

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 77 OF 2014

IN THE MATTER OF THE ESTATE OF BENJAMIN NG'ONO MBATI (DECEASED)

RULING

1. The Motion dated 26th November 2018 seeks the setting aside of proceedings that were conducted in the matter on 12th July 2018, that the applicants be allowed to file affidavits of protest and that their affidavits on record be deemed as duly filed. The application is opposed. The respondent argues that he had done everything right and that it was the applicants who took the process casually.

2. The events of 12th July 2018 were that a summons for confirmation of grant was coming up for hearing. It was dated 6th November 2017. There is an affidavit of service, sworn on 12th July 2018, indicating that a hearing notice was served on counsel for the applicants on 24th June 2018. It was received and stamped. The application was not responded to despite the service. Come the day itself, counsel for the applicants was initially in court, the file was placed aside as counsel for the respondent was yet to arrive. Thereafter, counsel for the applicants did not come back to court for the matter, and the same proceeded in his absence.

3. For all practical services there has been casualness in the way the application was handled by the applicants. Their advocates were served with the relevant papers, they did not bother to respond to the application despite being served in good time. They attended court and the file was placed aside but they did not have the patience to wait for the file to be called out again, they simply absented themselves. The difficulty that the applicants now face must be placed squarely at the doorstep of their advocates. They simply did not take the matter with the seriousness it deserved.

4. Confirmation of a grant heralds distribution of the estate. Distribution of the estate is the most critical stage in the administration of an estate. Indeed, the succession cause is initiated with the sole aim of distribution of the estate. Distribution is the reason for the cause. It is at the core of the matter. So confirmation of grant is the one process that the parties must take most seriously. It is the do or die process, which must not be taken with the casualness displayed in this case.

5. There is every reason for me to deny the motion, but I believe justice would be better served if I allow it in the following terms:

- a. that I decline to set aside the proceedings of 12th July 2018, instead I shall reopen the case by directing the recall of the applicant in respect of the application dated 6th November 2017 for cross-examination by the applicants herein;**
- b. that the affidavit of protest by the applicants is deemed as duly filed and served;**
- c. that the applicants shall pay throwaway costs of Kshs. 5,000.00 to the respondent before the rehearing, in default of which the orders in (a) and (b) shall lapse automatically;**
- d. that I shall allocate a date for the rehearing at the delivery of this ruling; and**
- e. that any party aggrieved by the orders made herein shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 1st DAY OF November, 2019

W. MUSYOKA

JUDGE