



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 273 OF 2008

IN THE MATTER OF THE ESTATE OF ONYIEGO (DECEASED)

AND

IN THE MATTER OF SUBSTITUTION OF ADMINISTRATORS TO THE ESTATE OF THE DECEASED

AND

IN THE MATTER OF LAW OF SUCCESSION ACT

BETWEEN

ERNEST MOTURI OGWORA.....1ST APPLICANT

PASKALIA NYANGARA ONYIEGO..... 2ND APPLICANT

WILLIAM NDEGE 3RD APPLICANT

JOSEPH OGEGA4TH APPLICANT

VERSUS

CHRISTOPHER OBWAGI 1ST PETITIONER/ RESPONDENT

CONRAD MANGERA2ND PETITIONER/ RESPONDENT

SUSAN N. ANGWENYI 3RD PETITIONER/ RESPONDENT

AND

JOHN MOMOIMA ONYIEGO 1ST RESPONDENT/APPLICANT

PETER ANGWENYI 5TH RESPONDENT

NICHOLAS ANGWENYI 6TH RESPONDENT

RULING

1. On 19th April 2021 this court heard an application dated 12th February 2021 by the 3rd and 4th applicants, which sought to appoint William Ndege, Joseph Ogega and Conrad Mangera, as administrators to the estate of the deceased in lieu of Christopher Obwagi and Susan N. Angwenyi the 1st and 3rd petitioners herein. The applicants claimed that the 1st petitioner was deceased and the 3rd petitioner, who was a daughter in law of the deceased was not qualified under section 29 of the Law of Succession Act to petition for letters of administration. They contended that it would serve the best interest of justice to appoint them to proceed with the administration of the estate which had not been determined 15 years after commencement. That application proceeded *ex parte* and the orders sought by the applicants in their application were granted.

2. Subsequently, the 4th respondent filed the application dated 22nd April 2021 which is the subject of this ruling. He sought orders that;

1) Spent

2) Spent

3) Spent

4) The Honourable Court be pleased to rescind, recall, vary and/or a null, the orders of the Honourable court issued on the 19th day of April 2021, in its entirety, including the appointment of WILLIAM NDEGE, JOSEPH OGEKA AND CALVINCE NDEGE respectively, as the joint administrators of the estate of the Deceased herein.

5) The Honourable Court be pleased to rescind, recall, vary and/or a null, the orders of the Honourable court issued on the 19th day of April 2021, granting an Amended Grant of Letters of Administration in favour of the new Petitioners, albeit on the face of a subsisting Grant of Letters of Administration, contrary to and in contravention of the provisions of Sections 81 of the Law of Succession Act, Chapter 160, Laws of Kenya.

6) Consequent to prayers 4 and 5 hereof being granted, the Honourable court be pleased to restore and/or otherwise reinstate the Chamber Summons Application dated the 12th day of February 2021, for hearing and disposal on merits.

7) The Honourable Court be pleased to grant and/or make further directions, towards facilitating the expeditious hearing and disposal of the subject application and consequential applications, pertaining to and/or concerning the subject matter.

8) Cost of this Application be provided for.

3. The application was supported by the grounds listed therein and an affidavit sworn by 4th respondent's learned counsel, Mr. Oguttu on 22nd April 2021. Counsel deposed that he was aware that due to the failure by the original petitioners to apply for confirmation of grant within six months as required by law, the firm of M/s G. M. Nyambati & Company Advocates was retained to file an application for revocation of the grant of letters of administration. The Summons for Revocation of Grant, was heard and dismissed in a ruling dated 15th August 2016. Following the dismissal of the Summons for Revocation of Grant, the applicants, who were represented by the firm of M/s G. M. Nyambati & Company Advocates, filed an appeal, challenging the decision of the court.

4. Counsel deposed that since the subject matter was pending before the Court of Appeal, this court was prohibited from hearing the matter. That notwithstanding, M/s G. M. Nyambati & Company Advocates, who was prosecuting the pending appeal proceeded to file the application dated 12th February 2021. The application was opposed by the 4th respondent who filed Grounds of Opposition. Counsel stated that when the application, came up for hearing on 19th April 2021 he was unable to access the online platform. He therefore caused a WhatsApp message to be posted on the Kisii Notice Board alerting various advocates of his inability to participate in the day's virtual proceedings. The applicant's learned counsel Mr. G. M. Nyambati also called him informing him that the matter had been called out and placed aside, to await his attendance.

5. Counsel averred that due to the difficulties he was experiencing he drove to the court's precincts to seek technological assistance. He participated in another matter which had been scheduled for highlighting of submissions on the same day but on perusing the court file in this Succession Cause he was struck by the fact that counsel for the applicants, had not informed the court about their conversation on the hearing of the matter. Counsel was of the view that although the applicant's counsel was not obliged to hold his brief, professional duty required that an advocate should not conceal deliberations held with the opposite counsel, with a view to obtaining quick orders. He argued that in this case, the mistake of counsel had deprived the 4th respondent of his right to fair hearing who ought to be given an opportunity to ventilate his side of the story.

6. Counsel further deposed that the court had proceeded to issue an Amended Grant of Letters of Administration, without first revoking the previous Grant of Letters of Administration. Although counsel was aware that one of the original administrators, had died, he argued that Section 81 of the Law of Succession Act, provided that the administration must proceed on the basis of the surviving administrators and that the law frowned upon the issuance of a second grant, without prior revocation of the existing grant. He therefore urged the court to set aside the orders issued on 19th April 2021 and give the 4th respondent a chance to ventilate his position.

7. With the authority of his co-applicant, William Ndege, swore an affidavit opposing the application. He explained that they had moved to file the application to substitute the deceased petitioner and the deceased's daughter in law who had commenced the succession proceedings but were unable to proceed further. He claimed that since the petition was filed in 2000, some of the beneficiaries had passed on and it was necessary for them to be substituted. According to him, the orders obtained on 19th April 2021 did not affect the 4th respondent in any way since he was a beneficiary of a property that was currently the subject of an appeal and not the succession cause.

8. The applicant also deposed that counsel for the applicant had no capacity to swear the affidavit on matters of fact and law. In his view, the present application was intended to derail the administration of the estate yet they were keen to move with speed and conclude the administration of the estate which had dragged in court since the year 2000. He claimed that they stood to suffer loss if the application was allowed to give the applicants an opportunity to continue intermeddling with the estate through the backdoor.

SUBMISSIONS

9. The application was canvassed orally before this court. The applicant's learned counsel, Mr. Kipnetich, reiterated that when the matter

came up for hearing Mr. Oguttu could not log in. He informed Mr. Nyambati of his predicament which Mr. Nyambati proceeded to relay to the court yet when the matter was called, Mr. Nyambati proceeded with the matter and the court granted the orders sought. Counsel submitted that the grant as issued by the court was a duplicate of a grant as the earlier grant had not been revoked. The summons for revocation of grant had been dismissed on 15th October 2016, to which Mr. Nyambati filed a Notice of Appeal to the Court of Appeal. Counsel submitted that the mistake of non-attendance of counsel should not be visited on the client. He submitted that they had responded to Mr. Nyambati's application and no party would be prejudiced if the orders sought were granted.

10. Mr. Nyambati on the other hand relied on the replying affidavit sworn on 28th May 2021, in response to the application. He submitted that the record was clear that on 19th April, 2021, Mr. Oguttu did not attend the virtual hearing of the matter. The orders issued by the court was to substitute the petitioner who was inactive. He asserted that the orders issued by the court had not contravened Section 81 of the Law of Succession Act because the 2nd petitioner was still alive and was proceeding with the matter. He added that the 4th respondent had not been omitted from form P & A 5. He stated that the form now included 7 properties belonging to the deceased and the court's orders would not prejudice the parties. He also argued that the issues raised would be dealt with at the distribution of the estate thus the application was not merited.

ANALYSIS AND DETERMINATION.

11. The main issue arising from the application, the response and the parties' submissions which are summarized above is whether the orders issued by this court on 19th April 2021 ought to be set aside.

12. Before I analyze this issue, I will dispose of the respondents' contention that the application dated 22nd April 2021 is incompetent for the reason that the affidavit in support of the application was sworn by the applicant's advocate who had no capacity to swear the affidavit.

13. A perusal of the affidavit shows that most of the averments made counsel in support of the application dated 22nd April 2021 were matters that were part of the record and which were not disputed by the respondents. Although it is desirable that the parties themselves swear affidavits in support of their claim, there is no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. (See ***Kamlesh Mansukhlal Damji Pattni v Nasir Ibrahim Ali & 2 others CIVIL APPLICATION 354 OF 2004 (UR.183/04) [2005] eKLR***)

14. Since he participated in the proceedings it is expected that counsel had personal knowledge of the depositions he made in his affidavit. Counsel's failure to attend court was a key element in the application to set aside this court's orders and he would therefore be the person best placed to explain the circumstances surrounding his absence. Accordingly, the respondent's protest against the affidavit in support of the subject application is rejected.

15. In ***CMC Holdings Ltd v James Mumo Nzioki Civil Appeal No. 329 of 2001 [2004] eKLR*** the court held as follows on the court's discretion to set aside *ex parte* orders;

"That discretion must be exercised upon reasons and must be exercised judiciously..... In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be 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. Such an exercise of discretion would be wrong principle...The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate".

16. Similarly, in ***Richard Ncharpi Leiyagu vs. Independent Electoral Boundaries Commission & 2 Others [2013] eKLR*** the Court of Appeal held:

"We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice ..."

17. As held in the above authorities, this court has unfettered discretion in determining whether or not to set aside *ex-parte* orders. This discretion is founded on the principle of natural justice which states that no man should be condemned unheard. (See ***James Kanyiita Nderitu & another v Marios Philotas Ghikas & another Civil Appeal No. 6 of 2015 [2016] eKLR***)

18. In this case, when the application dated 12th February 2021 came up for hearing before this court on 19th April 2021, Mr. Nyambati, appeared for the applicants but Mr. Oguttu learned counsel for the 4th respondent was not present. This court placed the file aside and instructed Mr. Nyambati to ask Mr. Oguttu to join the proceedings. The court called out the matter once more at about 9:30 a.m. and was informed by Mr. Nyambati that Mr. Oguttu was unable to log in. Mr. Nyambati then proceeded to prosecute the application after which the court issued the orders sought to be set aside.

19. As indicated above, the application dated 12th February 2021 sought to appoint William Ndege, Joseph Ogega and Conrad Mangera as administrators in the place of Christopher Obwagi who was deceased and Susan N. Angwenyi who was not keen on completing the process of administering the estate of the deceased.

20. The 4th respondent opposed that application in grounds of opposition dated 22nd February 2021. He contested among other things, the jurisdiction of this court to entertain the application in the face of subsisting grant of letters of administration which had not been revoked.

The respondent also contended that the application dated 12th February 2021 was essentially an application for revocation of grant which was an issue pending before the Court of Appeal on an earlier application for revocation of grant which had been dismissed. The respondent argued that the application violated the provisions of Section 81 of the Law of Succession Act. He also claimed that the issues raised in the application could not be addressed if all the parties to the original petition as well as the beneficiaries had not been served.

21. In the case of *Philip Keipto Chemwolo & Another v Augustine Kubende Civil Appeal 103 of 1984 [1986] eKLR* the court observed that;

“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 ... 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 for the purpose of imposing discipline.”

22. The 4th respondent’s counsel has explained the technological difficulties he experienced when the matter came up for hearing and the efforts he made to access the online platform to attend the hearing of the matter. He indicates that he had asked his fellow counsel Mr. Nyambati to have the matter placed aside to await his attendance but counsel proceeded with the hearing of the matter nonetheless. Some of these issues raised in the grounds in opposition to the application dated 12th February 2021 were reiterated by the 4th respondent’s counsel in his affidavit in support of the application for setting aside of the ex-parte orders issued by this court. I have considered those issues and I find that they are not idle issues as argued by the 3rd and 4th applicants. I find that the 4th respondent should be allowed to ventilate his issues and the excusable mistake of his advocate should not be visited upon him. The applicants will have an opportunity to respond to the 4th respondent’s case and cannot therefore argue that they will be prejudiced if the application is heard *inter partes*.

23. The upshot is that the application dated 22nd April 2021 is found to be merited. The orders of this court issued on the 19th April 2021, appointing William Ndege, Joseph Ogega and Conrad Mangera as the joint administrators of the estate of the deceased are hereby set aside. The Chamber Summons application dated the 12th day of February 2021 is hereby reinstated for hearing and disposal on merits.

24. The parties shall bear their costs for the application as this is a family matter. A date for the hearing of the application dated 12th February 2021 shall be taken by the parties after the delivery of this ruling.

DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF JULY 2021.

R.E. OUGO

JUDGE

In the presence of:

Mr. Kipngetch For the 4th Respondent

Orwasa Court Assistant