



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 377 OF 2010

IN THE MATTER OF ESTATE OF WELLINGTON KARIUKI ECHESSA(DECEASED)

MARY NJOKI NGUGI.....1ST APPLICANTS

CATHERINE NJERI NGUGI.....2ND APPLICANTS

VERSUS

PATRICIA GATHONI ECHESSA KARIUKI.....1ST RESPONDENT

BEATRICE KAMUYU MWAI.....2ND RESPONDENT

RULING

1. This is a ruling for the application dated 29/04/2019 seeking for review of the orders of Honourable Justice T. Matheka issued on 22/02/2019. The effect of the said ruling was that the grant earlier issued and confirmed on 18/10/2016 in favour of the 1st applicant was revoked.

2. The application is supported by the affidavit of Gerald Gakaria an advocate of the high court on record for the applicants. He depones that he had contacted the counsel for the respondents and informed her that his clients were bereaved having lost their brother and were not able to attend court on the date the matter was set for hearing. He deposes that it was misleading to the court for the respondents to intimate that his clients had demonstrated the willingness to delay the matter. It was his averment that the applicants be given a chance to be heard upon setting aside the orders of the honourable judge.

3. The respondents in their joint affidavit opposed the application on grounds that there was a deliberate move by the applicants and their counsel to delay the hearing of the summons for revocation. Four (4) instances for non-attendance of court by either the applicants or their advocates or both were cited as 12/06/2017, 17/10/2017, 24/09/2018 and 05/11/2018 whereas the court adjourned the hearing.

4. On 28/01/2019, the respondent depones that it is the court that decided to proceed with the matter in the absence of the respondents which was based on lack of authenticity of the message that the applicant were bereaved as claimed. A member of the family of the applicants who was present in court said he was not aware of such bereavement. The applicants and their advocates had formed a habit of failing to attend court any time the matter came for hearing. The respondent averred that the 1st applicant Mary Njoki has taken the estate of the deceased as the sole beneficiary and disinherited the rest of the beneficiaries of a polygamous household. The 1st applicant, a widow to the deceased and sole administrator excluded two minors from benefiting from the estate. The grant had been obtained by the 1st applicant through concealment of facts material to the case and in a fraudulent manner that left all the beneficiaries unaware of what she was doing..

5. It is further deponed that the court revoked the grant *sue moto* invoking its powers under Section 76 of the Succession Act so as to allow all beneficiaries to participate and benefit in the distribution of the estate which was justifiable in the circumstances. The respondents had already been heard by the court and cannot claim that they were condemned unheard. As such, no injustice has been occasioned to the respondents by the orders issued on 22/02/2019.

6. This court directed the parties to file their submissions in respect of this application 28/01/2020 and gave each party fourteen(14) days to do so. The respondents filed theirs on 11/03/2020 and served the applicants who failed to comply for almost one year before the date for this ruling was set.

7. The respondents in their submissions submitted that the power of the court to set aside orders is discretionary. The following cases were relied on where the relevant principles of setting aside were discussed:-

a) Mbogo Vs. Shah (1968) E.A 93

b) Esther Wamaitha Njihia & 2 others Vs. Safaricom

c) Patel Vs. E.A Cargo handling Services Ltd.

8. The issue for determination in this application are whether the applicant's have satisfied this court on grant of the orders sought.

9. In determining whether or not to allow an application seeking to set aside orders issued by the court, the court is essentially exercising its discretion. This was well highlighted in the case of **Mbogoh Vs. Shah [1968] EA 93** where it was held:-

“A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifestation from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.”

10. Similarly in **United India Insurance Co. Ltd. & 2 others Vs. East African Underwriters (Kenya) Ltd [1985] eKLR Madan JA** (as then was rephrased it as follows:-

“ The Court of Appeal will not interfere with a discretionary decision of the judge appealed from. The court of appeal is only entitled to interfere if one or more of the following matters are established; first, the judge misdirected himself in law; Secondly, that he misapprehended the facts; Thirdly, that he took account of considerations of which he should not have taken into account; Fourthly, that he failed to take into account of considerations of which he should have taken account, or Fifthly, that his decision, albeit a discretionary one, is plainly wrong”

11. This discretion will not be exercised capriciously or with a view to rewarding an indolent party. It is exercised to meet the end of justice. Koome J (as she then was) in **Alloys Kaveen Chepkwony Vs. Development Bani of Kenya & 2 others Nairobi HCCC No. 387 of 2008 Milimani** cited with approval the decision in **Patel Vs. Cargo Handling Services Ltd. [1975] EA 75** as follows:-

*“The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. **Shah Vs. Mbogo [1967] EA 116**. In exercising the discretion the court should consider among other things, the facts and circumstances both prior and subsequent, and all the respective parties. The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by setting aside the judgment should be considered and it should always be remembered that to deny a person a hearing should be the last resort of the court.”*

12. The applicants in seeking for the orders to be set aside, state that doing so will afford them an opportunity to be heard and will enable the court reach a just and fair finding based on merit of the matter. On perusal of the record, it is noteworthy that the applicants have demonstrated a certain degree of reluctance to proceed. The record shows that the applicants only appeared for hearing of the case only once when the matter proceeded for hearing with two witnesses testifying. The applicants henceforth gave various reasons for not proceeding with the hearing. On one occasion their counsel alleged that an appeal in the Court of Appeal whose particulars were not supplied was being heard on that day and that he was involved. Another time the applicant was said to be attending a seminar for a whole month. It is from these facts that the court was convinced that the applicants were not in a hurry to have this matter concluded.

13. I have perused the proceedings of court for the material day that show that the court heard the respondents advocate that led to the ruling of the court delivered on 22/02/2019 and has made several observations.

14. Firstly, it is not in dispute that the 1st applicant Mary Njoki became the sole beneficiary of the estate of the deceased. It is also not in dispute that the family of the deceased was a polygamous one and that the three widows of the deceased had children who were beneficiaries of the estate. The 1st applicant had listed two minors in her application as beneficiaries in the summons for confirmation of grant. It is not in dispute that the two minors whose shares are by law required to be held in trust by two people other family members until they attained the age of majority were excluded from inheritance. Contrary to Section 58 of the Law of succession Act, the 1st applicant became the only trustee.

15. The record shows that there are affidavits by several beneficiaries namely Jeff Muthee Kariuki, Gregory Kimaru Kariuki and Beatrice Kamuyu Mwai who depose that they were not involved in the whole process despite them being children of the deceased and rightful beneficiaries of the estate. Their consent in the succession process was never sought by the 1st applicant in the distribution of the estate. None of them consented to the 1st applicant being appointed the administrator of the estate.

16. The honourable judge in her ruling appreciated from the evidence on record of all the parties that include affidavits that most of the rightful beneficiaries were not invited to participate in the succession proceedings. These facts guided the judge as she revoked the grant *suo moto* invoking the powers of the court under Section 76 of the Act which provides:-

17. *“A grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides, either on application by any interested party or by the court on its own motion.”*

18. By invoking its powers to revoke the grant the court was convinced that such revocation was the only solution to remove the mess that the 1st applicant, Mary Njoki had created. The judge in her ruling also noted with concern that majority of the beneficiaries had been excluded in the inheritance of the estate of the deceased.

19. It was held in the case of Alloys Kaveen Chepkwony (Supra) *the discretion of the court in setting aside is purposed to avoid injustice, or hardship to the parties resulting from accident error, mistake or inadvertence.* In my considered view, the applicants have failed to demonstrate that any injustice or hardship has been caused to them by the revocation of the grant orders issued *suo moto*. Indeed the court used its powers to ensure that the law is followed by enabling all the beneficiaries to participate in this cause.

20. The court appointed three(3) administrators of the estate to represent the interests of each of the three houses of the deceased. It can be said for avoidance of doubt that the court saved precious judicial time that would have been wasted by the applicants in endless litigation for they were not in a hurry to have the matter determined.

21. I come to a conclusion that the applicants have not demonstrated that setting aside the orders issued on 22/02/2019 would serve any useful purpose. The court by its ruling opened the door of justice for all the parties herein by revoking the grant.

22. I find no merit in this application and I hereby dismiss it with costs to the respondents.

23. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 11TH DAY OF MARCH, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 11th day of March 2021.