



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 799 OF 2009**

**IN THE MATTER OF THE ESTATE OF KAMAU MUIGAI (DECEASED)**

**RULING**

1. The summons dated 8<sup>th</sup> June 2015 seeks three principal orders: -

- a. that the proceedings conducted on 28<sup>th</sup> April 2015 and all consequential orders be set aside;
- b. that the first four respondents be allowed to cross-examine the applicant; and
- c. that the first four respondents be granted unconditional leave to tender evidence.

2. The application is at the instance of the advocate on record for the first four respondents, S. M. Muthomi. He avers that the matter came up for hearing on 28<sup>th</sup> April 2015, but he was unable to attend. He had personal matters to attend at his home that morning and had requested that the matter be put off to 11.00 am that morning. After he was done with his family business he set off for Nairobi from Thika, unfortunately he ran into traffic and was delayed and by the time he arrived in court at 11.45 am the matter had been disposed of and directions given for filing of written submissions. He avers that the respondents were in court and were ready to proceed but were unable to do anything due to circumstances that were beyond their control. He pleads that those circumstances should not have been visited on the respondents, who are willing and able to testify.

3. The response to the application takes the form of an affidavit by Emma Wanjiku Ngungu sworn on 21<sup>st</sup> July 2015. She avers that she was in court on 28<sup>th</sup> April 2015 when an advocate held brief for the respondents counsel and requested for the file to be placed aside till 11.00 am. The matter was mentioned at 11.15 am according to her, and by then the respondents advocate had not yet arrived. She contests the allegation that the advocate reached court at 11.45 am to find the proceedings over, yet the matter went on till 12.30 pm according to her. She pleads that the court ought not to aid an indolent party.

4. I directed the parties to file skeletal written submissions which they did. I have perused through the said submissions, together with copies of the authorities that the parties are relying on, and noted the arguments made therein.

5. The applicant does not deny that he was aware of the hearing slated for 28<sup>th</sup> April 2015. The record reflects that when the matter was called out at 9.00 am that morning, Mrs. Muhoho held his brief and told the court that counsel for the applicant, Mr. Muthomi would be ready to proceed with the matter at 11.00 am. The court file was placed aside till then. The matter was called out at 11.07 am, Mr. Muthomi was not in court and nobody held his brief. The matter proceeded, two witnesses testified.

6. I have noted that Mr. Muthomi alleges that he was delayed by a personal matter, yet the nature of the personal matter has not been disclosed. The court therefore has no material upon which it can decide whether the so-called personal matter was serious enough to warrant exercise of discretion in the applicant's favour. The power to set aside a court order or court proceedings is discretionary. Before that power is invoked the applicant must provide material upon which the court can then exercise the discretion. The reason given by the applicant for non-attendance on 28<sup>th</sup> April 2015 really amounts to no

reason at all.

7. Mr. Muthomi still had the option of getting a colleague to attend court at 11.00 am to either beg to have the file placed aside for a further period, or to have it taken out altogether or to proceed to cross-examine the objector's witnesses. He did not avail himself of that opportunity. The proceedings resumed at 11.07 am and two witnesses were taken. It cannot be possible that the testimony of the two would have been disposed of within fifty minutes as alleged by Mr. Muthomi. If he indeed came to court at 11.45 am he should have still found the court in session.

8. Parties are obliged to take court proceedings seriously. The hearing date of 28<sup>th</sup> April 2015 had been obtained *ex parte*, but there was proper service thereof according to the affidavit of service on record. Mr. Muthomi's office was served with hearing notice on 2<sup>nd</sup> March 2015. He was obliged to make arrangements within that period for the disposal of the matter, and if he had other commitments there was adequate time for him to either contact his colleagues on time to take out the matter, or otherwise organize for someone to handle the matter on his behalf. Once a matter is given a date for hearing, the parties should develop the attitude that the matter would proceed for hearing on that date.

9. I have perused the record and noted that the hearing on 28<sup>th</sup> April 2015 was the second time that the application up for hearing was coming up. It had come up for hearing for the first time on 14<sup>th</sup> May 2013 when it was adjourned for it could not be reached due to pressure of work on the court's part. Mr. Muthomi was in attendance then.

10. I feel that the justice of the situation requires that the respondents be given an opportunity to cross-examine the objectors' witnesses and to call their own evidence. I shall accordingly allow the application; with the direction that the objectors' witnesses be recalled for cross examination and thereafter the respondents shall be at liberty to call their witnesses. The objectors shall have costs of this application.

**DATED, SIGNED and DELIVERED at NAIROBI this 20<sup>TH</sup> DAY OF JANUARY, 2017.**

**W. MUSYOKA**

**JUDGE**