



REPUBLIC OF KENYA



**In re Estate of Mwarigha Nyange (Deceased) (Succession Cause
263 of 2009) [2021] KEHC 9774 (KLR) (5 February 2021) (Ruling)**

Neutral citation: [2021] KEHC 9774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 263 OF 2009**

JN ONYIEGO, J

FEBRUARY 5, 2021

IN THE MATTER OF THE ESTATE OF MWARIGHA MOKA NYANGE

BETWEEN

EDWARD LENJO MWARIGHA 1ST APPLICANT

VIDELIS MNJALA MWARIGHA 2ND APPLICANT

AND

OCTAVIAN MWARIGHA RESPONDENT

RULING

1. The deceased herein died intestate on 14th September, 2008 while domiciled in Taita. According to the Chief's introductory letter dated 31st March, 2009 and the petition application filed on 31st August, 2009, the deceased was survived by;
 - a. Regina Chao Mwarigha (wife)
 - b. Frida Mshai (wife)
 - c. Videlis Mnjala Mwarigha (son)
 - d. Edward Lenjo Mwarigha (son)
 - e. Joseph Mwanyumba Mwarigha (son)
 - f. Rose Samba Mwarigha (daughter)
 - g. Jonam Mrangulo Mwarigha (son)
 - h. Caroline Mghambi Mwarigha (daughter)
 - i. Julian Wanjala Mwarigha (daughter)



- j. Octavian Nyange Mwarigha (son)
 - k. Martin Mwarigha (son)
2. The following properties were listed as comprising the estate;
- a. Maungu 12 acres unsurveyed plot
 - b. Maungu 3 acres unsurveyed plot
 - c. Chaani 1 house on plot 12/18
 - d. Plot at Maungu shopping center
 - e. Msorongu farm 3 acres
 - f. Tractor Reg No. KAL 608 B
 - g. Bank A/c balance Barclays and standard Chartered Ksh 23,000.
3. On 31st August, 2009, Edwin Lenjo Mwarigha and Videlis Mnjala Mwarigha both sons to Regina Chao Mwarigha the first wife petitioned for a grant of representation. Vide a notice of motion dated 18th March, 2012 and filed on 16th August, 2012, Frida Mshai Mwarigha the second wife to the deceased prayed for letters of administration intestate in respect of the estate of Mwarigha Moka Nyange (deceased) to be issued in the joint names of the petitioners and herself. In the alternative, she prayed for the petitioners to show cause why they could not pursue issuance of the grant for over 2 years.
4. In the application, Frida argued that since filing the petition on 31st August, 2009, no action had been taken to obtain the grant. Further, that the petitioners were enjoying benefits from the estate of the deceased to the exclusion of the second house.
5. After considering the application, the court on 11th September, 2014 directed the petitioners to amend the petition to include one member of each of the two houses as administrators. The petitioners having failed to amend the petition to include a representative from the second house, Octavian Nyange Mwarigha a son from the second house lodged a notice of motion dated 26th October, 2016 and filed on 23rd November, 2016 seeking;
- a. That the petitioners be ordered to show cause for failure to file the amended petition more than two years after the court order was issued.
 - b. That the Honourable court be pleased to allow that the applicant's nominees to apply for the grant of letters of administration of the deceased's estate
 - c. That rental proceeds from plot No. 12 /18 and 12/23 Chaani be deposited in court.
6. After considering the application, the court on 25th July, 2017 ordered as follows;
- a. That Octavian Nyange Mwarigha be and is hereby directed to file an application in respect of the deceased's estate and
 - b. The rental proceeds from Plot No 12/18 Chaani and 12/23 Chaani be deposited in court with effect from 1st August, 2017.
7. The order was extracted on 9th October, 2017. Pursuant to this authority, Octavian Nyange Mwarigha alone filed an amended petition application dated 17th October 2017, seeking a grant of letters of administration intestate. He listed the same beneficiaries as listed by the original petitioners. He also



listed the assets listed by the original petitioners but added; Chaani house Plot No 12/23 and shares at Sagana and Sasini Ranches. The estate was then gazetted on 4th September, 2017.

8. Aggrieved by the orders of the court made on 25th July, 2018 and issued on 9th October, 2017, the original petitioners filed a notice of motion dated 22nd October, 2017 seeking the following orders;
 - a. That this application be certified as urgent and its service be dispensed with in the first instance.
 - b. That, orders made on the 9th October, 2017, be varied, discharged and or set aside “exdebito justitiae”.
 - c. That the property known as Chaani site and service scheme 12/23 be exonerated from or removed from the Assets of the deceased as it is the property of a third party.
 - d. That the property known as 12/18 is in the exclusive hands of my mother Regina Chao and Edward Lenjo Mwarigha out of which, the mother is eking a living to sustain herself at her advanced age and there is no knowing how she can survive without subsistence as a widow.
 - e. That, the respondent herein is inclusive possession of 15 acres at Maungu where there are heads of cattle. Hence is accountable for the proceeds obtainable thereof.
9. The application is premised upon grounds stipulated on the face of it and an affidavit sworn on 22nd November, 2017 by Videlis Mnjala Mwarigha with authority from Edward Lenjo Mwarigha arguing that, the property known as Chaani 12/23 is his which he has owned for over 26 years. He attached official search marked VMM-1 showing that he was the sole owner having bought it in 1982 from the County Council of Mombasa. He also attached several rates payment receipts reflecting his name.
10. Regarding property known as Chaani 12/18, he claimed that it is operated and proceeds thereof received by his mother and younger brother Edward Lenjo for their subsistence.
11. In response to the application, Octavian Mwarigah filed a replying affidavit sworn on 28th November, 2018 opposing the application. He averred that the applicants in this application did not turn up during the hearing of the application dated 26th October, 2016 which gave rise to the impugned orders issued on 9th October, 2017. That the property alleged to be registered in the name of Videlis (Plot No 12/23) was being held in trust for the deceased and by extension the whole family. That the deceased had registered it in Videlis’ name to enable him (deceased) get a second allocation of plot No. 12/18 which he had already secured from Mombasa County Council in his name.
12. On 16th September, 2019, the court directed the application to be heard by way of submissions. Parties were given time lines within which to file their respective submissions. The matter was fixed for 28th October, 2019 to fix a ruling date. On that day, the court did not sit. The matter was then mentioned on 2nd December, 2019. By then, only Mr. Mulei appearing for the respondent had filed his submissions. There was no explanation given for noncompliance 3 months down the line. The court then proceeded to give a ruling date.

Submissions by the Respondent

13. The firm of Mulei appearing for the respondent filed his submissions on 18th October, 2019 reiterating the averments contained in the affidavit in support of the application. Counsel basically submitted that there was no ground or good reason cited why the orders made on 25th July, 2018 and issued on 9th October, 2017 should be set aside.
14. Learned counsel further submitted that the impugned orders arose from the application of 26th October, 2017 which was not opposed as the applicants did not attend court. Mr Mulei further



submitted that Chaani Plot No, 12/23 is respectively owned by a third party hence not owned in trust for the deceased.

Determination

15. I have considered the application herein seeking the court to set aside the orders of the court made on 25th July, 2017 and issued on 9th October, 2017 directing the respondent herein to file a petition in respect of the deceased's estate pursuant to the applicants' failure to do so and, that the rental proceeds, from Plot No 12/18 Chaani and 12/23 Chaani be deposited in court with effect from 1st August, 2017. There is no dispute that the application dated 26th October, 2016 was served upon the applicants and then fixed for hearing on 25th July, 2017. On that day, the applicants were nowhere in court. The application was not opposed hence allowed as prayed.
16. The applicants have not clearly given reasons why this court should vary or set aside the orders. They have not explained why they did not attend court and challenge the application. The reasons given for setting aside the orders can only be raised on appeal and not on the proposed variation of the orders which is a semblance of a review application but not specifically stated.
17. For the court to excise its jurisdiction to set aside the *ex parte* order, the applicant must demonstrate sufficient cause to warrant such action while bearing in mind that justice must be seen to be done.
18. Although the court is duty bound to do justice by setting a side *ex parte* orders or decision where there is sufficient cause, it is also duty bound not to exercise its jurisdiction in order to assist anon-deserving or indolent litigant. See *Waweru v Ndwiga* (1983) KLR 236 Where the court held that a court has unfettered discretion to do justice between parties. Further, it held that it may be just and on the facts of a particular case to set aside an *ex parte* judgment to avoid hardship or injustice arising from inadvertence or mistake even though negligent but, the decision should not be exercised to assist any one to delay the cause of justice.
19. Similarly, in the case of *Shah v Mbogo* (1967) E A 166 the court held as follows;

“This discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice”.
20. In the instant case, there is no mention as to why the applicants did not attend court to oppose the application. They had been given an opportunity to petition for a grant jointly with a representative from the second house. From 11th September, 2014 they did not take any action. Their previous conduct or indolence since 31st August, 2009 when the first petition for the grant was lodged now over 11 years without taking any step is a clear manifestation that their intention is to delay this case.
21. I do not see any prejudice in the respondent petitioning for a grant alone as directed by the court. To set aside those orders will amount to sitting on an appeal on the decision of a court with concurrent jurisdiction. I do not find any justification in setting aside those orders. In any event, the respondent has already been gazetted as the administrator.
22. To fast track this matter and in applying my discretion under Section 66 of the Law of Succession, it is my holding that the scales of justice demands that the respondent one Octavian Nyange Mwaragha who has shown commitment in prosecuting this matter be issued with a grant of letters of administration forthwith so as to apply for confirmation of the same within six months.



23. Regarding the ownership of property Plot No. 12/23, and its removal from the list of assets, parties are in agreement of the fact that its registered in the name of Videlis. However, the respondent is claiming that it was being held by Videlis in trust for the deceased and by extension the whole family.
24. It is clear that the applicants did not prosecute their application either orally or by way of submission. The application was generally not prosecuted and the issue of trust cannot adequately be addressed. Since the court in its orders of 9th October, 2017 did authorize deposition of rent from that property in court, and since there is no appeal challenging that order, I cannot make a substantive decision on the same at this stage. I would advise that the issue be canvassed during the hearing of the confirmation application when the court will decide whether it will handle the issue of trust or not.
25. For the above reasons stated, I do not find any merit in the application herein and the same is hereby dismissed. This being a family matter, each party shall bear on costs.
26. However, as stated herein above, a grant of letters of Administration intestate shall issue to the respondent Octavian Nyange Mwarigha and the same will be confirmed after six months.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF FEBRUARY, 2021.

J.N. ONYIEGO

JUDGE

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