Imaet v Okodoi (Civil Appeal 66 of 2019)
[2024] KECA 1198 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1198 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 66 OF 2019

JM MATIVO, HM OKWENGU & JM NGUGI, JJA

SEPTEMBER 20, 2024

BETWEEN

ELIZABETH IGULE IMAET ..... APPELLANT

AND

STEPHEN OKITI OKODOI ..... RESPONDENT

(Appeal against the ruling of the High Court of Kenya at Busia (Kiarie J.) dated 25th February 2019 in HC Misc. Civil Application No. 186 of 2011)

JUDGMENT

1. On 4th October 2011, Stephen Okiti Okodoi (the respondent) applied for Citation against Elizabeth Igule Imaet (the appellant), under Rules 21, 22 and 23 of the Probate and Administration Rules requiring her to Accept or Refuse Letters of Administration Intestate pendente lite to the estate of the late David Otwane Imaet (deceased) who died intestate in 1997. In support of the application, the respondent swore an affidavit dated 4th September 2011 in which he deposed that L.R. No. South Teso/ Osuret/809 was family land registered in the deceased's name and that a limited grant was required to settle a long-standing dispute relating to the said land.

2. On record are two affidavits of service signed by one Joseph Orata Kweyu, a process server. These affidavits are pivotal in resolving this dispute because the key ground cited by the appellant is that she was never served with the court documents, hence her failure to respond to the citation. The first affidavit of service is dated 24th November 2011 sworn by the said Joseph Orata Kweyu stating on oath that on 7th November 2011 he served the appellant with the application dated 6th October 2011, the supporting affidavit and annextures at Osuret Village, Aremit Location, Amukura Division, South Teso District, Busia County. The second affidavit of service is dated 26th September 2018 in which he averred that on 8th September 2018, he received an application from the appellant's advocate with

instructions to serve the same upon the respondent, and pursuant to the said instructions, he served the respondent at Odijoi village, Odurrete sub-location in Amukura.

3. The appellant did not respond to the citation nor did she attend the court on 24th July 2012 when the matter came up for hearing before Kimaru J. (as he then was). After hearing the citor ex parte, the learned Judge ordered as follows:-

> " Elizabeth Agutu is hereby ordered to petition this court within 45 days being served with this order to administer the estate of David Olwarie Imaet, in default the applicant Stephen Okodoi shall be at liberty to petition the court for the same."

4. The appellant moved the trial court by an application dated 21st February 2018 brought under Order 10 Rule 11 of the Civil Procedure Rules and Rules 22 (1) and 63 of the Probate and Administration Rules seeking orders that:-

   a. That the ex parte proceedings conducted on 24th July 2012 and the ex parte order issued on the 23rd August 2012 be set aside unconditionally.

   b. That the grant of letters of administration intestate and the certificate of confirmation of grant issued to the citor vide succession cause No. 342 of 2012 which are founded on the ex parte proceedings conducted herein, and the consequent subdivision and or partition of land parcel No. South Teso/Osurette/809 into new parcels Nos. South Teso/ Osurette/2917 & 2918 be cancelled.

   c. That costs of this application be provided for.

5. In support of the above application, the appellant contended that she was never served with the citation or hearing notice, and that, therefore, she could not attend court. She contended that after obtaining ex parte orders in the said proceedings, the respondent filed Busia High Court Succession Cause No. 342 of 2012 after which he subdivided the estate property being South Teso/ Osurette/809 into South Teso/Osurette/2917 and South Teso/ Osurette/2918.

6. The respondent opposed the said application on two grounds, namely; that the application was frivolous, and that the appellant had filed a similar application in succession cause no. 342 of 2012.

7. After hearing the parties, in the impugned ruling dated 25th February 2019, Kiarie J. stated:-

   > 4. "I have perused the file and noted that on 24th July 2016, before Judge Kimaru issued the orders complained of, he satisfied himself that there was service. Joseph Orata Kweyu disowned the affidavit of service, which was filed on 24th November 2011. Having compared the signature in the disputed affidavit and the undisputed one in affidavit dated 26th September 2018, I make a finding that he indeed signed the affidavit dated 24th November 2011. The citee was therefore served contrary to her contention that she was not.
   >
   > 5. The purpose of a citation is to notify a person entitled to a grant but has failed to file a succession cause to do so. Failure, the person citing him may do so. Once this purpose for the miscellaneous file has been achieved, the file is closed. This means the moment the judge issued orders to the citor, this file's purpose was fulfilled. Any issues that may arise in respect of the estate that may arise in respect of the estate of the deceased must be addressed in the succession cause that has been filed. In the instant case, the applicant is aware of High Court succession

cause 342 of 20`2. She has filed an application therein. It is therefore mischievous to attempt to open this miscellaneous file."

8. In her quest to overturn the above ruling, the appellant has cited 4 grounds of appeal in her memorandum of appeal dated 24th March 2019. She faults the learned Judge for:- (a) finding that she was served with the citation; (b) describing her application as mischievous; (c) denying her the opportunity to be heard, and, (d) failing to appreciate that the respondent was using the said ex parte order and the High Court orders to remain as the administrator of the deceased's estate. She prays that her appeal be allowed with costs and the orders issued on 25th February 2019 dismissing her application with costs be substituted with an order allowing her application dated 21st February 2018 with costs.

9. In support of her appeal, the appellant submitted that the trial court erred in holding that she was served with court papers, which was not correct. She implored this Court to invoke its inherent powers under Rule 73 of the Probate and Administration Rules and allow her appeal and cited Accredo AG & 3 Others vs. Stefano Ucceli & Another [2017] eKLR which held that the inherent jurisdiction of the court enables it to exercise control over the process by regulating its proceedings and preventing abuse of court process. To prove that she was not served with the court papers, she called Joseph Orata Kweyu, a process server who testified disputing his signature in the affidavit of service dated 24th November 2011, and denying ever serving the appellant with any court papers or signing the said affidavit of service. To buttress her argument, she cited the Court of Appeal decision in James Kanyiita Nderitu & Another vs. Marios Philostas Ghikas & another [2016] eKLR in support of the proposition that absence of a proper service renders the ensuing judgment irregular. She faulted the trial Judge for describing her application as mischievous and lamented that the ex parte order was used to register an entry at the lands office against the subject title to her detriment. Lastly, she maintained that the ex parte proceedings violated her constitutional right to be afforded a hearing.

10. In opposition to the appeal, the respondent maintained that the trial Judge correctly found that the appellant was served with the court papers. He relied on United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd [1985] E.A. which held that an appellate court will only interfere with a trial court's discretion in limited proven circumstances. It listed the circumstances as proven misdirection in law or misapprehension of facts, or if the court took into account irrelevant considerations, or failed to take into account relevant considerations, or if the decision is plainly wrong. The respondent maintained that the learned Judge correctly held that the appellant was aware of the succession file, and ought to have applied for the revocation of the grant in the said file.

11. We have carefully considered the entire record, the impugned ruling, the parties' submissions and the law. The appeal before us challenges a decision by a trial court refusing to set aside ex parte proceedings and the ensuing court orders. As for the applicable grounds for setting side ex parte orders/proceedings, the Court of Appeal for East Africa in Ongom vs. Owota [2009] E. A. 356 laid down two requirements, either of which if proven will suffice to set aside ex parte order. These are:- (a) the applicant was not served with summons; or, (b) the applicant failed to appear in court at the hearing due to sufficient cause.

12. The gravamen of the appellant's case falls under the first consideration, which is lack of service of court papers. The question before us now narrows down to whether the appellant demonstrated to the required standard that she was never served with the court papers. In resolving the issue at hand, the thought to be borne foremost in mind is that every trial is a search of truth. This purpose is succinctly captured in the following terms in American Jurisprudence, Second Edition, 2007:

> " The purpose of trial is to determine the validity of the allegations. The objective is to secure a fair and impartial administration of justice between the parties to the litigation and not the

achievement of a hearing wholly free from errors. Once a civil action has been instituted and issue is joined upon the pleadings, there must be a trial on the issue before a judgment may be rendered. Trial is not a contest between lawyers but a presentation of facts to which the law may be applied to resolve the issues between the parties and to determine their rights. It is also not a sport; it is an inquiry into the truth, in which the general public has an interest."

13. No Court can rightly proceed to hear a suit ex parte until it has been demonstrated to its satisfaction that the summons to a defendant to appear has been duly served strictly in such manner as the law provides. As the record shows, on 16th May 2012 when the citation proceedings came up before Kimaru J., the learned Judge was not satisfied that service was proper. Accordingly, he clearly recorded that the appellant had not been properly served and directed that she be served properly and stood over the matter to 24th July 2012. When the matter came up for hearing on the said date, the learned Judge was satisfied that the appellant had been properly served, and he proceeded to put that on record.

14. Much as Joseph Orata Kweyu, the court process server testified that he never signed the affidavit of service dated 24th November 2011, on record is also another affidavit of service dated 26th September 2018 sworn by the same process server stating that on 8th September 2018, he served the respondent with a hearing notice. Confronted with the process server's evidence disputing one affidavit of service, the learned Judge examined the contested and the uncontested affidavit of service and concluded that the signatures in both affidavits were identical and that they were by the same person. This case turns on the question of whether the learned Judge erred in concluding as aforesaid.

15. Before the learned Judge were two diametrically opposed versions, one by the appellant and his witness disputing service while on the other hand the respondent maintained that service was effected by the same process server. In Stellenbosch Farmers' Winery Group Ltd and Another vs. Martell et Cie and Others 2003 (1) SA 11 (SCA) the South African Supreme Court of Appeals laid out the applicable test to be applied by a trial court when faced with a factual dispute, in particular when faced with two irreconcilable versions. According to this judgment (at para 5) the court arrives at a conclusion on the disputed issues by making findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. The Court proceeded to lay down the following guiding principles:-

    a. The court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. This finding will, in turn, depend on a variety of subsidiary factors, such as:-

        i. the witness' candour and demeanour in the witness- box;

        ii. his or her bias, latent and blatant;

        iii. internal contradictions in his or her evidence;

        iv. external contradictions with what was pleaded or put on his or her behalf, or with established fact or with his or her own extra-curial statements or actions;

        v. the probability or improbability of particular aspects of his or her version; and

        vi. the calibre and cogency of his or her performance compared to that of other witnesses testifying about the same incident or events.

16. Unlike this Court, the trial Judge had the benefit of seeing and listening to the process server as he testified. However, as was held by the South African Labour Court of Appeal in ABSA Investment Management Services (Pty) Ltd vs. Crowhurst [2006] 2 BLLR 107 (LAC), although courts have on

many occasions cautioned against attaching undue weight to witnesses' demeanour, an assessment of credibility goes much further. It involves an assessment of how witnesses fared especially under cross-examination and in light of the probabilities pertaining to the particular dispute. A witness' reliability will depend on, inter alia, the quality of his evidence, his integrity, independence and truthfulness and an analysis and evaluation of the probabilities and improbabilities of each party's version on each of the disputed issues.

17. This Court must be careful while reversing findings of facts by a trial court which had the benefit of hearing the witnesses. It is also important to mention that the decision to set aside ex parte proceedings is discretionary. In the celebrated case of Shah vs. Mbogo and Another [1967] EA 116, Harris J. stated as follows as regards the power of the Court to set aside an ex-parte judgment made in exercise of a discretion:-

> "I have carefully considered, in relation to the present application, the principles governing the exercise of the Court's discretion to set aside a judgment obtained ex-parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

18. On appeal against the above decision, the Court of Appeal for East Africa in Mbogo and Another vs. Shah [1968] EA 93 at 96) affirmed the decision of the High Court thus:-

> "... a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice."

19. The Supreme Court in Parliamentary Service Commission vs. Martin Nyaga Wambora & Others [2018] eKLR after evaluating decided cases, set out the following principles to be exercised by a court when called upon to review or set aside a decision made in exercise of a court's discretion:-

> "(31) Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:
>
> i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.
>
> ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
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> iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
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> iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court,

how the Court erred in the exercise of its discretion or exercised it whimsically.

v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.

vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercising their discretion and:

a. as a result a wrong decision was arrived at; or

b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

20. We are not persuaded that the appellant had established any of the above grounds to merit this Court's interference. The learned Judge carefully considered the appellant's allegation that she was not served and the process server's testimony that he never signed the affidavit of service. Luckily, there was an undisputed affidavit of service in the court file signed by the same process server which the learned Judge compared with the disputed affidavit and concluded that the two signatures were by the same person. It should be borne in mind that the learned Judge arrived at this finding after evaluating the process server's testimony. We find no reason to fault the learned Judge for this finding.

21. In any event, a Citation to accept or refuse a Grant is a method to attempt advancing the estate administration by forcing a party with a right to the Grant to act. As was held by the High Court in Josiah Muli Wambua [2014] eKLR:-

> "in intestacy, citations issue only in cases where no petition has been lodged in court. Citations are intended to trigger the process of applying for letters of administration intestate in circumstances where the persons entitled to apply are not willing or are slow in moving the court in that behalf. The citor should not be a person who has himself already applied for the grant, for the citor should only apply for grant after the citee fails to so apply."

22. The trial court correctly pointed out that a Succession Cause was filed in respect of the deceased's estate being Busia High Court Succession Cause No. 342 of 2012. The learned Judge noted that the appellant is not only aware of the said proceedings but also she had filed an application in the said file. Her attempt to file a similar application in the citation file, which triggered this appeal, was misguided.

23. Equally misguided is prayer (b) of the applicant's application dated 21st February 2018 which yielded the ruling on the subject of this appeal. In the said prayer, the appellant prayed that the grant of letters of administration intestate and the certificate of confirmation of grant issued to the citor vide succession cause No. 342 of 2012 be revoked and the consequent subdivision of land parcel No. South Teso/Osurette/809 into new parcels Nos. South Teso/Osurette/2917 & 2918 be cancelled. There is no doubt that the said prayer was being sought in the wrong file. Ironically, the appellant prays that we allow this appeal and grant the said prayer. For the same reasons stated above, we decline the said request.

24. In view of our conclusions arrived at on the issues discussed above, it is our finding that this appeal is devoid of merit. Accordingly, we dismiss it with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF SEPTEMBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR