



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 63 OF 2007

IN THE MATTER OF THE ESTATE OF SAMSON NZIOKI KYUMA (DECEASED)

VINCENT MUSYOKA NZIOKI.....PETITIONER/APPLICANT

VERSUS

STEPHEN KAWINZI NZIOKI

WAMBUA NZIOKI

MUTUKU NZIOKI.....OBJECTORS/RESPONDENTS

RULING

Background

1. This succession cause was filed in 27th February, 2007, when the Petitioner who is a son of the deceased petitioned for grant of letters of administration intestate. Summons for confirmation of grant were filed on 28th October, 2008 and the Objectors filed a summons for revocation of grant on 10th March, 2009 seeking that the grant issued to the applicant be revoked, and the same was revoked wherein the court directed that the 1st objector petition as a joint administrator and thus he became the 2nd petitioner. On 9th June, 2009, the 1st petitioner/objector applied for confirmation of grant of probate and subsequently filed affidavits proposing the mode of distribution while the 2nd Petitioner also proposed a different mode of distribution of the estate. The court heard the application for confirmation and vide judgement delivered on 24th July, 2017 where the court confirmed the grant as proposed by the 2nd Petitioner. The applicant is aggrieved by the said judgement and hence the instant application.

The Application

2. It has been necessary to give the foregoing background to provide the context of the application before this Court for determination. The application for determination is dated and filed on 4th September, 2017. It is brought under Section 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules and seeks stay of execution of the judgement and setting aside of the proceedings and that the applicant be allowed to file witness statements and give evidence in the case.

3. The Applicant in his application is seeking the following substantive orders:

- a. There be stay of execution of the Judgment delivered by the Court dated and delivered on 24/07/2017.
- b. An order be issued setting aside the *ex parte* proceedings on 22.2.17 and the *ex-parte* judgement delivered on 24.7.17 and all subsequent orders issued thereafter.
- c. An order be issued permitting the petitioner/applicant to file his witness statement out of time and to give evidence in this case.

4. The main grounds for this application as stated in the said summons, and in a supporting affidavit sworn by the applicant on 4th September, 2017, were that the Court proceeded *ex-parte* with the proceedings and evidence of the judgement was delivered *ex-parte* on 27.7.17 and yet the applicant was never informed of the court proceedings by the previous advocates who passed away in 2014. Further, that he was taken ill and was not in contact with his previous advocates. The Applicant averred that the objector presented an untrue allegation that the deceased did not subdivide his property and yet the subdivision occurred in 1964.

5. The objector in response filed a replying affidavit on 22nd January, 2018 sworn by the 2nd petitioner on the same date, wherein it was

stated that the date was taken by consent on 15.11.2016 and that the petitioner did not attend court, thus the affidavit of protest was not prosecuted, In addition, the petitioners case was closed and a date given for submissions whereupon the petitioner was allowed to file submissions and on 6.4.17 his advocate indicated in court that he had lost contact with his client. He deponed that the date 25.4.17, when the matter came up to confirm filling of submission was taken by consent and there was no appearance for the petitioner thus the matter was reserved for ruling on 24.7.17. Further, that the Petitioner's Advocate was duly served by the Applicant's advocates as regards the dates for ruling and hence the court made it's final determination and the instant application lacks merit for the petitioner cannot be heard to say that he was condemned unheard.

6. The Court at the hearing of the application directed that the same be canvassed by way of written submissions. Gladys Gichuki, the learned counsel for the applicant filed submissions dated 14th November, 2018 while O.N. Makau & Mulei Advocates, the learned counsel for the Respondents, also filed submissions dated 14th November, 2018.

7. Learned Counsel Gichuki submitted that the court do exercise discretion in her favour and allow the application. She relied on the case of **John Kamau Njuguna and Others v Emilio Mwangi & Anor, Milimani HCCC 634 of 2007**.

8. Learned Counsel Makau Mulei submitted that the court lacks jurisdiction to grant the orders sought for setting aside ex-parte judgements is governed by Order 9A rule 10 and 9B of the Civil Procedure Rules. Further that Rules 49 and 63 of the Probate and Administration Rules do not give this court power to set aside judgements.

9. Learned counsel also submitted that the proceedings of 22.2.2017 were not ex-parte as the date was taken by consent and with the knowledge of the applicant's former counsel. He quoted the case of **Charles Ratemo Nyamweya v Joyce Bochere Nyamweya & 8 Others (2016) eKLR**

The Issues and Analysis

10. I have read and carefully considered the pleadings and submissions made herein. The issues to be decided are firstly, whether the proceedings of 22.2.2017 and judgment delivered herein on 24.7.17 are subject to setting aside. Secondly, whether the Applicant should be allowed to file a witness statement out of time and give evidence in the case.

11. On the first issue, the applicant relied on various judicial authorities on the applicable principles in the exercise of the Court's discretion to set aside an *ex parte* judgment, including the decision in **John Kamau Njuguna and Others v Emilio Mwangi & Anor, Milimani HCCC 634 of 2007**.

12. The Respondents on the other hand submitted that the Objector has shown no basis for the setting aside of the judgment as his lawyer was served with a hearing notice and failed to attend Court. Further, that the date 25.4.17 was taken by consent.

13. I have noted that no affidavit was filed by the applicant's previous lawyer as to why they did not attend court. It was pointed out that there are no *ex parte* proceedings on record that took place on 22.2.17 for the date was taken by consent. In order to determine the issue of setting aside of the impugned proceedings and judgment, this Court must first determine whether the proceedings of 22.2.17 and judgment on 24.7.17 were undertaken and given *ex parte*.

14. The record shows that the applicant's Advocate was present in court on 15.11.16 when the date for hearing was given and directions were given by Judge Ogola that the parties file witness statements within 21 days. Further the applicant's advocate was served with the notice in good time. He however did not attend the hearing or the ruling and court noted that all parties had been notified. In **Pithon Waweru Maina vs E.A. Cargo Handling (1982-88) 1 KAR 171** it was held that *ex parte* proceedings can arise either from non-appearance or a defence in a suit or failure by either party to attend a hearing after appearance. In both cases, the Court has discretion to set aside a default judgment arising out of the proceedings pursuant to the provisions of Order 10 Rule 11 of the Civil Procedure Rules.

15. In the present application, the issue of whether the judgment delivered herein was *ex parte* is however muddled by the fact that after failure to attend Court for the hearing on 22.2.17, the petitioner's counsel did attend Court during the mention thereafter, namely on 6/4/2017 and did not challenge the *ex parte* proceedings. On the contrary he was aware of the 24.7.17 when Court delivered its judgment and opted to file the instant application. I am persuaded in this regard by the distinction made in **Remco Limited vs Mistry Jadva Parbat & Co Ltd & 2 Others, (2002) 1 EA 233** between an irregular judgment where there is no proper service of summons to enter appearance which the Court held must be set aside *ex debito justitiae* (as a matter of right), and a regular judgment where the Court has discretion to set aside the judgment upon such terms that are just. It is my view that the judgment in this succession cause was regular to the extent that the applicant's counsel did participate in, and was aware of its delivery.

16. I am persuaded that the applicant had every opportunity to participate at the hearing held on 22.2.17, and opted not to, he also had 21 days from 15.11.16 when his advocate was on court to file his witness statements but did not do so, and in any event there is no application on record to extend the 21 days that were granted. I am in agreement with the holding by Odunga J. in **Yusuf Gitau Abdallah vs Building Centre (K) Ltd & 4 Others (2013) eKLR** that a litigant should not be penalised for the mistake of the Advocate where failure to appear in Court was attributed on the Defendant's counsel, however I agree more with the holding in **Charles Ratemo Nyamweya v Joyce Bochere Nyamweya & 8 Others (2016) eKLR** because I am convinced that the proceedings of 22/2/2017 was not ex-parte and the judgement on 24/07/2017 was not irregular.

17. It was held in **Shah vs Mbogo, (1967) EA 116** that the Court's discretion to set aside *ex parte* judgments is to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake and error, but is not designed to assist a person who has deliberately sought to obstruct or delay the course of justice.

18. I am also alive to the fact that the afore-cited decisions were based on the provisions of the Civil Procedure Act which do not apply to

succession causes. The principles enunciated in the foregoing have been relied upon to aid this Court in the exercise of its inherent powers under section 47 of the Law of Succession Act, and Rule 73 of the Probate and Administration Rules to make such orders as may be expedient or necessary for the ends of justice or to prevent abuse of the process of the court. This Court is in this regard also reminded that a constitutional imperative now applies that requires that disputes be determined on the basis of merit and substance under Article 159(2) of the Constitution.

19. The respondent has raised issue as to the competence of the application herein and the jurisdiction of the court. While it is indeed the position that Rules 49 of the Probate and Administration Rules require applications in a succession cause not provided for to be by way of summons, and Rule 63 of the said Rules limits the application of the Civil Procedure Act and Rules to succession causes, the spirit of Article 159(2) of the Constitution now requires that substantive justice should not be sacrificed at the altar of technicalities, and the said rules must now be read as being subject to the Constitution. It is my view in this regard that the manner that the applicant approached court does not affect the substance of their application and can be heard and determined by this Court.

20. After carefully considering the application dated 4/9/2018, I am convinced that the Applicant is only intend at delaying the finalization of this cause. It is noted that as far back as the 15/11/2016 the Applicant had been directed to file and serve witness statements. None have been filed to date. Further if indeed the Applicant was serious then he would even have annexed draft copies of such witness statements so as to convince the court that there is need to set aside the proceedings and judgements. In the absence of such witness statements, I find the Applicant has not presented sufficient reasons for setting aside the proceedings and judgement herein. In any event I see no prejudice likely to be suffered by the Applicant since his rival affidavit on the mode of distribution was duly considered in the judgement of this court dated 24/07/2017. The Applicant should now team up with the 2nd Petitioner and implement the orders of the court dated 24/07/2017.

21. In the result it is my finding that the 1st Petitioner's application dated 4/9/2017 lacks merit. The same is ordered dismissed with no order as to costs.

Orders accordingly.

Dated and delivered in open court at Machakos this 4th day of February 2019.

D.K. KEMEI

JUDGE