty



and reveals indolence, and that on 23/11/2023, the Objectors were within this Court's premises but chose not to attend the proceedings. She also urged that the Grant herein was obtained in accordance with the law and all the children of the deceased were given a portion and that therefore, there is no fraud. He urged that although the Court has powers to grant the orders sought, it can only do so upon the Objectors' advancing a good cause/reasons. She then contended that the Objectors, despite having knowledge that the matter was coming up on 23/11/2023 and failing to attend, did not bother to even peruse the Court file to check what transpired, and that they waited until it was brought up in the subordinate Court for them to act. She then restated general principles applicable in Applications of this nature and deponed that if anyone is to be prejudiced, it is the beneficiaries of the estate.

Hearing of the Application

7. The Application was canvassed by way of written Submissions. The Objector's Submissions was filed on 21/03/2024 while the Petitioners filed theirs on 2/05/2023.

Applicant's Submissions

8. The Objector's Counsel repeated the matters set out in the Supporting Affidavits explaining reasons for the non-attendance but also made some further statements that amounted to introduction of fresh facts. He also repeated the contention that the Objectors have a strong case in this matter, and that mistakes of Counsel should not be visited upon the clients. He then conceded, as alleged by the Petitioners, that on the said 23/11/2023, the clients were present in Court but due to ignorance, they failed to address the Court. Counsel then cited various authorities and reiterated the fact that the 2nd Petitioner is the biological son of the 1st Objector. Counsel then, again, fell into the irregularity of seemingly arguing the Application for Revocation of Grant, which is not the subject of this Ruling

Respondent's Submissions

9. On her part, Counsel for the Petitioners recounted the background of this matter up to the point at which the Objectors' said Application dated 18/05/2023 was dismissed for attendance. She then reiterated that the failure to attend Court was wilful neglect or deliberate intention to delay the matter and in stressing the same, she repeated the matters already set out in the Replying Affidavit, including the issue of the conduct of the LSK North Rift Branch elections, the fact that the Objectors were within the Court precincts on the material date, that the Objectors' Advocates has 5 Advocates and that there is no explanation why one of them could not attend. She also reiterated that it is only the Kapsabet Magistrates' Court that was closed on the material date, and not the Kapsabet High Court, and that Counsel for the Objector, while attending a related case before the Kapsabet Magistrate's Court a few days earlier involving the parties herein, cited the reason that this matter was coming up in this Court on 23/11/2023 as a ground for seeking an adjournment. She urged that although the Objectors are pegging the non-attendance on the mistake of their Counsel, it is trite law that a case belongs to the litigants and not their Advocates, that justice delayed is justice denied, that inasmuch as the right to be heard is fundamental, in this case, the Objectors have not been denied the opportunity to be heard but it is them who have not taken up the opportunity presented to them, and that high chances of success is not one of the conditions for setting aside an order but that in any event, the Objectors have not demonstrated any triable issues.



Determination

10. The issue that remains for determination herein is

“whether the dismissal of the Objector’s Summons for Revocation of Grant dated 18/05/2023 should be set aside and the same reinstated”.

11. It is not in doubt that the Court possesses a wide discretion in deciding whether to allow an application for the setting aside the dismissal of an Application, or even a suit, for non-attendance. This discretion must however be exercised judiciously as was well-stated in the case of *Shah v Mbogo* (1979) EA 116 as follows:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

12. For the Court to exercise its discretion in favour of the Applicant, it must be satisfied that there is sufficient cause or reason to warrant reinstatement of an action dismissed for non-attendance. The term “sufficient Cause” was defined by the Supreme Court of India in the case of *Parimal v Veena* in the following terms:

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore, the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”



13. Similarly, in the case of the *Hon. Attorney General v the Law Society of Kenya & Another*, Civil Appeal (Application) No. 133 of 2011 (UR), Musinga, JA explained as follows:

“28. Sufficient cause” or “good cause” in law means:

“..... the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused”.

See *Black’s Law Dictionary*, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

14. In the instant Application, the Objectors and their Counsel have alleged that the reason for their non-attendance on 23/11/2023 was that their Counsel had inadvertently mis-diarised the date of the case under the Kapsabet High Court, instead of Eldoret High Court.
15. This matter first came up before me on 19/05/2023 on which date, as the duty Judge, the Objectors’ Summons for Revocation dated 18/05/2023 was placed before for under Certificate of Urgency. I did not certify the same as urgent and directed that the same be served for inter partes hearing on 26/06/2023. On 26/06/2023, there was no appearance from the Objectors. Although the Petitioners’ Counsel sought for dismissal of the Summons for non-attendance, I declined to do so and adjourned the same to 16/10/2023 for hearing. I also made an order that, since the matter arose from the Kapsabet area, the parties discuss and report back to the Court why the case should not be transferred to the Kapsabet High Court. On 16/10/2023, again, there was no appearance by the Objectors. Yet again, I did not dismiss the Summons but adjourned it to 23/11/2023. On 23/11/2023, once more, there was no attendance by the Objectors or their Counsel. The Court’s patience having been pushed to the limit, the Petitioner’ Counsel having once again sought for dismissal and upon certifying myself that there was an Affidavit of Service on record confirming service, I finally dismissed the Summons for non-attendance and for want of prosecution.
16. It is therefore evident that the Objectors’ Counsel, despite moving the Court under Certificate of Urgency, failed to thereafter attend Court, not once, but on 3 consecutive occasions, namely, 26/06/2023, 16/10/2023 and 23/11/2023.
17. The Objectors have attributed the blame for non-attendance on their Counsel, and who has readily embraced such blame. However, in the case of *Savings and Loans Limited v. Susan Wanjiru Muritu* Nairobi (Milimani) HCCC No. 397 of 2002, Kimaru, J (as he then was) expressed himself as follows:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour, is an indictment



of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.”

18. Having recounted the above however, I note that both sides are in agreement that on 23/11/2023, despite the absence of their Counsel, the Objectors were within the Court precincts. but I believe that, perhaps it is out of ignorance, naivety, fear or incomprehension of the rules of the Court, that they did not respond when the matter was called out. This indicates that, although there was obvious lethargy from their Counsel, the Objectors were themselves intent on pursuing their case. For this reason, I am prepared to give the Objectors the benefit of doubt and save them from being punished for the mistakes of their Counsel. Although I fully agree that a case belongs to the litigants, not to their Advocates, and that the litigants therefore have the obligation to follow-up and ensure the progress or prosecution of their case, this is one case where the inaction by the litigants may be attributable perhaps ignorance and a party’s full reliance on his Advocate.
19. I also note that there are various other cases presently ongoing in several other Courts between the same parties herein, with some possibly even stayed or adjourned on the basis of the existence of the Summons for Revocation herein dismissed herein for non-attendance. Dismissal of the Summons herein is therefore likely to have a ripple effect on the rest of the related matters to the prejudice of the Objectors.
20. Further, the 1st Objector’s claim in the Summons for Revocation dismissed for non-attendance is that she is the widow of the deceased herein and that the Petitioners have unjustly disinherited her from her late husband’s estate. She claims that the Petitioners, while applying for the Grant of Letters of Administration, fraudulently omitted her name from the list of survivors and/or beneficiaries, left her out in the distribution of the estate when applying for confirmation of the Grant and that the Petitioners are now attempting to evict her from her land. It is not lost on me that according to the 1st Objector, the 2nd Petitioner is her own biological son which allegation has not been denied by the Petitioner. These are therefore no doubt weighty issues that justify determination on merit.
21. I also take into account the fact that while the Summons for Revocation was dismissed on 23/11/2023, the instant Application was filed on 4/12/2023, only about 11 days later. It is therefore evident that the same was brought timeously, perhaps a signal that the Objectors’ Counsel has now realized his folly and has since “reformed”.
22. In the case of *Philip Chemowolo & Another v Augustine Kubede*, [1982-88] KAR 103 at 1040 Apalo, JA (as he then was), held 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.”
23. Further, in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, the Court of Appeal held that:

“[22]. The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even



if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

24. Similarly, the Court of Appeal, in the case of *CMC Holdings Ltd v James Mumo Nzioka* (2004) KLR 173, guided as follows:

“The discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”

25. Lastly, in the case of *Belinda Murai & 9 Others v Amos Wainaina* [1982] KLR 38, the indefatigable C.B. Madan, JA (as he then was) pronounced himself in the following manner:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not forgive or condone it but it ought to certainly do whatever is necessary to rectify it if the interests of justice so dictate. The courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule.”

26. Applying the above principles, while I cannot excuse the Objectors’ Counsels’ repeated and unexplained failure to attend Court on several occasions, the nature of the dispute and the broad equity approach, justifies reinstatement of the Summons dismissed for non-attendance. This is therefore one case where I find it apt to apply the principle that a litigant should not always be made to suffer for the mistakes of his Advocate. I also find that in this case, the error or default committed by Counsel by the Objectors can be put right by payment of costs.

Final Orders

27. In the end, I order as follows:

- i. The Objectors’ Notice of Motion dated 4/12/2023 is hereby allowed.
- ii. The consequently, the Orders made herein on 23/11/2023 dismissing the Objector’s Summons for Revocation dated 18/05/2023 for non-attendance is hereby set aside and the said Summons for Revocation is reinstated for hearing on merit.
- iii. I award thrown away costs of this Application to the Petitioners which I assess at a sum of Kshs 30,000/-. For the reasons stated above, I order that the same shall be personally paid by the Advocates’ law firm on record for the Objectors, Messrs Rotich, Langat & Partners Advocates, within a period of 30 days.
- iv. Further, since the matters herein clearly arise from the Kapsabet region where the parties also come from and where there is now a fully-fledged operating High Court and since there are also other related ongoing cases before the Kapsabet Law Courts involving the parties herein, I



transfer this file to the High Court at Kapsabet for hearing and determination of the Summons for Revocation dated 18/05/2023 and for all other matters related thereto.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF NOVEMBER 2024

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:-

Ms Kenei for the Petitioners-Respondents

N/A for the Objectors

Court Assistant: Brian Kimathi

