



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 804 OF 2012

IN THE MATTER OF THE LATE CLEMENT KIARIE GACHIE (DECEASED)

CLEMENT KIARIE -----OBJECTOR

RULING

1. By way of a notice of motion dated 21/3/2017, Clement Kiarie (hereinafter the Applicant) seeks orders;

a) Spent.

b) That the order of this Court given on 21st day of March 2017 by Honourable Justice A. Ndung'u dismissing the summons be and is hereby set aside.

c) That the Applicant's summons for Revocation of Grant dated 6th day of March, 2017 be and is hereby reinstated and admitted for hearing forthwith.

d) That a stay of execution of the grant confirmed on 27th November, 2015 be and is hereby granted.

e) That costs of this application be provided for.

2. The application is premised on grounds that;

1. On 21st day of March 2017 the summons for Revocation of Grant dated 6th day of March, 2017 was scheduled for hearing before Honourable Justice A. Ndung'u.

2. That following the inadvertent non-attendance by the Advocates for the Applicant herein, the Honourable Court proceeded to dismiss the said summons for Revocation dated 6th day of March, 2017.

3. The said failure by the Applicant's Advocates to appear in Court on 21st day of March, 2017 was inadvertent and not intended whatsoever, the advocate prosecuting the matter was held up in traffic and thus late for the matter.

4. As a result of the said grave but honest mistake on the part of the said Advocates, the Applicant did not get an opportunity to be heard, to prosecute and the Summons for Revocation of Grant dated 21st day of March, 2017.

5. The Applicant remains most willing and ready to prosecute the said Summons for Revocation of grant dated 6th day of March, 2017 as demonstrated by the past attending evidence from the court proceeding this far.

6. With the summons for the Revocation dated 6th day of March, 2017 now dismissed, there is every likelihood that the Applicant stands to be disinherited thereby causing the Applicant great injustice and irreparable harm.

7. Unless this application is heard and the orders sought herein granted, the Applicant stands to be unjustly prejudiced, disinherited on account of a fraudulently obtained grant and is supported by the affidavit of James K. Murache Advocate.

3. The gist of the application is that the Applicant's Summons for Revocation of Grant was dismissed by Court on the 21/3/2017 for non-attendance. The non attendance is said to have been inadvertent and not intended as the Advocate prosecuting the matter was held up in traffic.

4. As a result of the said mistake on the part of the said Advocate the Applicant lost the opportunity to be heard so that his summons for revocation could be heard on merit. The Applicant now stands prejudiced and stands the risk of being disinherited. This mistake should not be visited on the Applicant.

5. It is urged that the summons for revocation raises prima facie triable issues. The failure to attend arose from excusable mistake, inadvertence, accident or error for which the Applicant should not suffer injustice or hardship as a result.

6. The application is opposed and Marcus Gachie and Beatrice Nduta Kiarie (hereinafter the Respondents) have in a joint replying affidavit denied that any letters of administration were issued to them on 27/11/2015 but they aver that the grant of representation in respect of the Estate of Clement Kiarie that was made to them was confirmed on the 27/11/2015.

7. It is urged that the application dated 21/3/2017 seeking to set aside the dismissal orders in respect of the application dated 6/3/2017 is an utter abuse of the Court process, frivolous and calculated to merely delay the distribution of the estate herein.

8. The Respondents have indicated in great detail the demerits of the Summons for Revocation of Grant. It is ultimately urged that the applicant was indolent and the Court should not help the indolent.

9. The application was canvassed by way of written submissions.

10. I have had occasion to consider the application, the supporting grounds and affidavit, the replying affidavit and learned submissions of counsel.

11. The emerging issues for determination are;

1. Whether this Court has jurisdiction to entertain the said application.

2. Whether the order to set aside should issue.

3. Whether the summons for revocation of grant dated 6/3/2017 should be reinstated and admitted to hearing.

4. Whether a stay of execution of the confirmed grant should issue.

5. Who should bear the costs of this application.

12. In any contested matter, the issue of jurisdiction takes precedence as it is trite law that where the Court lacks jurisdiction the Court ought not move a single step. Jurisdiction is everything and without it a court downs its tools (see **OWNERS OF MOTOR VESSEL "LILIAN S" vs. CALTEX OIL (K) LIMITED [1989] IKLR1, 14** and **BONIFACE WAWERU vs. MARY NJERI & ANOTHER HC MISCELLANEOUS APPLICATION NO. 639 OF 2005**).

13. The application before Court is premised on **Section 76 of the Law of Succession Act, Cap 160 Laws of Kenya and all other applicable provisions of the Law and the Constitution of Kenya.**

14. The Respondents have in their submissions urged that **Section 76** confers no jurisdiction upon the Court similar to the jurisdiction discussed in **PITHON WAWERU MAINA VS THUKU MUGINA** cited and relied on by the objector. That case is grounded on the setting aside jurisdiction conferred by the old **order IXA and IXB of the Civil Procedure Rules.**

15. It is the Respondents case that **Rule 63** of the **Probate and Administration Rules** under the **Law of Succession Act** deliberately did not incorporate the setting aside jurisdiction as part of the provisions to be applied under the **Law of Succession Act.**

"Rule 63 provides.....

63. (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules."

16. While that is the correct statement of the Law, parliament could not have intended to shut out a party aggrieved with exparte orders in circumstances like in this case. Indeed **Rule 73** came into being to allow the Court to invoke the inherent powers of the Court for the ends of justice or to prevent abuse of the Court process.

17. True, the Applicant has anchored his application on a provision (**Section 76**) that does not provide for the grant of orders of the nature sought.

18. Must an application brought under the wrong provision of the Law be dismissed? Our jurisprudence and decisional law no longer countenances this kind of technical and formalist justice (See **CIVIL APPEAL NO. 19 OF 2016, ANCHOR LIMITED vs. SPORTS KENYA [2017] eKLR**).

19. In the above case and the learned judge quoting from the decision in **KENYA PORTS AUTHORITY VS. KENYA POWER AND LIGHTING COMPANY LIMITED (2012) eKLR**, stated that the procedural technicality is a lapse in form that does not go to the root of the suit.

20. The judge in the Anchor case (Supra) stated;

“I can think of no better example of a technicality than citing a wrong provision of the Law being used as a basis to dismiss a suit or application....”

21. Substantial justice will be achieved even where a wrong provision of Law is cited where the context is clear as to the statute intended. I am persuaded that this applies squarely in the circumstances of this case. The challenge on jurisdiction based on the citing of the wrong provision of the law must fail.

22. Has the applicant laid basis for the setting aside of the orders of Court of 21/3/2017?

23. The power to set aside a judgment or order of Court is vested in Court to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error. It is however not available to be exercised in favour of a party who deliberately seeks, whether by evasion or otherwise, to obstruct or delay the cause of justice. The main concern of the Court is to do justice.

24. On considering such an application the Court will take into account the nature of the action, the defence or claim (triable issue), the reason for failing to attend Court and whether the opposite party can be reasonably compensated by costs. Of note is that a triable issue is not that one which must succeed. The application must be brought timeously without undue delay.

25. In our instant suit counsel states failure to attend was occasioned by being held up in traffic. This, it is urged, was inadvertent and not intentional.

26. The issue of traffic jams in virtually all our big towns in this country is a matter of common notoriety. However, it behoves on the parties to devise ways and means of beating the grindlocks when they arise. If the Courts were to entertain applications like the one before Court on the basis of traffic jams, that would be a sure invite to anarchy in our Court proceedings and judicial operations. Lateness to Court by parties must be discouraged at all costs and this Court should not ordinarily entertain this ground unless where a plausible explanation is given, say for example an act of God closing a road. Each case to be determined on its own circumstance.

27. I have considered the nature of the applicant's claim in the summons for revocation of grant. The issues raised by their very nature ought to be determined upon hearing all the parties. The mistake was purely counsels. I am reluctant to punish the Applicant for the mistake of counsel.

28. Triable issues are raised in the summons for revocation of grant. The Applicant should be accorded a chance to ventilate his case (See **OLYMPIC ESCORT INTERNATIONAL COMPANY LIMITED VS. PARMANDA SINGH SANDHEN & ANOTHER [2009] eKLR**).

29. The application was brought timeously, specifically, on the same day the dismissal orders were given. The Respondent can be reasonably compensated by way of costs.

30. I reach the conclusion that in the circumstances of this case, the Applicant merits to have the adverse exparte orders of 21/3/2017 set aside and the summons for revocation reinstated.

31. Following 30 above, the wider interest of justice would lean towards allowing a stay of execution of the confirmed grant herein so as to preserve the subject matter.

32. With the result that the notice of motion herein is allowed in terms;

a) That the dismissal order made on 21st March, 2017 is hereby set aside.

b) The summons for revocation of grant dated 6th day of March, 2017 is hereby reinstated and admitted to hearing.

c) A stay of execution of the grant confirmed on 27th November 2015 is hereby granted pending the determination of the summons for revocation of grant.

33. The Respondent shall have throw away costs of Kshs. 20,000/= which shall be met personally by Counsel on record for the Applicant and payable before a hearing date is taken.

34. A hearing date for the summons for revocation of granted dated 6th March, 2015 be fixed at the registry on a priority basis.

Dated and Signed at Nakuru this 16th day of May, 2018.

A. K. NDUNG'U

JUDGE