



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 19 OF 2017

IN THE MATTER OF SUCCESSION CAUSE NO 42 OF 2016

AND

IN THE MATTER OF THE ESTATE OF MWACHARO MWAWASI SAMBOJA (DECEASED)

AND

IN THE MATTER OF SUMMONS FOR CONFIRMATION

MARIA TATU MWASHIGIRE.....APPELLANT

Being an appeal from the dismissal of an application for Confirmation of Grant by Senior

Principal Magistrate's Court Wundanyi on 27th July 2017

RULING

1. Further to this court's Ruling of 12th February 2018, the Appellant filed her Record of Appeal on 16th February 2018. She relied on four (4) Grounds of Appeal.
2. The brief facts of this case are that on 6th January 2017, she was granted Letters of Administration Intestate at Wundanyi Law Courts. On 27th June 2017, she filed a Summons for Confirmation on even date seeking to have the said Grant confirmed.
3. The matter was listed for the hearing of the said Summons for Confirmation on 25th July 2017. However, she did not attend court on time whereupon the Learned Trial Magistrate dismissed her said application for want of her appearance. On 27th July 2017, she filed a Chamber Summons application of the same date seeking to have her said Summons for Confirmation of Grant reinstated for hearing and determination.
4. When the said application came up for hearing on 1st August 2017, she informed the Learned Trial Magistrate that she did not attend court as she had been unwell. However, the said Learned Trial Magistrate dismissed her application on the ground that she did not adduce any evidence to prove that she had been unwell on the said date or that she came to court late. He also clarified that the Petition stood as dismissed.
5. The gist of her Appeal was that the Learned Trial Magistrate exercised his discretion wrongly when he failed to appreciate that her failure to attend court was occasioned by circumstances beyond her control. She pointed out that she filed her application to reinstate her Summons for Confirmation of Grant two (2) days after it had been dismissed and that she attended court on 1st August 2017 for the prosecution of her Chamber Summons application. She added that such dismissal was punitive, irrational and not meant to serve justice.
6. In her Written Submissions that were dated 12th January 2018 and filed on 22nd February 2018, she pointed out that she was an elderly lady who was unrepresented and that it was only fair if the Learned Trial Magistrate had placed the filed aside to give her time to come to court.
7. She placed reliance on the cases of **Dyson vs Attorney General, D.T. Dobie & Co (K) vs Muchina** and **Richard N Leiyagu vs IEBC [2013] eKLR** where the common thread was that a mistake by a party to a suit should not be a reason for a court not to render justice. She therefore urged this court to allow her Appeal herein.

LEGAL ANALYSIS

8. In considering whether or not this court should allow the Appellant's Appeal, this court had due regard to several cases in which the issue of mistake, omission and inadvertence have been dealt with.

9. In the case of Shah vs Mbogo [1967] EA 116, it was held as follows:-

“Discretion is judicially exercised when it is based on concrete facts not whims. The court is vested with the discretion so that in the exercise of it injustice or hardship resulting from accident, inadvertence or excusable mistake or error may be avoided.”

10. This court also had due regard to the cases of Charagu vs Kaguru [1986] KLR where the court exercised its discretion and allowed a party to file a Notice of Appeal out of time and the case of CMC Holdings Limited vs Nzioki [2004] 1KLR where the Court of Appeal also exercised its discretion where the litigant had demonstrated such an excusable mistake, inadvertence, accident or error.

11. In the case of Shamsudin Jiwani Mitha vs Abdulaziz Ali Ladak [1960] E.A. 1054, the court therein stated that where a party who is called out and does not appear when the suit was called out must show sufficient cause exactly what happened to him as he was coming to court as to cause his delay in coming to court. This court also had due regard to the case of Kitts Mbatia Mukonyole vs Levi Ndombi Mukonyole [2013] eKLR where the Court of Appeal reinstated an appeal which had been dismissed for non-attendance by the parties when the same was called out for hearing by the said court.

12. It is trite law that a party must be given a fair and reasonable opportunity to present its case. A court must consider what prejudice an opposing party would suffer if it exercised its discretion in favour of an applying party. The court should consider the hardship that would be caused to the party applying if the said application was not granted and determine whether an award of costs would be adequate compensation to the party who has been set back by the setting aside of *ex parte* orders.

13. The court's discretion is not an absolute one. It must be exercised judiciously on the basis of facts and legal principles. Notably, the test for allowing the Appellant's Appeal is whether or not the same falls squarely within the parameters of the court's discretion to allow the same. A court must be satisfied that a plausible explanation has been given to explain the inadvertence of doing a particular act to establish whether or not the same would be excusable. This does not, however, excuse a party who has been ignorant of a particular fact for the reason that ignorance is not an excuse.

14. In determining whether the Appellant had satisfied the parameters, this court found it useful to consider the events that led to the court dismissing her Summons for Confirmation of Grant. In Paragraph (4) of her Supporting Affidavit that was attached to her Chamber Summons application, she had contended that she went to court late and found that her case had been called out and dismissed.

15. Whereas the Learned Trial Magistrate indicated that she did not adduce any evidence to show that she came late or she was sick as she had contended in the Trial Court, it was the view of this court that the averments in her Supporting Affidavit as aforesaid were sufficient to explain why she was not available when her Summons for Confirmation of Grant was called out for hearing.

16. This court also found that she was not guilty of laches as she filed her application for reinstatement of the said Summons for Confirmation timeously. The mere fact that she filed her Chamber Summons application two (2) days after her Summons for Confirmation of Grant was dismissed demonstrated her keenness to prosecute her said Summons for Confirmation of Grant. This was an *ex parte* application as she was the Personal Administrator to the deceased's estate hence no one had suffered prejudice or hardship if the said Summons for Confirmation of Grant was to be reinstated. Indeed, there was no party who was to be compensated by way of costs.

17. Accordingly, having considered the Appellant's Written Submissions and the case law she relied upon, this court came to the firm conclusion that by swearing an affidavit, she had satisfactorily explained why she failed to attend court. In declining to reinstate her Summons for Confirmation of Grant, the Learned Trial Magistrate acted harshly and failed to exercise his discretion judiciously.

18. Indeed, shutting out a litigant from court is a draconian step and ought to be used only as a last resort as every person is entitled to a fair trial in a court or tribunal as enshrined in Article 50 of the Constitution of Kenya.

DISPOSITION

19. Accordingly, the upshot of this court's ruling was that the Appellant's Appeal that was dated 15th August 2017 and lodged on 16th August 2017 was merited and the same is hereby allowed but with no order as to costs.

20. It is so ordered.

DATED and DELIVERED at VOI this 6th day of March 2018

J. KAMAU

JUDGE