REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.451 OF 1996

IN THE MATTER OF THE ESTATE OF

JAMES NYAMWEYA – DECEASED

CHARLES RATEMO NYAMWEYA…………………………………PETITIONER

VERSUS

JOYCE BOCHERE NYAMWEYA……………………….…….1ST RESPONDENT

JEMIMAH NYABOKE NYAMWEYA……………..…..…….2ND RESPONDENT

REBECCAS MORAA MASESE…………………...……...3RD RESPONDENT

GEORGE OMARI NYAMWEYA……………………….……4TH RESPONDENT

KENYALYN MONYENCHE MAKONE……………………..5TH RESPONDENT

MARY NYAMBOKE KIMORO…………………...……....6TH RESPONDENT

JAMES OGENDI NYAMWEYA…………………………...…7TH RESPONDENT

CHRISTOPHER NYAMBANE NYAMWEYA…………..……8TH RESPONDENT

PAUL NYAMWEYA…………………………………..…..….9TH RESPONDENT

RULING

Background

1. Grant of Probate for grant of letters of administration to the written will of the deceased James Nyamweya's estate were confirmed on the 25th May 2000 and a certificate of confirmation issued on the 27th November 2001. The deceased herein had, by a written will dated 3rd April 1991, appointed his wives Tabitha Moige (1st wife), Jemima Nyaboke (2nd wife) and his son Charles Ratemo to be his trustees, executors and guardians of his infant children when he dies. Unfortunately, Tabitha Moige Nyamweya passed on the 18th July 1995 before the deceased herein who passed on two months later on 25th September 1995. Jemimah Nyaboke and Charles Ratemo were therefore left behind as the trustees, executors and guardians in accordance to the aforesaid

will. The deceased's property was thereafter distributed amongst the beneficiaries after this court confirmed the said grant. Twelve years after the confirmation of grant, the 1st respondent herein, by chamber summons applications dated 31st July 2013 and 15th August 2013 challenged the said grant and sought its revocation. In a judgment delivered on 17th December 2014 Sitati J. revoked the grant that had earlier on been confirmed by this court on 21st November, 2001. It is the revocation of the said grant that has triggered the instant proceedings before the court.

Introduction

2. As a consequence of the said judgment by Justice Sitati, three different applications, dated 28th January 2015 (filed by the applicant herein), 9th February 2015 (filed by the 1st respondent herein) and 10th April 2015 (filed by 4th respondent herein) were filed in quick succession.
3. In a ruling delivered by my predecessor Nagillah J, on 25th June 2015 directions were given to the effect that the application dated 28th January 2015 be heard first. Directions were also taken that the instant application be canvassed by way of written submissions. This ruling therefore relates to the Notice of Motion application dated 28th January 2015 brought under rule 49 of the Probate and Administration Rules in which the applicant seeks the following orders:-

1. **Spent**
2. **A temporary stay of proceeding herein pending the hearing and determination of this application.**
3. **That the ex parte proceedings herein and other consequential orders arising therefrom and the resultant ruling delivered on the 17th December 2014 be set aside.**
4. **That this matter be listed down for hearing afresh and the same be heard on its merits.**
5. **That the costs of this application be provided for.**

Applicant's affidavit

4. The application is supported by the applicant's (**CHARLES RATEMO NYAMWEYA**) affidavit dated 28th January 2015 in which he states that as the eldest son of the deceased, he is also one of the legal representatives of the suit estate. The applicant further explains the sequence of events that culminated into the court proceedings of 23rd and 24th October 2014 that led to the impugned ruling of 17th December 2014 which the applicant now seeks to set aside through the instant application. It is the applicant's case that the 1st respondent made two applications dated 5th July 2013 and 15th August 2013 seeking prayers for revocation of the already confirmed grant and that when the said applications came for hearing on 17th September 2014, the same was adjourned so as to allow the applicant's advocates time to familiarise himself with the case and to file a replying affidavit and submissions as by that time, all the other parties to the suit had already filed their pleadings and written submissions to the applications for revocation of grant and were awaiting the highlighting of the said submissions. The matter was then fixed for hearing on the 16th October 2014 by consent all parties to the case.
5. The applicant contends that his advocates were not supplied with the certified copies of proceeding as was ordered by the trial judge on 17th September 2014 and that on 22nd September, 2014, his advocates received an email from the Deputy Registrar of Kisii High Court to the effect that the case would not proceed to hearing on 16th October 2014 as earlier planned. In the said email, the deputy registrar stated that she had been instructed to re-schedule the hearing to either 22nd or 23rd of October 2014 at 10.00am subject to the confirmation by the advocates for all the parties on the suitability of the said proposed hearing dates. The applicant attached a copy of the Deputy Registrar's said email to his supporting affidavit as annexture "**CRN3''.**

6. The applicant states that his advocates replied to the Deputy Registrar's email vide a letter dated 29th September 2014 in which they confirmed that the proposed date of 23rd October 2014 would be a suitable hearing date for them. The Deputy Registrar in turn sent another email dated 25th September 2014 to the applicant's advocates to the effect that she was still awaiting confirmation,

from three other law firms appearing in the matter, on whether the proposed hearing date of 23rd October 2014 would be suitable for them as exhibited by a copy of the said email marked as ''**CRN-6.**''

7. He further depones that on 29th September 2014 the Deputy Registrar wrote to his advocates and informed them that owing to the clash in the diaries of the counsels, the matter could not be fixed for hearing on 23rd October 2014 or 24th October 2014 and hence, she advised parties in this matter to take new dates at the registry. A copy of the said letter was marked as **''CRN7.**''
8. The applicant's case is that despite clear and documented information from the court's Deputy Registrar that the proposed dates were not convenient to all the parties and they were to propose and take fresh dates in the registry, the case still proceeded for hearing on 23rd and 24th October 2014 without notice or presence of his advocates. He adds that all the efforts by his lawyers to establish, from the court, how the case could have proceeded without their notice in the face of clear communication from the court that fresh dates would be given in the matter did not yield and positive response or at all.
9. The applicant adds that his failure to attend court on 23rd and 24th October 2014 was not deliberate but was caused by the misleading and conflicting communication emanating from the court itself regarding the suitability of the said hearing dates. It is for the above reasons that the applicant now seeks the setting aside of the proceedings of 23rd and 24th October 2014 and the resultant ruling of 17th December 2014 while citing his right to a fair hearing.

<u>1st Respondent's response</u>.

10. On 9th February 2015, the first respondent filed a notice of preliminary objection to the applicant's instant application citing the following grounds:

1. **This honourable court is functus officio.**
2. **The application is barred by the res judicata doctrine, the applicant having made on 23rd October 2014 an application for a stay of proceedings which was declined.**
3. **The applicant was heard through counsel on 23rd October, 2014.**
4. **The applicant forfeited the right to be heard on the 1st respondent's application dated 31st July, 2013 and 15th August 2013, when he failed to file, as ordered by this court, his written submissions on or before 3rd October 2014.**

11. The 1st respondent also filed a 122 paragraph replying affidavit sworn on 7th February 2015 in which she gives a detailed background of the case from its inception to-date and summarizes the grounds upon which she opposes the application as follows:

a. **this Honourable Court lacks jurisdiction to hear the applicant's said application dated 28th January, 2014, as it is functus officio;**
b. **the said application is an abuse of the process of this Honourable Court in that it is not made honestly for the proper purpose but for the purpose of perpetuating maladministration of my parents' estates which the judgment seeks to put an end to;**
c. **the said application is defective as it should have taken the form of a summons brought under rule 49 of the Probate and Administration Rules;**
d. **where a statute prescribed a procedure to be used it must be followed;**
e. **the applicant has not followed the applicable procedure;**
f. **as this Honourable court's record shows all the proceedings which resulted in the judgment delivered on 17th December 2014 were interparties proceedings as the Applicant participated in them;**
g. **on the last two days of hearing on 23rd and 24th October 2014 the Applicant was represented by Mr. Naeku and Mr. Ochwang advocates who told this honourable Court that they held the brief of Mr. Onyinkwa his counsel on record;**
h. **this Honourable court dismissed his similar application for stay of proceedings which he**

made on 23rd October, 2014;

i. **the only remedy the Applicant has is to appeal against the said judgment at the court of appeal;**

j. **the Applicant is yet to begin taking steps to appeal against the said judgment. The said application dated 28th January, 2015 is for striking out with costs or dismissal with costs.**

12. The 1st respondent filed a further affidavit sworn on 27th November, 2015 in which she reiterates the contents of her affidavit sworn on 7th February 2015 and states that several events had taken place since she filed her said replying affidavit. She depones that the applicant, the 2nd and 9th respondents are out to frustrate the implementation of the court's judgment delivered on 17th December 2014 in order to maintain the status quo so that they can continue enjoying the properties of the estate of the deceased persons which they have been administering for their own benefit for the past 15 years.

13. The 1st respondent depones that the objective of the applicant, the 2nd respondent and the 9th respondent is to prevent the correction of mistakes that they have committed during their administration of the estate of the deceased as executor and executrix respectively since they were appointed on 25th may 2000.

14. The 1st respondent has exhibited pleadings and proceedings taken in a related suit over the same estate being Kisii ELC. Suit no. 37 of 2015 which she filed against the applicant towards the implementation of this court's orders of 17th December, 2015 which suit the applicant has once again not appeared in or defended and according to the 1st respondent, this demonstrates that the applicant has all along not been interested in having the dispute between the parties resolved.

2nd Respondent's affidavit

15. The 2nd respondent herein **JEMIMA NYABOKE NYAMWEYA** filed a replying affidavit on 16th February 2015 in which she supports the applicant's instant application dated 28th January 2015 and states that indeed the parties' counsels were advised by the Deputy Registrar that the case would not proceed on 23rd October 2014 as counsels appearing for the parties had not reached a consensus on the suitability of the said hearing date.

7th Respondent's replying affidavit

16. In the 7th respondent's replying affidavit sworn on 6th February 2015, he states that judgment was delivered on 17th December 2014 after this court heard the 1st respondent's applications dated 31st July 2013 and 15th August 2013 in which the Applicant, the 2nd, 3rd, 4th, 5th 6th, 8th and 9th respondents were also the respondents and which applications he supported vide an affidavit sworn on 14th September 2013.

17. The 7th respondent adds that he has read 1st applicant's replying affidavit to the instant application and he fully adopts the same in his opposition to this applicant.

18. The 7th respondent contends that he has all along been attending court whenever required to do so while the Applicant has never attended court even on a single occasion and therefore, the applicant voluntarily chose not to participate in the court proceedings.

19. The 7th respondent further depones that the Applicant has intermeddled with the estate of the deceased and has not accounted for the animals, equipment and proceeds from the deceased's Moige farm.

Applicant's submissions

20. In his written submissions filed on 18th November 2015 the applicant gives a brief background of this succession case and the events that led to the judgment that was delivered on 17th December 2014 which he now seeks to set aside.

21. The applicant cites the provisions of Articles 49, 50, and 159 of the Constitution that provides for the right to fair hearing and further stipulates that justice shall be administered without undue regard to procedural technicalities.

22. The has cited several authorities in support of his submissions on the court's unfettered discretion to set aside orders granted ex-parte and the principle that the rules of procedure should not be applied to the detriment of justice

23. The applicant contends that he was not accorded a right to fair hearing on 23rd and 24th as his evidence and submissions were not presented at the hearing and therefore the ruling/judgment that followed those ex-parte proceedings is devoid of material facts, is greatly oppressive and prejudicial to him.

24. The applicant argues that because of conflicting and misleading information emanating from the court's Deputy Registrar regarding the hearing dates, the applicant was made to believe that the case would not proceed on 23rd October 2014 only to learn later that the matter actually proceeded on 23rd and 24th October 2014 in his absence and without any notice to him or his lawyers for that matter. The applicant reiterates that he should not be made to suffer because of the misleading communication from the court.

25. The applicant contends that **Rule 49 of the Probate and Administration Rules** confers jurisdiction on this court to set aside the judgment delivered on 17th December 2014 which position is further fortified by the provisions of **Rule 63 of the Probate and Administration Rules**.

26. The applicant further points out that **Rule 73 of the Probate and Administration Rules** grants the court the inherent powers to make such orders as may be necessary for the ends of justice to be met and to prevent abuse of the process.

27. The applicant's case is that the application should be allowed in the interest of natural justice as, in any case, the judgment delivered on 17th December 2014 was not in tandem with the provisions of **Section 76 Law of Succession Act and Rule 44 of the Probate and Administration Rules**.

28. The applicant also relied on cases of **Shah vs Mbogo (1967) E A 116, Katuma vs Kimbowa Builders and Contractors (1974) EA 91, Philip Kiptoo Chemwelo & |Another vs Augustine Kubende (1982 – 88) KAR 1036, and Mary Gathoni Wachira vs Jane Wairimu Thangana [2014] eKLR** that relate to the courts discretion to set aside exparte judgments.

1st Respondent's submissions

29. In her submissions filed on 3rd July 2015, the 1st respondent gives a summary of her grounds of opposition to the application and states that this court has no jurisdiction to hear the instant application which she adds is an abuse of the process of court as it has been filed dishonestly and for an improper purpose in order to perpetuate the illegal administration of the two estates for the applicant's own selfish benefit.

30. The 1st respondent further submits that **Rules 49** and **63** of the **Probate and Administration Rules** do not give this court the power to set aside a judgment which has been delivered after hearing the parties. It is the 1st respondent's case that **Order 9A Rule 10** and **Order 9B** of the

Civil Procedure Rules that previously governed the setting aside of ex-parte judgments do not apply to succession proceedings and even if they were apply, the circumstances of this case to do not warrant the exercise of the court's discretion in favour of the applicant. The 1st Respondent relied on the case of **Shah vs Mbogo** (supra) and **Pithon W. Maina vs Mugiria (1982-1988) I KLR at 172.**

31. The 1st respondents submissions contains a detailed explanation of the sequence of events that followed the filing of the two applications dated 31st July 2013 and 15th August 2013 for summons to set aside confirmation of grant and how the applicant, despite being fully aware of the existence of the said applications did not file any replying affidavit or submissions on time or at all only to appear in court on 17th September 2014 after the highlighting of submissions, when the 2 applications were listed for mention for the cross examination of the 4th and 7th respondents. The applicant, on 17th September 2014, successfully applied for an adjournment to enable him file submissions despite strong opposition from most of the respondents who observed that the applicant had not been keen on appearing in participating in the case.

32. The first respondent adds that even though the applicant was granted an adjournment and ordered to file his submissions on or before 3rd October 2014, he did not comply with the court order. The 1st respondent therefore submits that the applicant cannot claim that the proceedings went on ex-parte without his input or participation because he was granted an opportunity to file his submissions which opportunity he squandered by failing to comply with the said court order on time or at all.

33. The 1st respondent contends that the applicant cannot claim that his lawyers were not present in court on 23rd and 24th October 2014 or that they were unaware of the said dates because the court records shows that on 23rd October 2014, Mr. Naeku advocate held brief for Mr. Onyinkwa for the applicant and on the following day 24th October 2014, Mr. Ochwangi held Mr. Onyinkwa's brief and on those two occasions, the two lawyers sought an adjournment of the case which applications for adjournment were rejected by the court.

34. The 1st respondent argues that all the proceedings that culminated in the judgment of 17th December 2014 cannot therefore be said to have been ex-parte proceedings because the applicant was aware about them and even attended court through his counsels but declined to file his submissions or cross-examine the 4th and 7th respondents when granted the chance to do so.

35. The 1st respondent's case is that this court, having delivered a final judgment on an issue, lacks jurisdiction, is ***functus officio*** and cannot be invited to give a second ruling over the same matter and therefore anyone aggrieved by the judgment can only appeal against it to the Court of Appeal. On the question of jurisdiction the 1st respondent relied on the case of **Raila Odinga vs IEBC Supreme Court Petition No. 5 of 2013** and **Owners of the Motor Vessel "Lillian" S vs Caltex (K) Ltd 1989 KLR I at 14** in which it was held that a court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction.

36. The 1st respondent further argued that it is the court that controls its own proceedings, not the applicant, and therefore, having ordered the applicant to proceed with the cross-examination of the 4th and 7th respondents on 24th October 2014, the applicant had no choice but to comply with the said order yet the applicant behaved in a manner to suggest that he was not bound by the court orders by not only failing to file his submissions on time or at all, but by failing to appear in court when ordered to do so. The 1st respondent concluded his submissions by stating that the applicant is an arrogant litigant who was not ready to abide by the court's orders.

2nd Respondent's submissions

37. The 2nd respondent filed her submissions on 18th September, 2015 in which she supported the prayers sought by the applicant in the instant application on the basis that the proceedings leading to the judgment of 17th December, 2014 were ex parte due to lack of clear communication from the court regarding the actual hearing date.

38. The 2nd respondent contends that the rules of natural justice that are also enshrined in **Articles 25 and 50 of the Constitution** require that no person be condemned unheard and that the principle of a fair trial is a fundamental right.

39. The 2nd respondent cited the cases of **Kiai Mbaki & 20 others vs Gichuki Macharia & Another (2005)eKLR and HC ELC No. 155 of 2011, Florence Pamela Achieng and Boaz Brayan Omondi (both suing as the legal representatives of the estate of Edwin Opiyo Omori) vs Dickson Gilbert Ochieng & two others (2013) (unreported)** in support of her submissions on the principle of a fair trial.

40. The 2nd respondent argued that the instant application fell under **order 45 of the Civil Procedure Rules** which provides for review of judgments and therefore this court has jurisdiction to review its orders of 17th December 2014.

<u>1st Respondent's reply to the 2nd respondent's submissions</u>

In his response to the 2nd respondents submissions filed on 22nd September 2015 the 1st respondent stated that the 2nd respondent had misapprehended the law governing the setting aside of judgments as laid down by the landmark cases of **Shah vs Mbogo (supra) and Pithon W. Maina vs Mugiria (supra)**.

41. The 1st respondent reiterated that **Rule 49 of the Probate and Administration Rules** under which the instant application was filed, does not confer any jurisdiction to set aside the judgment on this court and the claim by the 2nd respondent that **Order 45 of the Civil Procedure Rules** allows for review is not tenable since the instant application has not been amended to be that of review and not setting aside. The 1st respondent emphasized that in line with the holding in the case of **Nandwa vs Provincial Insurance Co of East Africa (1995-1998) EACA, 288**, cases must be decided based on the issues on the record, and if it is desired to raise other issues, they must be placed on the record by an amendment. Furthermore, the 1st respondent submits that even assuming that the instant application could be considered as an application for review under **order 45 of the Civil Procedure Rules**, the facts of the case do not satisfy the conditions for grant of orders of review.

42. The 1st respondent relied on the findings in the case of **Openda vs Ann 1982 (1982-1988) IKAR 28** in which it was held that the court has discretion on whether or not to adjourn a case based on the conduct of the parties in relation to the matter before it.

<u>1st Respondent's reply to the Applicant's submissions.</u>

43. On 30th November 2015, the 1st respondent also filed a reply to the applicant's submissions in which she adopted her earlier submissions filed on 23rd July and 22nd September 2015.

44. The 1st respondent went through the main gist of the judgment of 17th December, 2014 which the instant application seeks to set aside and reiterated that the only option available to the applicant was to appeal against the said judgment and not to set it aside.

45. The 1st respondent reiterated that the applicant was duly represented by a counsel during the proceedings of 23rd and 24th October 2014 and therefore the said proceedings were not ex parte.

46. The 1st respondent challenged the applicant's reliance on the case of **Shah vs Mbogo (supra)** and submitted that the applicant's aim in the entire proceedings has been to delay the matter and obstruct justice so as to maintain the status quo and therefore the courts discretion should not be exercised in his favor.

47. The parties thereafter highlighted their written submissions in court on 15th February 2016.

Analysis and Determination

48. I have carefully perused and considered the applicant's application dated 28th January 2015, the response by the 1st, 2nd, 4th and 9th Respondents, the submissions by the parties and the authorities cited.

49. I have also perused the proceedings preceding the judgment delivered on 17th December 2014 and I discern the issues requiring this court's determination to be as follows:

1. **Whether this court has jurisdiction to hear and determine the instant application.**
2. **Whether the proceedings of 23rd and 24th October 2014 were ex-parte proceedings.**
3. **Whether the applicant is entitled to the orders sought.**

Jurisdiction

50. On Jurisdiction the applicant submitted that **Rule 49 and 63 of the Probate and Administration Rules** confers jurisdiction on this court to set aside the judgment delivered on 17th December 2014. The applicant further stated that **Rule 73 of the Probate and Administration Rules** grants this court the inherent jurisdiction to make such orders as may be necessary for the ends of justice to be met and to prevent abuse of the process.

51. The 1st Respondent on the other hand contended that the proceedings of 23rd and 24th October 2014, which the applicant seeks to set aside, were not ex-parte proceedings in the first place and secondly, that even if they were ex-parte proceedings, this court lacks the jurisdiction to set aside such ex parte proceedings and judgment.

52. **Blacks Law Dictionary** defines *ex-parte* as follows:

"On or from one party only, without notice to or argument from the adverse party. Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested."

53. In order to determine whether or not the applicant had notice of the case or presented his arguments to the issues at hand on 23rd and 24th October before the judgment was delivered, one needs to retrace the courts "footsteps" by perusing the court record for the period and dates in question.

54. I have therefore perused the court record and noted the following:

- On 17th October 2014, the Applicant instructed his advocates, M/s Onyinkwa & Co. Advocates to act for him in the applications dated 15th July 2013 and 31st August 2013 seeking the revocation of the grant that was confirmed on 25th May 2000. When the two applications came up for hearing on 17th September 2014, the applicant's advocates sought an adjournment to enable him file his submissions whereupon the matter was adjourned to 16th October 2014 and the applicant ordered to file his submissions on or before 3rd October 2014.
- Thereafter the court's Deputy registrar sent emails to the advocates of the parties suggesting that

the hearing dates had been altered for one reason or the other and that the parties would have to take a fresh hearing date in the registry

- On 23rd October 2014 the case however came up for cross examination of the 4th and 7th Respondents and Mr. Naeku advocate appeared for the 9th Respondent and as holding a brief for Mr. Onyinkwa for the applicant who was then the 2nd respondent. Mr. Naeku then sought an adjournment of the case on his client's behalf and on behalf of the 2nd respondent who is the applicant herein. The adjournment was sought on the basis that there was contradictory communication from the court regarding the actual hearing date since not all advocates had agreed on the 23rd October 2014 as a suitable hearing date.

55. The court, upon hearing the submissions of all the counsels on the issue of the adjournment made a ruling as follows:

"Regarding today's hearing date, the court has seen the communication form this court (deputy registrar) stating that today would not be convenient to all parties. Unfortunately and regrettably that information does not seem to have reached the 4th and 7th respondents who are the subject of today's appearances and counsel for the applicants who are all in court. Mr. Naeku is also in court for 9th respondent though it is strange that he does not have his file. The letter from Judy Thongori which led to the deputy registrar's letter of 29th September 2014 is also not here.

Taking all the above matters into account and particularly the view that 4th and 7th respondents have always been ready to be cross-examined and noting the 7th respondents averments that Mr. Naeku personally rang him and told him that this matter would be proceeding either yesterday or today. I do not think that it would be in the interest of justice to adjourn this matter further.

Accordingly, the court directs that the 2nd and 9th respondents to take one of the following options.

1. **Abandon the desire to cross-examine the 4th and 7th respondents or**
2. **Proceed with the same on Friday, 24th October 2015 at 10.00am.**
3. **The 1st respondent must pay court adjournment fees ordered by this court on 17th September 2014 before close of business today."**

56. Immediately after the ruling on the application for adjournment was delivered, Mr. Naeku applied for leave to appeal against the said ruling and at the same time sought a stay of proceedings for 14 days to enable the respondents lodge the appeal. The court then granted the respondents leave to appeal against the ruling but declined to grant the orders for stay of proceedings.

57. Mr. Onyinkwa advocate for the 1st respondent (applicant herein) did not attend court on 24th October 2014 when the case came up for hearing and a further attempt by Mr. Ochwangi advocate to adjourn the case on the instructions of Ms Judy Thongori for the 2nd respondent (applicant herein) and Mr. Naeku for the 9th respondent was rejected by the court after which the case proceeded with the testimony of the 4th and 7th respondents. The court observed that it was apparent that M/s Thongori and Mr. Naeku had no interest in cross examining the 4th and 7th respondents as they had failed to comply with the court's orders of 23rd October 2014.

58. I note that the applicant herein had also not filed his written submissions on or before 3rd October 2014 as directed by the court thereby leading the court to observe that the applicant did not wish to file any written submissions and thus closed the matter.

59. A recap of the events preceding the impugned judgment reveals that the applicant, in the instant

application, was on 17th September 2014 granted an opportunity to participate in the proceedings by filing his submissions on or before 3rd October 2014 which opportunity he did not utilize and as at 23rd October, 2014 when he claims the matter proceeded ex-parte, the court noted his non-compliance with the order of filing of submissions and concluded that he did not wish to file the same. In any event, the applicant was on 23rd October 2014 represented by Mr. Naeku when the court adjourned the matter to the following day.

60. It is therefore my finding that, strictly speaking, the proceedings of 23rd and24th October 2014, cannot be said to have been exparte as the applicant had notice of the same, was represented in court by advocates, and was granted an opportunity to present his arguments by way of written submissions. The applicant cannot therefore say that he had no notice of the date or that he was denied a chance to participate on the proceedings. It is evident that the applicant's application for setting aside cannot withstand the force of the argument presented by the 1st respondent that the proceedings of 23rd and 24th October 2014 were not ex parte.

61. The above extract of the court's ruling on the application for adjournment shows that the court also considered the issue of conflicting or mixed communication from the Deputy Registrar regarding the hearing date and decided that it would not be in the interest of justice to adjourn the case further before making an order that the matter proceeds the following day being 24th October 2014.

62. The main gist of the instant application is that there was mixed, erroneous or conflicting information emanating from the court regarding the actual hearing date and this is the sole reason given by the applicant for seeking a setting aside of the judgment of 17th December 2014.

63. I find that the issue of mix up in dates is an issue that had already been advanced, deliberated upon and determined by this court when an order was made to the effect that the case would proceed, the mix-up in the hearing dates notwithstanding. It is therefore my finding that inviting this court to reopen the issue of the conflicting information emanating from the Deputy Registrar, as a ground for setting aside the impugned judgment, would be tantamount to asking this court to sit on appeal in its own ruling. This court had already conclusively dealt with the subject of the conflicting information, on the hearing dates, sent from the court through e-mails and found that the same notwithstanding, the case would not be adjourned. It is at this juncture that Mr. Naeku, then holding brief for the applicants counsel sought leave to appeal against the said ruling and therefore it would be expected that the matter would then be dealt with at the appeal level and not through an application to set aside the judgment.

64. Assuming, for argument's sake, that the impugned proceedings were indeed ex parte, would this court have the powers to grant the orders sought? The 1st respondent has argued that this court lacks jurisdiction to grant the orders sought since **order 9A Rule 10 and order 9B Rule 8**, of the old **civil procedure Rules**, that previously governed the setting aside of judgments in Civil matters was not one of the orders that were imported into the **Probate and Administration Rules** as being applicable in succession matters. The applicant has on the other hand argued that Rules 49 and 73 of the Probate and Administration Rules empowers this court to grant the orders sought.

65. **Rule 63 (1) of the Probate and Administration Rules** provides as follows:

"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 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules."

66. An order for setting aside is ordinarily sought under order 10 of the Civil Procedure Rules but previously as at the time the probate and administration Rules were passed, the applicable order was order 9A and 9B of the Civil Procedure Rules.

67. The Probate and Administration Rules, under which this instant application is anchored, do not provide for orders of setting aside judgment since order 10 (formerly order 9A and B of the Civil Procedure Rules) is not one of the Civil Procedure Rules envisaged by Rule 63 (1) of the Probate and Administration Rules as being applicable to succession matters.

68. The applicant quoted rule 49 of the Probate and administration rules as the rule empowering the court to intervene in this case and issue orders for setting aside of judgment. Rule 49 Probate and Administration rules states as follows:

"**A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit."**

69. The above rule is coached in general terms and clearly does not give a blank cheque to anyone to invoke the provisions of the Civil Procedure Rules not included in the Rule 63 of the Probate and Administration rules so as to clothe the court with powers that the Probate and Administration rules do not grant.

70. It is my humble view that if indeed the intention of the law makers was to give a succession court powers to grant orders setting aside judgments, then nothing could have been easier than to include order 9A and 9B (old Civil Procedure Rules) into Rule 63 (1) of the Probate and administration Rules.

71. This court therefore agrees with the 1st respondent's submissions that it has no powers to grant the orders sought as it has been held time and time again that jurisdiction is everything without which a court must do nothing but down its tools. (**See Motor Vessel Lillian S vs Caltex (K) Ltd (Supra**).

72. The applicant alluded to the fact that Rule 73 of the Probate and administration Rules grants the court inherent powers to grant the orders sought. Once again Rule 73 states as follows:

"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

73. The inherent powers of the court are usually only resorted to where there are no clear provisions and having found that orders for setting aside ex parte judgments, under order 9A and 9B of the Criminal Procedure Rules (old), were omitted from Rule 63 of Probate and Administration Rule as being among the orders applicable in probate cases, this court cannot assume jurisdiction that the lawmakers clearly had no intention of granting it. Khamoni J in **the Matter of the Estate of Erastus Njoroge Gitau (Deceased) Nairobi High Court Succession cause number 1930 of 1997**, pointed out that Rule 73 is to be used only in deserving cases where no specific provisions exist to deal with the situation in question. He added that it is not an omnibus provision which allows the court to entertain all manner of applications.

74. In the estate of **Kilungu (Deceased) (2002) 2KLR 136**, it was held that Rule 73 cannot be used to do what the Law of Succession Act does not allow the court to do. Clearly therefore the law of Succession Act does not grant court any powers to set aside ex parte judgments.

75. Assuming for a moment that this court has jurisdiction to grant orders of setting aside sought does the current application merit the exercising of jurisdiction in favour of the applicant?

76. The discretion to set aside a judgment, as was held in the case of **Shah vs Mbogo (supra)**, can only be exercised in the most deserving cases and not at the instance of a party who has sought, by evasion to block the course of justice.

77. The applicant has stated that the judgment of 17th December 2014 lacked material facts and

submissions on his part. I find this statement to be an act of dishonesty on the part of the applicant because he was, on 17th September 2014, granted leave to file his written submissions on or before 3rd October 2014 which order he did not comply with. The applicant cannot therefore be seen to cry wolf, as it were, and complain of having been excluded from presenting his case as the court record speaks for itself on this aspect. The applicant has not given any reasons for his own failure to file his submissions on time or at all and therefore, his claim that there was conflicting communication from the Deputy Registrar over the hearing date can only be an excuse and afterthought intended to protract a case that has been pending in court since 1996 when it was first initiated.

78. I find that if there is any case where the adage that 'litigation must come to an end' is applicable, then it is this case. A perusal of the proceedings in this case shows that the applicant has not been eager to have it concluded going by, not only his unexplained late entry in the applications that gave rise to the decision of 17th December 2014, but also his failure to comply with the court order requiring him to file submissions on before 3rd October 2014, his failure to attend court on 24th when the case was listed for hearing by an express order of the court and his latest attempt to seek a setting aside of judgment on the same grounds that had already been placed before the court and a decision made thereto.

79. The 2nd respondent, on his part, submitted that the instant application fell under order 45 of the Civil Procedure Rules which provides for review and therefore this court has jurisdiction to review its orders of 17th December 2014. In respect to this line of submissions, I find that the instant application was clearly one for setting aside of ex-parte judgment which is completely different and distinguishable from an application for review of judgment. Furthermore the instant application was filed by the applicant and not the 2nd respondent and therefore the 2nd respondent cannot purport to know the kind of orders the applicant sought better than the applicant himself. Even if the instant application was to be viewed as an application for review, Order 45 of the Civil Procedure Rules, under which applications for review occurs, is categorical that orders for review can only be granted where the applicant has shown the discovery of new and important evidence or that there is a mistake apparent on the face of the record. In the instant application, I find that the applicant has not fulfilled any of the conditions for the grant of an order for review. I therefore find that 2nd respondent's argument that the instant application falls under Order 45 of the Civil Procedure Rules to be misconceived and I reject it.

80. Having found that the proceedings of 23rd and 24th October 2014 were not ex parte proceedings and further, having found that even if they were ex parte, the applicant, by his own conduct in this case, is undeserving of the orders sought and that this court lacks the jurisdiction to set aside the judgment delivered on 17th December 2014, the order that commends itself to me is that of dismissal of the application dated 28th January 2015 with costs to the respondents.

Dated, signed and delivered in open court this 6th day of June, 2016

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Ayieko for the Applicant

- Mr. Karanja for the 1st Respondent
- Mr. Naeku for the 9th Respondent
- Mr. Gitonga for the 2nd Respondent
- Omwoyo: court clerk