



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 34 OF 2018

IN THE MATTER OF THE ESTATE OF MARY NGONDU MWANUNGA(DECEASED)

BRIGIT KAMENE.....INTRESTED PARTY/APPLICANT

-VERSUS-

ANGELINE MUNYIVA MWITHAMA.....1ST ADMINISTRATOR

SAMMY MWITHAMA NGONDU.....2ND ADMINISTRATOR

RULING

1. On 14th December, 2020, I expressed myself in this matter as follows:

“Apart from bare averments, there is however no evidence that the Applicant and her sister were notified as required in Part VI Rule 26(1) of the *Probate and Administration Rules* despite the fact that they rank in priority to the 1st Respondent. In her replying affidavit, the 1st Respondent has not given any reason why this was not done...Accordingly, the Grant of Letters of Administration issued to Angeline Munyiva Mwithama and Sammy Mwithama Ngóndu herein on 25th February 2019 is hereby annulled and/or revoked. I am however not satisfied that the 2nd Respondent was an innocent party to the said proceedings. His change of mind seems to have arisen from the fact that his relationship with the 1st Respondent is no longer rosy. Having been a party to the defective proceedings it is my view that none of them ought to further administer the Estate of the deceased. I hereby appoint Brigit Kamene and Mirriam Ndunge Ngongu as joint administrators of the estate of Mary Ngongu Mwanunga. They should expeditiously proceed to apply for confirmation of Grant. However, before doing so none of the properties of the deceased should be disposed of or in any other manner alienated. I further direct that this dispute be referred to mediation for the purposes of proper distribution of the estate of the deceased.

2. By summons dated 27th January, 2021, the 2nd administrator/applicant herein seeks to have the said orders set aside. The application is premised on the ground that the application forming the basis of the said orders proceeded without her advocate’s input.

3. According to the application which was supported by an affidavit sworn by Jack Mackenzie, who deposed that he is one of the advocates on record for the applicant, on 4th July, 2020 he was served with an application by the interested party dated 3rd July, 2020 but without a hearing date. However, he was shocked when he was served with a notification of mediation hearing which was to commence on 18th January, 2021. Upon perusing the file, he discovered that the said application had been heard and a ruling given without his knowledge. Upon contacting his client, he was informed that the client believed that he knew what was going on and that he had opted to allow the other firm to proceed with the application with his blessings.

4. According to the deponent, all along he has always been ready to give his contribution if given a chance and would have objected to the application on the ground that the person who commissioned the affidavit lacked capacity to do so.

5. On their part the 1st and 2nd Respondents the applicant’s advocates, Khaminwa & Khaminwa Advocates were duly served with the application for revocation and the mention date and that Dr Khaminwa, the lead counsel responded to the application on 12th October, 2020 hence the applicant fully participated in the proceedings. It was their position that the deponent of the supporting affidavit was acting in the matter jointly with the firm of Khaminwa & Khaminwa Advocates which fully represented the applicant.

Determination

6. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

7. It is clear that the basis for seeking to set aside the order issued herein is because one of the applicant's advocates was not notified of the proceedings. It is not contended that the other advocate who was properly on record was similarly not served. To the contrary, that firm of advocates was aware of the proceedings in question. It is contended which contention is not challenged that **Dr Khaminwa** was the lead counsel in the matter. That being the position, the law is clear that it is the firm of advocate leading the litigation that ought to be served if both firms of advocates are on record.

8. The decision whether or not to set aside an ex parte order, assuming this was an ex parte decision, is discretionary and as was held in **Shah vs. Mbogo (1967) EA 166**:

“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 has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

9. A party cannot, by instructing several firms of advocates to appear for him or her, impose the burden of effecting service on all the said firms. He or she must take the risk that only one firm may be served and once that is done, the law presumes that he or she was duly served. To apply for setting aside a decision on the ground that one of the several advocates was never served with the hearing notice when the other duly instructed advocate(s) was/were served can be properly termed as the conduct of a person who sets out to *deliberately evade or otherwise obstruct or delay the cause of justice. Such conduct is not deserving of favourable exercise of judicial discretion.*

10. In the premises, I find no merit in this application which I hereby dismiss with costs to the Respondents.

11. It is so ordered.

Ruling read, signed and delivered virtually at Machakos this 10th day of June, 2021.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Munguti for the Administrator

Mr Kisili for the 3rd Respondent

CA Geoffrey