



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 285 OF 2009

IN THE MATTER OF THE ESTATE OF MUTHAMI GITHINJI (DECEASED)

WANGARI GICHUKIAPPLICANT/OBJECTOR

-VS-

DANIEL WANJIGU MUCHEMIPETITIONER/RESPONDENT

RULING

1. This ruling relates to the Summons dated 6th March, 2018 which was brought under **Section 47 of the Law of Succession Act (“the Act”) and Rule 73 of the Probate and Administration Rules**. The summons sought the review, variation and the setting aside of the orders made on 26th February, 2018 which dismissed the Applicant’s objection and for the re-instatement of the matter for hearing.
2. The grounds upon which the application was grounded were contained in its body, the supporting and further supporting affidavit of Wangari Gichuki sworn on 6th March, 2018 and 16th April, 2018 and the affidavit of Joshua Mwiti of 16th April 2018, respectively. It was averred that Mr. Joshua Mwiti, advocate who appeared in court on 13th February, 2018 mis-diarized the hearing of the matter both in the file and in their office diary as slated for 27th and 28th February, 2018. Instead it was 26th and 27th February, 2018. Despite the objector’s advocate being in the court premises on 26th February, 2018 for other matters, she did not check the cause list. That the objector could not have failed to attend court with her witnesses as she had been on a last adjournment.
3. It was further contended that she was ready to be heard on her case as she had filed all the relevant documents and was ready to pay the court adjournment fees of Kshs.1,000/- and costs to the petitioner of Kshs.5,000/-, earlier on ordered. That her case had been dismissed because of the mistake of her advocate. She was 81 years old and she sought the court’s mercy and sympathy as she might be condemned unheard whereby her children will lose their father’s inheritance.
4. The application was opposed vide the replying and further replying affidavit of Daniel Wanjigo Muchemi sworn on 27th March and 24th May, 2018, respectively. According to him, the applicant had perjured herself in swearing that the matter was not diarized 26th February 2018 yet she had deliberately refused to attend court. That was in court on 27th February 2018 from about 8.15 a.m to noon and he did not see her. That she was in contempt of the order that required her to pay adjournment fees and costs.
5. The petitioner further contended that a delay of over 5 years was prolonged, unexplained and inexcusable. That was likewise elderly, the more reason why the cause should be hastily concluded.
6. It was submitted for the applicant that the mistake was not intended. That the court should do substantive justice under **Article 159 (2) (d) of the Constitution** and avoid technicalities. On the other hand, the respondent submitted that the application was legally incompetent and fatally defective as the applicant did not annex an extract of the order. That before the dismissal the matter had remained unprosecuted for 5 ¼ years and this inordinate delay was unexplained. The cases of **Joseph Nderitu Wamaita v Joseph Ndungu Njoroge & 2 others [2008] eKLR, Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR, Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR, Mbogo v Shah[1968] E. A 93** and **Three Ways Shipping Services (Group) Ltd v Mitchell Cotts Freighters (K) Ltd [2005] eKLR** were relied on in support of those submissions.
7. The issue here is whether the order made on 26th February, 2018 dismissing the applicant’s objection should be set aside. On 26th February 2018, when dismissing the objection, the court expressed its displeasure with the conduct of the applicant. The court opined that the applicant was not interested in prosecuting her objection. The court proceeded to dismiss the objection on the ground that neither the applicant nor her advocate attended court.
8. Under **section 47 of the Law of Succession Act, Cap 160 Laws of Kenya**, the court has wide powers and discretion to make any and all such orders that are necessary for the ends of justice. In my view, the wide discretion notwithstanding, an order such as the one sought should not be made as a matter of course. The court must be guided by some known principles. In my view, these are that the applicant must be

made to timeously, the reason for non-attendance must be explained and the prejudice, if any, be suffered by the other side must be examined.

9. The respondent approached the application as if it was an application for review under order 45 of the Civil Procedure code because of the term 'review' However, that is not the case. The application is for setting aside of the orders of dismissal under **Section 47** of the Act.

10. As regards time, the impugned order was made on 26th February, 2018. The present application was made on 6th March, 2018. That was a period of about 8 days. To my mind, the application was made timeously.

11. As regards the reason for non-attendance, it was alleged that Mr. Joshua Mwiti, advocate who had appeared for the applicant on 13th February, 2018 when the hearing date was fixed mis-diarized the hearing dates as 27th and 28th February, 2018 instead of 26th and 27th February, 2018. Not only was a copy of the managing partner's diary exhibited, but Mr. Joshua Mwiti, Advocate appeared and was cross-examined at length on an affidavit he swore in support of the application.

12. Mr. Mbaabu learned Counsel for the respondent invited the court to hold that Mr. Mwiti advocate had misled the court for failing to exhibit a copy of his own diary instead of the partner's. This court has however considered that, although Mr. Mwiti was at the time an associate in the law firm representing the applicant, as at the time the application was being made, he was no longer with in that law firm. That did not stop the applicant from having Mr. Mwiti swear an affidavit to explain the mistake. Mr. Mwiti himself as an officer of this court appeared in court to support the averments he had made in his affidavit.

13. In his intense cross-examination, nothing untoward came out to suggest that Counsel was lying or intended to mislead the court. In having the advocate who made the alleged mistake not only swear an affidavit to explain the mistake but also offer him for cross-examination, both the applicant and her advocates had exhibited utmost good faith.

14. A voluntary admission to a careless mistake such as mis-diarizing a client's matter which leads to a dismissal of such matter and possibly a client forever barred from being heard, is a grave matter. For an advocate to do so, it is expected that he must have taken into consideration the possible drastic consequences attendant thereto including a law suit for professional misconduct or a date with the Disciplinary Committee of the Law Society of Kenya. A conduct that leads to a catastrophic order against a client is no child's play. It is for that reason that I believed Mr. Mwiti would not appear and lie on oath.

15. The failure by Mr. Mwiti to produce a copy of his diary is explainable. He stated that he did not diarize the matter on his diary as the matter belonged to Ms.Kiome in whose diary he diarized the matter. He further stated that he did come with it to court on the date fixed for his cross-examination as he was not aware he would be required to produce the same.

16. In this regard, I am satisfied that the applicant failed to attend court on 26th February, 2018 for good reason. The interests of justice will therefore demand that the applicant be given another chance, albeit final, to prosecute her matter. The issue of mercy and sympathy does not arise. The Court considers law and facts.

17. As regards prejudice, none was shown that will be suffered by the respondent if the orders sought are granted. In any event, where cause for non-attendance is shown, in a matter of inheritance such as the present one, the court should bend backwards to accommodate the parties and hear them on merit.

18. One thing that troubled this court is the failure by the applicant to pay the adjournment costs and fees ordered on 13th February, 2018. I would have minded not to hear the applicant until she paid the said amount but I exercised my discretion in her favor, at least to give her a hearing. She might have failed to pay the costs for lack of proper advice.

19. I allow the application subject to the applicant paying the said costs within 48 hours.

SIGNED at Meru

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 15th day of November, 2018.

F.K. GIKONYO

JUDGE