



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
SUCCESSION CAUSE NO.250 OF 2013
IN THE MATTER OF THE ESTATE OF ELIJAH SHOSO
SITIMA alias ELIJAH SHOSHO SITIMA (DECEASED)
BENSON KUTWA AJIRA.....ADMINISTRATION/RESPONDENT
VERSUS
CLEOPHAS LUSAVA AMIANI.....PETITIONER/APPLICANT

R U L I N G

1. The application before me is the Notice of Motion dated 29/04/2015. The same is expressed to be brought under Rule 73 of the Probate and Administration Rules (The Rules). The applicant prays that the orders made on the 27/01/2015 be set aside. The application is supported by 5 grounds set out on the face thereof and is also anchored in the averments of the applicant's supporting affidavit sworn on 29/04/2015. In the main, the applicant avers that he was not served with the notice for the hearing of the Summons for Revocation of Grant coming up on 27/01/2015 and as a consequence of his failure to attend Court, the Summons was dismissed for non-attendance. He also says that the said hearing date having been taken by the Respondent herein and notice of the same not having been duly served on him then failure to attend Court on 27/01/2015 was not deliberate and that it is excusable.

2. The application is opposed vide the Respondents Replying affidavit sworn on 22/06/2015 and filed in Court on 24/06/2015. The replying affidavit contains 6 paragraphs and reads as follows:

“1. THAT I have read and understood the contents of the Notice of motion dated 29th April, 2015 together with it's supporting affidavit and wish to respond thereto as follows:

2. THAT the applicant lodged an objection herein and failed to attend Court on 27th January, 2012 when his objection was dismissed.

3. THAT the said date was taken by me in the registry and I was advised by the registry to hand over the documents that they had indicated the date to the objector/Applicant which document I handed over to the Objector personally in company of another woman in his shop at Cheptulu market.

4. THAT it is not true that the Objector/Applicant was not aware of the hearing date of 15th January 2015 as he was aware and failed to attend Court (sic)

5. THAT from the above explanation it is clear that the applicant's intention is to delay this cause given the fact that since 15th January 2015, the applicant only made an application to set aside the orders on 15th April 2015, 3 months after the dismissal of his Objection.

6. THAT what is deposed (sic) to herein is true to the best of my knowledge, information and belief."

3. At the hearing of the application today the applicant's Counsel submitted that the purported service upon his client the applicant was not proper service and that he (Counsel) ought to have been served. Counsel also submitted that the applicant who is in occupation of the suit land is threatened with eviction if the order sought herein is not granted. He also submitted that the instant application was made without undue delay. Finally that even if the Respondent alleges he served the Applicant, the respondent did not attach copies of the documents served and whether the applicant received the same. Counsel urged the Court to allow the application as prayed.

4. In response the Respondent reiterated his averments in the replying affidavit, only adding that since he did not know the details of the applicant's advocate, it was the applicant's duty to inform his client that the Summons for Revocation was coming up on 27/01/2015 and also attend Court. The Respondent urged the Court to dismiss the application.

5. Briefly, the background to this matter is this: the Respondent commenced these succession proceedings in the Principal Magistrate's Court at Hamisi on 23/05/2012. He described himself as son to Elijah Choso Sitima the deceased herein. The grant was issued to the Respondent on a date that is not indicated but it was in September 2012. The grant was confirmed on 15/03/2013 and the estate comprised in LP No. Kakamega/Cheptulu/998 was to be shared out between the Respondent and one Muliakha Solomon in accordance with the shares shown on the ground.

6. On 24/04/2013, the Applicant moved the Court through Summons for Revocation of Grant dated 24/04/2013. The applicant wanted the grant revoked for reasons that the same was obtained fraudulently and that the respondent did not seek the applicant's consent before proceeding with the succession. He also claimed that the Respondent had failed to disclose to the Court that he (respondent) did not have any interest in the deceased's estate since he had already disposed of his share.

7. On 27/06/2013 the matter was fixed for directions on 20/11/2013. On the 20/11/2013 parties agreed to take directions on 09/04/2014 but on 09/04/2014, the parties were absent. The Respondent appeared at the registry on 09/06/2014 and fixed the matter for directions on 21/10/2014. The Applicant did not appear on 21/10/2014 and there is no indication on record whether the Applicant or his Counsel was served. The matter was then fixed for directions on 27/01/2015. On the 27/01/2015 the applicant was not in Court. His Counsel was also absent. On that date, the Respondent asked for a date to call witnesses but the Court noting that there was no reason why the applicant and his Counsel were not in Court to prosecute the Summons for Revocation of Grant dismissed the Summons for want of appearance, hence the instant application.

8. I have now carefully considered the application as filed and the reasons for the same. I have also carefully considered the Respondent's replying affidavit. I have also carefully considered the submissions made in Court today by both parties. The issue that arises for determination is whether the Applicant has satisfied the conditions for setting aside of the orders made by this Court on 27/01/2015. In the case of **Sarfraz Motors & Another –vs- Kisii Hardware – Civil Appeal number 98 of 1998**, the Judges of Appeal held, inter alia that in setting aside judgment, the nature of the defence is important even if there is no reason for default; the most important thing is the existence of a meritorious defence. It was also held that the nature of the delay is important. Also see the case of **Nimrod Nchogu –vs- Joseph Momanyi – Civil Appeal No.35 of 1998** (unreported) in which it was further held that a litigant should not be deprived of an opportunity of pressing his defence. In the case of **Shanzu Investment Ltd. –vs- The Commisisoner of Lands – Civil Appeal Number 100 of 1993** the Judges of Appeal held, inter alia, that there are no limits and restrictions on the discretion of the Judge to set aside exparte orders, save that if the orders are to be set aside, it must be done on terms that are just. A Court considering an

application for setting aside must therefore be guided by the following tests.

- i) Defence on the merits;
- ii) Prejudice and
- iii) Explanation for the delay.

9. Although the above cited cases were all civil cases, I am satisfied that the applicable principles can apply in the instant case. Rule 73 of the Rules, which is equivalent to Sections 1A, 1B and 3A of the Civil Procedure Act give this Court unlimited inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. A look at the Summons for Revocation of grant reveals that there are serious issues between the Applicant and the Respondent which need to be heard and determined on the merits. I am also satisfied that no prejudice will be suffered by the Respondent if the case is heard and determined on the merits. I am also satisfied that there was no undue delay in bringing this application. In any event, the purported service by the respondent was not sufficient.

10. Finally, the record shows that on the 27/01/2015, the matter had been fixed for mention and the Respondent clearly sought to be given a hearing date when he would call witnesses. He also undertook to serve. On hind sight, the order dismissing the Summons dated 24/04/2013 was both unwarranted and inappropriate. I would therefore set it aside the said order on that ground.

11. In the premises, and for the reasons above given, I allow the Notice of Motion dated 29/04/2015 and hereby set aside this Court's order made on 27/01/2015. The Summons for Revocation of Grant dated 24/04/2013 be and is hereby reinstated for hearing on the merits.

12. Costs shall be in the cause.

13. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 2ND day of NOVEMBER 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Musiega h/b for Applicant/Objector

Present in person for Respondent

Lagat/Okoit - Court Assistant