REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. E185 OF 2015

IN THE MATTER OF THE ESTATE OF SAMUEL CHESIRE CHEBIEGO

KENNEDY KIBIWOTT CHEBIIT ROP……...PETITIONER/RESPONDENT

VERSUS

MATHEW KIPKOSGEI KIPYEGO…….....1ST OBJECTOR/APPLICANT
GLADYS JEPKEMOI KIPYEGO…….....2ND OBJECTOR/APPLICANT
EMILY JEPKORIR KIPYEGO…….....3RD OBJECTOR/APPLICANT

RULING

1. The Application before Court is the Objectors' Notice of Motion dated 7/04/2025 filed through **Messrs Ego Kipkemboi & Co Advocates**. Apart from seeking that the said law firm be granted leave to come on record, it basically seeks reinstatement of the Objectors' Summons dated 2/02/2023 whereof the Objectors had applied for Revocation of the Grant issued herein to the Administrator, which Summons was dismissed on 19/02/2025 for non-attendance, and also failure to comply with earlier directions issued by the Court.

2. The Application is supported by the Affidavit sworn by the Objector's Counsel, **Ego K. Evans**. Counsel deponed that the dismissal was as a result of no fault of the Objectors but that of their former Advocate who failed to prosecute the matter or attend Court. He urged that the Objectors are still desirous of prosecuting the Summons for Revocation, and that there was no inordinate delay in filing the Application. He then averred that the Objectors will be evicted from the subject parcel of land if the dismissal is not set aside.

3. The Application is opposed by the Administrator by way of the Grounds of Opposition dated 2/05/2025, and filed through **Messrs Limo R. K. & Co**. In the Grounds of Opposition, it was urged that the Summons sought to be reinstated was filed on 2/02/2024 but the Objectors have been indolent in prosecuting the same, and no cogent reason has been advanced to warrant setting aside of the dismissal.

4. Considering the straight-forwardness of the Application, Counsels agreed with the Court that there would be no need to file written Submissions.

Determination

5. The issue herein is "**whether the Objector's Summons for Revocation of Grant dismissed for non-attendance, and for failure to comply with Court's direction's, should be reinstated**".

6. The Court possesses a wide discretion in determining whether to allow an application for setting aside of an order dismissing an Application, or even a suit, for non-attendance. This discretion must however be exercised judiciously as was stated in the case of **Shah vs Mbogo (1979) EA 116** as follows:

> **"..... this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."**

7. For the Court to exercise its discretion in favour of an Applicant, it must be satisfied that there is "***sufficient cause***" or reason to warrant reinstatement, which term was explained by **Musinga, JA** in the case of **The Hon. Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (UR)**, in the following terms:

> **"28**. "**Sufficient cause**" or "**good cause**" in law means:
>
> ***"….. the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused".*** *See* ***BLACK'S LAW DICTIONARY, 9th Edition, page 251.***
>
> **Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."**

8. In this case, the Objectors attributed blame for the non-attendance on 19/02/2025 to their former Counsel whom they alleged failed to act diligently in prosecuting the Summons for Revocation.

9. As a background, the deceased herein died in the year 2002 and the Petition for Letters of Administration was filed by the Administrator, a nephew of the deceased, 13 years later on 18/05/2015. The Grant was then issued to the Administrator on 16/10/2015 and later confirmed on 27/03/2017 whereof the only property comprising the estate, **Irong/Mutei/807** was distributed among 4 beneficiaries, including the Administrator, and the 2nd Objector. However, the Objectors, claiming to be children of the deceased, by the said Summons dated 2/02/2023 filed through **Messrs Cherono J. & Co. Advocates**, sought revocation of the Grant alleging that the Administrator, their cousin, obtained the Grant without obtaining the consent of all beneficiaries. They also alleged that the Administrator misrepresented to the Court that there was only one surviving child of the deceased, the 2nd Objector, who had allegedly consented to the mode of distribution proposed, that on the date when the Grant was confirmed the Administrator presented a person purported to be the 2nd Objector, and also that the Administrator had included two of their relatives as beneficiaries. The Summons was subsequently amended upon leave granted on 9/05/2023.

10. The Administrator, in response, filed a Replying Affidavit in which he referred to the Objectors as strangers and although he acknowledged that the deceased was not his biological father, he claimed that the deceased raised him from childhood since the deceased never bore his own children. He however acknowledged that the 2nd Objector, alone, was recognized by the deceased. He then averred that the Certificate of Confirmation of Grant had long been implemented and title deeds already issued to the beneficiaries.

11. I then, on 8/2/2024, referred the matter to Court annexed Mediation which however was not successful and the same was returned to Court sometime between February and March 2024. When the matter came up for directions on 7/10/2024, none of the parties attended Court and, in their absence, I fixed the Summons for Revocation for hearing on 26/11/2024 on 26/11/2024, only Counsel for the Objectors, **Ms. Cheruiyot** appeared. I thus adjourned the hearing and since none the parties had filed Witness Statements or List of documents, I gave timelines for doing so, and fixed the matter for ***viva voce*** hearing on 19/02/2025. However, on 19/02/2025, none of the parties attended Court. Upon perusing the record, and noting that the Objectors had also consistently failed to comply with timelines given by the Court to file and serve pleadings, and had also failed to attend Court on several occasions, I dismissed the Summons for Revocation.

12. As aforesaid, the Objectors have attributed blame for their non-attendance and failure to comply with Court directions to their former Counsel. Regarding this nature of excuse, **Kimaru, J** (**as he then was**), in the case of **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCC No. 397 of 2002**, expressed himself as follows:

> **"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."**

13. The Objector's conduct herein is on all fours with the above sentiments. It is obvious that they took no interest in their own case and never bothered to know what was going on therein. Shifting blame to their Advocate will not therefore hold as the case belongs, not to the Advocate, but to the client. The Administrator has also presented copies of a green card and title deeds demonstrating that the beneficiaries were already registered in the year 2021 as owners of the portions of land sub-divided from the mother title, in accordance with the Certificate of Confirmation.

14. Despite the above however, I am prepared to give the Objectors the benefit of doubt. Although I agree that a case belongs to litigants, not to their Advocates, and that litigants therefore have the obligation to follow-up and ensure progress or prosecution of their cases, this is one case where inaction by the litigants may be attributable to perhaps ignorance and a client's reliance on his Advocate. The matters the Objectors have raised in the Summons for Revocation are also weighty and it will not be fair to shut them out before the same are interrogated. I particularly note the admission by the Administrator

that he is not a son of the deceased but a nephew, and on their part, the Objectors claim to be children of the deceased. At least the Administrator has admitted that the 2nd Objector was acknowledged by the deceased, and I also note that there is a Certificate of Birth indicating the deceased as the 1st Objector's father. The allegation that the Administrator on the date of Confirmation of the Grant presented a "fake" person to impersonate the 2nd Objector is also a weighty matter.

15. I also take into account the fact that while the Summons for Revocation was dismissed on 19/02/2025, this Application for its reinstatement was filed on 7/04/2025, less than 2 months later. It is therefore evident that the Application was brought timeously. The Objectors also appointed a new law firm to represent them, a signal that they have now realized their folly and have since "reformed". It is however strange that the Objectors chose to leave the Supporting Affidavit to be sworn by the new Advocate who was not even on record when the Summons was dismissed. The matters raised in the Application ought to have been deponed by the clients, not the Advocate. I will excuse this irregularity though.

16. In the case of **Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040 Apaloo, J.A.** (**as he then was**), held as follows:

> **"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."**

17. Further, the Court of Appeal, in the case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR**, held that:

> **"22]. The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."**

18. Similarly, the Court of Appeal, in the case of **CMC Holdings Ltd vs James Mumo Nzioka (2004) KLR 173**, guided as follows:

> **"The discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error."**

19. Lastly, **C.B. Madan, JA** (**as he then was**) in the case of **Belinda Murai & 9 Others -Vs- Amos Wainaina [1982] KLR 38**, pronounced himself in the following manner:

> **"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not forgive or condone it but it ought to certainly do whatever is necessary to rectify it if the interests of justice so dictate. The courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule."**

20. Applying the above principles, while I cannot excuse the Objectors' omissions, the nature of the dispute and the broad equity approach, justifies reinstatement of the Summons for Revocation dismissed for non-attendance. This is therefore one case where I find it apt to apply the principle that a litigant should not always be made to suffer for the mistakes of his Advocate. The omission can be put right by payment of costs.

Final Orders

21. In the end, I order as follows:

i) The Objectors' Notice of Motion dated 7/04/2025 is hereby allowed.

ii) The consequently, the Orders made herein on 23/11/2023 dismissing the Objector's Summons dated 2/02/2023 for non-attendance, and for failure to comply with

directions given by the Court, is hereby set aside, and the same is reinstated to be heard and determined on merits. The law firm of Ego Kipkemboi & Co. Advocates is also deemed or ratified to be properly on record herein as representing the Objectors.

iii) Regarding the Objector's Summons dated 21/06/2023 seeking leave to amend the Summons dated 2/02/2023, also dismissed on the same date, the same was so dismissed in error as it had already been allowed and granted earlier on 9/05/2023.

iv) I award thrown away costs of the Application herein to the Administrator which I assess at a sum of Kshs 30,000/-, to be paid by the Objectors within a period of 45 days.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 30TH DAY OF JANUARY 2026

……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mr. Ego for the Objectors-Applicants

Mr. Kibii for the Administrator

Court Assistant: Brian Kimathi