



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 510 of 2010**

**N THE MATTER OF THE ESTATE OF MUTISYA MWANIKI**

**BETWEEN**

**PETER MUTINDA MUTISYA.....PETITIONER/ RESPONDENT**

**VERSUS**

**MUTUKU MWANIKI.....OBJECTOR/ APPLICANT**

**RULING**

1. By a Notice of Motion dated 30<sup>th</sup> March, 2017, the Petitioner herein seeks to have this succession cause reinstated to hearing on merits. The application was based on the fact that this cause was listed for directions on 21<sup>st</sup> March, 2017, a date which had been fixed by the court on 9<sup>th</sup> November, 2016 in the presence of the petitioner but in the absence of the Objector and his counsel. According to the Objector's advocate, on the said date of 9<sup>th</sup> November, 2016 his vehicle developed a mechanical problem coupled with a puncture on his way to Makutano Junction hence by the time the directions were being given, he was not in court. It was averred that on that day, the Objector was indisposed and was on bed rest hence could not attend Court.

2. It was deposed that that very day counsel for the Objector perused the file but mistakenly noted that date for directions as 22<sup>nd</sup> March, 2017 instead of 21<sup>st</sup> March, 2017 and he mistakenly advised the Objector to come to court on 22<sup>nd</sup> March, 2017. Accordingly, the date was misdiarised as 22<sup>nd</sup> March, 2017 on which day he together with the Objector came to court and discovered that the petitioner's counsel had applied for the dismissal of the cause for want of prosecution on 21<sup>st</sup> March, 2017.

3. According to the deponent, the non-appearance and subsequent dismissal of the cause was entirely due to counsel's mistake which ought not to be visited on the Objector.

4. As the Objector seeks to revoke the grant issued to the petitioner, it was averred that the cause is of utmost importance to the Objector and he ought to be given a chance to urge his application.

5. It was further averred that an application dated 7<sup>th</sup> December, 2016 was heard on 14<sup>th</sup> December, 2016 without the notice to the Objector or his counsel as no service of the application dated 7<sup>th</sup> December, 2016.

6. The application was opposed by way of an affidavit sworn by **Gladys Gichuki**, advocate for the Petitioner/Administrator. The gravamen of the said affidavit was that the Objector has slept on his rights and is not interested in the matter as he has never attended court at any one time and has not been vigilant in prosecuting his case.

7. It was averred that the applicant's advocates were served with the mention date for 21<sup>st</sup> March, 2017 on 23<sup>rd</sup> February, 2017. It was averred that the Objector/Applicant was not a party to the application dated 7<sup>th</sup> December, 2016 but that his son was the Respondent and was duly served at Machakos Law Court while attending to his criminal case.

**Determination**

8. I have considered the application, the affidavits in support thereof and in opposition thereto as well as the submissions filed.

9. The decision whether or not to reinstate a cause is no doubt an exercise of judicial discretion and like any other judicial discretion must be

based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

10. In this case the record is clear that on 14<sup>th</sup> December, 2016, the hearing of the application dated 7<sup>th</sup> December, 2016 was stood over to 20<sup>th</sup> February, 2017 in the presence of counsel for the Petitioner but in the absence of counsel for the Objector. On 20<sup>th</sup> February, 2017, once again only counsel for the Petitioner was present and the Court was informed that both the application dated 7<sup>th</sup> December, 2016 and the hearing date were duly served. The Court then proceeded to grant orders disposing of the application dated 7<sup>th</sup> December, 2016 and gave directions on the mode of hearing of the application dated 27<sup>th</sup> July, 2016 and stood over the matter to 21<sup>st</sup> March, 2017, with an order that the Objector be served. Come that day and there was no representation by the Objector and Counsel for the Petitioner informed the Court that she served the Objector with a replying affidavit to the application dated 27<sup>th</sup> July, 2016 on 3<sup>rd</sup> March, 2016. The Court then proceeded to dismiss the summons dated 27<sup>th</sup> July, 2016.

11. It is the said order of dismissal that is the subject of this ruling.

12. In this application the Objector's case is that he was not aware of the proceedings that took place after 9<sup>th</sup> November, 2016, save for the fact that his summons dated 27<sup>th</sup> July, 2016 was listed for 21<sup>st</sup> March, 2017, a date which was misdiarised by his counsel as 22<sup>nd</sup> March, 2017. The Petitioner has however exhibited an affidavit of service dated 20<sup>th</sup> March, 2017 to which a mention notice dated 22<sup>nd</sup> February, 2017 for 21<sup>st</sup> March, 2017 is annexed. Subsequent to the filing of the replying affidavit, no further affidavit was filed by the Objector. Instead the Objector chose to challenge the fact of service in the submissions. In my view, this will not do. The Objector ought to have sought to file a further affidavit challenging the alleged service since the notice has a stamp that bears the name of his advocate. He ought to have gone further and sought to cross-examine the process server. In the case of **Justus Kariuki Mate & another vs. Martin Nyaga Wambora & Another [2014] eKLR** the Court of Appeal had this to say in regards to Affidavits of Service:

**“An Affidavit of Service consists of sworn factual evidence of the deponent. This Court in Baiwo --vs- Bodi Bach, Civil Appeal No. 122 of 1986 (UR) while applying the principles restated in; Miruka -vs- Abok & Another, [1990] KLR 544, Platt, JA stated: -**

**“There is a qualified presumption in favour of the process server recognized in MB Automobile -vs- Kampala Bus Service [1966] EA 480 at p 484 as having been the view taken by the Indian courts in construing similar legislation. On Chitaley and Annaji Rao: The Code of Civil Procedure Vol. II p 1670, the learned commentators say: -**

**‘3.Presumption as to service – There is a presumption of service as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.’**

**See also this Court’s decision in Kingsway Tyres & Automart Ltd. –vs- Rafiki Enterprises Ltd., – Civil Appeal No. 220 of 1995. Going by the material that is before us regarding the service of the order and the dicta enunciated the aforesaid authorities we agree with counsel for the 1<sup>st</sup> respondent that the burden lay with the appellants to demonstrate that the affidavit of service was incompetent.”**

13. In the premises as the service was not properly challenged, the allegation of lack of service in light of the uncontroverted evidence cannot be sustained. In my view a default that is sought to be explained away by contrived grounds is not made *bona fide*. To my mind, favourable orders cannot be sought and obtained on the basis of an affidavit that is less than candid and is meant to mislead. In that event, the application would be refused since default ought not to be explained away by contrived grounds. See **John Kiragu Mwangi vs. Ndegwa Waigwa Civil Application No. Nai. 179 of 2000.**

14. In the premises, I find no merit in the instant application which I hereby dismiss.

15. As the parties did not comply with the Court’s directions to furnish soft copies of their pleadings, each party will bear own costs of the application.

16. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 4<sup>th</sup> day of February, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mrs Nyakundi for Mr Mbaabu for the Applicant**

**Mr Muthama for Miss Gichuki for the Respondent**

**CA Geoffrey**