REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 113 OF 1995

IN THE MATTER OF THE ESTATE OF ELIUD NGICHE GITHIRE (DECEASED)

ARTHUR NDURU GITHIRE .....APPLICANT

V E R S U S

RUTH WANJA OTSYULA .....RESPONDENT

RULING

(1) Before this Court is the Notice of Motion dated **22nd October 2020** by which **ARTHUR NDURU GITHIRE** the Respondent / Applicant seeks the following orders:

> **"1. SPENT**
>
> **2. SPENT**
>
> **3. The Honourable Court be pleased to set aside its proceedings as from 11th February 2020 to 8th October 2020 and the consequential Ruling made on 8th October 2020, such that the applications dated 23rd April 2015 and 17th January 2020 be heard afresh. Order that the Confirmed Grant issued to Stephen Kaguku Mariba be revoked.**
>
> **4. THAT the O.C.S Tigoni Police Station supervise and ensure compliance of the orders above.**
>
> **5. THAT the annexed draft Replying Affidavit be deemed as duly filed.**
>
> **6. THAT costs of this Application be provided for."**

(2) The Application was premised upon **Article 159** of the **Constitution of Kenya, Order 12 Rules 7** of the **Civil Procedure Rules, 2010, Sections 1A, 1B** and **3A** of the **Civil Procedure Act Cap 21** and all enabling provisions of the law and the inherent jurisdiction of the Court. The Application was supported by the annexed Affidavit of even date sworn by the Applicant.

(3) The Respondent / Applicant **RUTH WANJA OTSYULA** opposed the Application. Following directions made by this Court the matter was canvassed by way of written submissions. The Applicant filed his written submissions dated **3rd February 2021** whilst the Respondent relied upon her written submissions dated **19th January 2021.**

BACKGROUND

(4) This Application arises from two (2) Applications dated **23rd April 2015** and **17th January 2020** which were filed by the Respondent. The Applicant herein was directed to file and serve his replies to the said Applications within **ten (10) days** and the Respondent was granted leave to file a reply thereto if the need arose. The hearing of both Applications was scheduled to proceed on **1st April 2020.**

(5) The Applicant avers that he had instructed the firm of **NYAMU J. & CO. ADVOCATES** to come on record and act on his behalf in the Succession Cause. However the Applicant later came to learn that the two (2) applications were heard in his absence on **22nd July 2020** and further learnt that his Advocates on record **had not** filed any reply to the two Applications as per his instructions.

(6) The Applicant states that upon making enquiry from the firm of **Nyamu & Co. Advocates,** the law firm informed him that due to the

abrupt closure of the **Milimani Law Courts** in **March 2020** following the onset of the **Covid-19 Pandemic** in Kenya, the firm also closed down its offices and only resumed operations in **October 2020** and that the Applicants file and documents had been inadvertently misplaced.

(7) The Applicant states that he learnt that the **Hon. Lady Justice Ali-Aroni** proceeded to deliver her Ruling in respect of the two applications on **8th October 2020,** without having the benefit of his Replying Affidavit. That the effect of said Ruling was that the Respondent herein was to proceed with the distribution of the estate of the Deceased. The Applicant avers that this Ruling which was against him will cause him irreparable harm as he stands to be denied his lawful share in the estate. That he still resides on **L.R. No. 239/7 Limuru Township** which parcel of land was unlawfully and irregularly amalgamated with **two (2)** other properties and subsequently further sub-divided into **fourteen (14)** plots.

(8) The Applicant avers that he was never served with a Hearing Notice in respect of the two Applications and that being an elderly man he had no idea that High Court matters were proceeding virtually. That he was not served with Notice of the date of delivery of the Ruling. That he only became aware of the Court's Ruling of **8th October 2020,** when the Respondent came to his door threatening to evict him.

(9) By this Application the Applicant prays that the Court be pleased to set aside the entire proceedings in this matter running from **11th February 2020** to **8th October 2020** as well as the Ruling delivered on **8th October 2020.** He further prays that the two applications dated **23rd April 2015** and **17th January 2020** be heard afresh and that the Confirmed Grant issued to one **KAGUKU MARIBA** be revoked. The Applicant prays that his Draft Replying Affidavit be deemed as duly filed.

(10) As stated earlier this Application was opposed vide the Replying Affidavit dated **30th November** sworn by the Respondent **Ruth Wanja Otsyula.** The Respondent argued that the Applicants application of **22nd October 2020** amounted to an abuse of Court process as the same had already been overtaken by events and that said Application was filed merely as a ploy to delay justice in this Succession Cause.

(11) The Respondent asserts that the Applicant was properly served with Hearing Notice but deliberately failed to attend Court on said hearing date. The Respondent opposed a fresh hearing of the two Applications dated **23rd April 2015** and **17th January 2020,** and maintained that all issues in this Succession Cause had been substantively dealt with, thus the Court is '**functus officio'** in the matter. She urged the Court to dismiss this Application with costs.

ANALYSIS AND DETERMINATION

(12) I have carefully considered the Notice of Motion dated **22nd October 2020,** the Affidavit in support, the Replying Affidavit dated **30th November 2020** the written submissions filed by both parties as well as the relevant law.

(13) In seeking to have the Ruling of **8th October 2020** set aside the Applicant terms said Ruling as irregular in that the hearing of the two Applications dated **23rd April 2015** and **17th January 2021** proceeded in his absence. The Applicant submits that he was not served with a Hearing Notice for the two Applications and thus he was denied his right to be heard.

(14) The difference between a regular and irregular Ruling of a Court was set out in the case of **JAMES KANYIITA NDERITU & ANOTHER –VS- MARIOS PHILOTAS GHIKAS & ANOTHER [2016]** as follows:-

> **"In an irregular default judgment, on the other hand, judgment will have been entered against a Defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."**

(15) Similarly, in **HCCC No. 241 OF 1998: FIDELITY COMMERCIAL BANK –VS- OWEN AMOS NDUNG'U & ANOTHER Hon. Njagi** (as he then was) drew attention to the distinction between regular and irregular judgments by stating that where an ex-parte Judgment is entered because there was no proper service or any service of the Summons to Enter Appearance, it is irregular and the Defendant is entitled to have it set aside as of right.

(16) In **SHAH –VS- MBOGO [1983]eKLR,** the Court held thus:-

> **"2. The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:**
>
> **a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules ….**
>
> **b) Secondly, this discretion is intended so 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 has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.**

c) ….”

(17) The Applicant herein claims that neither he nor his Advocate were served with Notice of the hearing date for the two applications. The assertion by the Applicant runs contra to the findings of the **Hon. Justice Ali-Aroni** who in paragraph **5** in her Ruling dated **8th October 2020** observed as follows:-

> **“Having satisfied itself through an Affidavit of Service dated 16th July 2020 that a hearing notice in reference to applications dated 23rd April 2015 and 17th January 2020 was served upon Arthur Nduru Githire the 1st Respondent and Buxton Farmers Co. Ltd the 2nd Respondent the matter proceeded on 22nd July 2020 their absence notwithstanding.”**

(18) Therefore despite the Applicants claim that he was not served with a hearing notice the learned Trial Judge found to the contrary and declared herself satisfied that he had infact been properly served. I have myself carefully perused the **Affidavit of Service** dated **16th July 2020.** The said Affidavit of Service appears as Annexture ‘**RWO-4’** to the Respondents Replying Affidavit dated **30th day of November 2020.** In that Affidavit one **PETER MUSYOKA KISILU** a Court Process server avers that on **9th July 2020** he served a Hearing Notice on the firm of **Njau Ngigi & Co. Advocates.** That same Process-Server further on the same date he travelled to the home of the 1st Respondent (the Applicant herein) in **Limuru Town** next to **Nazareth Hospital** where he served the Applicant who received the Hearing Notice but declined to sign the copy. From this Affidavit it is evident that the Applicant was properly served with the Notice of Hearing of the matter on **22nd July 2020.**

(19) Aside from being served with notice of the hearing by the Process-Server, there is evidence that a link to the virtual Court hearing on the material day was forwarded to the Applicant by the Respondent. A copy of the E-mail sent to the Applicant by the Respondent herein appears as **Annexture 6’a’ & 6’b’)** to the Replying Affidavit dated **30th November 2020.** Therefore the Applicant cannot claim to have been unaware of the hearing date. Further a copy of the Cause List indicating the Ruling date was sent to the Applicant by e-mail on **7th October 2020,** thus he cannot claim to have been unaware of the date of Ruling. (Annexture **‘7b’**).

(20) The Applicant in his submissions challenged the Affidavit of Service but does not state the grounds on which the same is being challenged. I note that in paragraph **(5)** of the Affidavit the Process-Server have very clear details of the location of the Applicants homestead stating that the home was next to a **‘CITIZEN TV BOOSTER’.** Further at paragraph **(6)** the Process-Server states that he found the Applicant in the company of two children namely ‘**MBURU’** and ‘**NJOKI’.** In light of the specifics and detail given I am satisfied that the Process-Server did effect proper service upon the Applicant and the Applicants allegation that he was not served is a blatant lie. Having been duly served with Hearing Notice neither the Applicant nor his Advocate appeared in Court on the hearing date. They cannot now cry foul over their own failure to attend Court.

(21) The Applicant further submits that he was not granted an opportunity to be heard in respect of the two Applications as his Advocate failed and/or neglected to file a Replying Affidavit despite having been instructed by the Applicant to do so. The Applicant pleads that the mistake of his Advocate should not be visited upon the client. The Applicant cites and relies on the case of **BELINDA MURAS & 6 OTHERS –VS- AMOS WAINAINA [1978] KLR** in which **Madan J/A** as he then was held thus:-

> ***“A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.” [emphasis supplied]***

(22) The record indicates that on **10th February 2020** the trial Court gave its directions in respect of the two (2) Applications dated **23rd April 2015** and **17th January 2020.** The Respondent (Applicant herein) was directed to file his response to the two Applications within **ten (10) days.** No Replying Affidavits were filed within **the 10 days** or at all and no Application seeking extension of time within which to file a Reply was made. As such the Court after satisfying itself that the Hearing Notice had been duly served proceeded to hear the two (2) Applications without the benefit of any Reply from the Applicant.

(23) The Applicant lays the blame on the failure to file Replying Affidavits at the feet of his Counsel then on record. Recent jurisprudence holds that a suit belongs to the Litigant and **not** to the Advocate. As such a Litigant has an obligation to check on the progress of his matter. He cannot just instruct counsel and then sit back without confirming that instructions given have been followed. In **SAVINGS & LOAN LIMITED –VS- SUSAN WANJIRU MURITU NAIROBI HCC NO. 397 OF 2002, Hon. Justice Luka Kimaru** held as follows:-

> ***“ Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate 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 for the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with the 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 judgment that was dismissed by the court, it would be a traversity of justice for the court to exercise its discretion in favour of such a litigant”. [own emphasis]***

(24) Likewise in Court of Appeal in **Civil Appeal No.24 of 1978** it was held:-

> **"A Litigant cannot plead ignorance of his own cause. It is upto a Litigant to keep himself informed as to what happened in his case."**

(25) Similarly I find that the Applicant herein cannot lay the entire blame on his Advocates. He has not demonstrated what if any steps he himself took to ensure that his Replying Affidavits were filed as per the directions of the Court.

(26) The Applicant further attempts to explain the failure to file Replying Affidavits on the fact that the Courts closed down in **March 2020** as a result of the **COVID-19 Pandemic** in Kenya. He avers that his Advocates also closed their law firm and did not re-open until **October 2020.** That they were unaware that Court matters were proceeding virtually. I find it hard to believe that the Applicants lawyers closed down their offices for a full **seven (7) months** and had no idea that hearings were proceeding virtually. Any lawyer worth his salt was fully aware when the Courts were re-opened as this information was made public via the mainstream media. Indeed it was a well known fact that Advocates were agitating for Courts to re-open so that they could continue to practice and earn their living. It is unfathomable that the Applicants lawyers shut down his office for a full **seven (7)** months due to the Covid Pandemic, and had no idea that Courts were hearing matters virtually.

(27) Finally it is evident that following the Ruling delivered by **Hon. Justice Ali-Aroni,** the Administrators were directed to put in place mechanisms to divide the remainder of the estate. The Applicants present Application has therefore been overtaken by events. **L.R. No. 239/2/3/1** no longer exists as a single unit. Those properties were amalgamated with **L.R. No. 14316** and **L.R. No. 239/4** to form **L.R. No. 24940 (Itugi Farm)** which was then distributed to twelve (12) persons.

(28) In his pleadings the Applicant makes reference to **L.R. No. 239/7.** In **paragraph 16** of her Ruling dated **8th October 2020 Justice Ali-Aroni** stated as follows:-

> **"16. In his application dated 7th June 2018 the 1st Respondent made reference to a non-existing L.R. No. being L.R. No. 239/7 Limuru Township. He obtained an order requiring status quo on L.R. No. 239/7 be maintained. It is clear to me that the Respondent misled the Court as no such property as 239/7 does exist. The Respondent is only entitled to 14.8 acres of the amalgamated property now known as L.R. No. 24940. The order issued based on wrong information is therefore vacated."**

(29) Finally I find no merit in this Application. I find that the Applicant was properly notified of the hearing date but for reasons best known to himself failed to appear in Court. The Ruling of **8th October 2020** was in my view regular. I decline to set aside the same. Finally I dismiss in its entirety the Notice of Motion dated **22nd October 2020.** This being a family matter I direct that each side pay its own costs.

Dated in **Nairobi** this **18TH** day of **JUNE, 2021**.

.....

MAUREEN A. ODERO

JUDGE