



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Alfred Gwedeya Luvembe (Succession Cause
14 of 2022) [2025] KEHC 683 (KLR) (27 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE 14 OF 2022
JN KAMAU, J
JANUARY 27, 2025**

BETWEEN

GIDEON GWEDEYA LUVEMBE 1ST ADMINISTRATOR

MARY MWIKALI SEWE 2ND ADMINISTRATOR

AND

JOASH SENERWA MAGAMU 1ST OBJECTOR

FRANCIS ONZERE LUVEMBE 2ND OBJECTOR

GRACE KAGONYA 3RD OBJECTOR

EZINAFI KAVAIRA 4TH OBJECTOR

RULING

1. In their Summons for Review and/or setting aside orders that was dated 20th September 2023 and filed on 20th December 2023, the Objectors sought that this court set aside the orders that were made on 19th October 2022 dismissing their Summons for Revocation of Grant and/or Rectification of Grant dated 4th April 2022 and reinstate the same for hearing on its own merits. They also prayed that their Written Submissions that were filed on 16th August 2023 be admitted and deemed to have been properly on record.
2. Their said application was supported by the Affidavit of the 1st Objector who swore the same on 20th December 2023 on his behalf and on behalf of the 2nd, 3rd, and 4th Objectors herein.
3. They averred that their advocate only learnt of the dismissal of their Summons for Revocation and/or Rectification of Grant dated 4th April 2022 on 4th December 2023 when their advocate attended court. They averred that their advocate managed to peruse the court file on 18th December 2023 and noted that the said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 was



- dismissed for want of prosecution on 19th December 2022. They asserted that although their advocate was the one who fixed the matter for mention on 19th December 2022, he did not attend court as he inadvertently failed to diarise the same.
4. They explained that their advocates had fixed the matter for mention and took out further proceedings not knowing that the said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 had already been dismissed.
 5. They stated that their advocates received a letter dated 26th July 2023 from M/S S.M. Keyonzo & Co Advocates for the Administrator herein informing them that the said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 was dismissed by P.J. Otieno J on 21st October 2023. They averred that they checked the online cause list and noted that the matter had not been fixed for mention and/or hearing on 21st October 2023.
 6. It was their contention that their said advocate enquired further and found that the matter was actually listed on 19th October 2023 but the outcome was not indicated. They explained that the delay in filing the present application was because their advocates relied on the online public information kiosk.
 7. They further averred that they had complied with the court's directions on filing of Written Submissions and since their said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 was coming for mention for the second time, it was harsh to dismiss the same.
 8. They urged this court not to visit the mistakes of their advocates on them as it was evident that the failure to diarise the matter was due to inadvertence and not indolence on his part.
 9. They prayed that this court considers that no one would be prejudiced if the orders were set aside to enable their Summons for Revocation and/or Rectification of Grant dated 4th April 2022 to be heard on merit. They therefore urged this court to allow their said application in the interests of justice.
 10. The 1st Administrator swore a Replying Affidavit in opposition to the present application on 18th January 2024. The same was filed on 12th February 2024.
 11. He was emphatic that the matter was listed for the hearing of the Summons for Revocation and/or Rectification of Grant dated 4th April 2022 before P.J. Otieno J on 19th October 2022 and that the said Summons was dismissed after the Objectors' advocates failed to attend court.
 12. He asserted that the Objectors who were not the deceased's children and had insisted on being the deceased's dependants, were aware of the dismissal of their said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 because his advocates informed their advocate of the said dismissal through their letter dated 26th July 2023.
 13. In a Further Affidavit that he swore on 18th January 2024 and filed on 12th February 2024, he explained that the 2nd Administrator had since died. He sought that the mode of distribution be as per the consent that was recorded in court on 14th July 2014.
 14. It was his contention that the present application and the said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 were not merited and therefore urged this court to dismiss the same for being a waste of time.
 15. The Objector's Written Submissions were dated and filed on 21st May 2024 while those of the Respondent were dated 23rd May 2024 and filed on 25th July 2024. This Ruling is based on the said Written Submissions, which both parties relied upon in their entirety.



Legal Analysis

16. The Objectors reiterated the contents of their Supporting Affidavit in their Written Submissions. They were emphatic that the mention on 19th October 2022 was for taking directions of their said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 and not for its hearing. They also added that the failure of their advocate to attend court was due to an inadvertent error that ought not to be visited on them.
17. They submitted that they ought to be recognised as beneficiaries of the deceased's estate and consequently, their said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 ought to be heard on merit to avoid future animosity between them and also not to cause them any prejudice. It was their argument that the Administrator could not purport to be prejudiced by delay as he had gone to slumber and was only awoken by their said Summons for Revocation and/or Rectification of Grant dated 4th April 2022.
18. They urged this court to administer justice to all parties as was contemplated in Article 50 and 59 of the *Constitution* of Kenya. They also asked this court to exercise its wide discretion under Rule 73 of the Probate and Administration Rules. They relied on an extract of the Public Judiciary Kiosk and the cases of *Ngugi vs Thiong'o* (Civil Application 372 of 2108 (sic)) [2021] KECA 88[KLR] (22 October 2021) Ruling and *HAM vs SOS* [2021] eKLR but did not highlight the holdings that they were referring to.
19. On his part, the Administrator submitted that the Supporting Affidavit was sworn by the 1st Objector yet what he had deponed to were matters that were within the knowledge of their advocate which was contrary to the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules, 2010.
20. He submitted that there was a delay of more than a year in filing the present application and hence the explanation for the delay was wanting. He asserted that the Objectors acknowledged that their advocates received a letter dated 17th July 2023 informing them that their said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 was dismissed on 21st October 2022 although the correct date was 19th October 2022. He argued that having been aware of the said dismissal, there was no reason to have filed the present application five (5) months later.
21. He further asserted that the present application was filed sixteen (16) days after the court informed their advocates that their application was dismissed on 19th October 2022.
22. He pointed out that the present application was filed almost twenty-seven (27) years after the death of the deceased. He accused the Objectors of indolence, laches, delays, and lack of vigilance which were not explained. He averred that litigation had to come to an end.
23. He placed reliance on the case of *Shah vs Mbogo* [1967] EA 116 which had set out the principles of setting aside an order or judgment and urged this court to dismiss the present application with costs to him.
24. Right at the outset, this court agreed with the Administrator's submissions that the 1st Objector ought not to have sworn the Supporting Affidavit as the same contained so many facts that could only have been deponed by their advocate.
25. Order 19 Rule 3 of the Civil Procedure Rules provides as follows:-
 1. Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.



2. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.”
26. The assertions in the Supporting Affidavit were based on hearsay and were argumentative. The entire affidavit was haphazard and confusing as it did not set out the events in a chronological manner. It also seemed to blame everyone else.
27. While they argued that the matter was not listed on 21st October 2022, they seemed to side step or put behind the burner why their advocate did not attend court on 19th October 2022 as that was a day that he himself took. It was not necessary to have mentioned how they could not access the file as at 4th December 2023 when they themselves attached a letter from the Administrator’s advocates informing them that their said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 was dismissed on 21st October 2022. Whereas the correct date for dismissal was 19th October 2022, it did not negate the fact that the said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 was dismissed for want of prosecution.
28. It was not necessary for their advocates to peruse the physical file to confirm that fact. Their assertion that their advocate could not access the file because it was not at the Registry was superfluous and argumentative as it was their advocate who ought to have deponed to the efforts that he made to trace the file.
29. In view of the fact that the matter was coming up in court on 19th October 2022, they did not offer any plausible explanation as to why their advocate attended court more than a year later. Their said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 was transferred to High Court Vihiga on 19th May 2022 when they did not attend court despite the matter having been listed for hearing on the said date. There was no indication in the court file that they had taken any steps to prosecute the same.
30. The reasons that were advanced to explain why the said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 was not prosecuted were not satisfactory to this court. This was one of the rare cases that this court would decline to set aside the orders for dismissal due to the indolence that had been explained herein. No hardship would have been demonstrated as was envisaged in the case of Shah vs Mbogo (Supra).
31. Be that as it may, this court perused the proceedings of 19th May 2022 and noted that Musyoka J transferred the same to High Court Vihiga and directed that the matter be listed for directions on 20th July 2022. On the said date of 20th July 2022, both parties were present and P.J. Otieno J fixed the matter for mention on 19th October 2022. However, none of the parties attended court and he dismissed the said Summons for Revocation and/or Rectification of Grant dated 4th April 2022.
32. Notably, courts must exercise great caution not to deny litigants their right to a fair trial. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it a reprieve to seek justice.
33. Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to



enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

34. Further, Rule 73 of the Probate and Administration Rules provides 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 (emphasis court) or to prevent abuse of the process of the court.”

35. In determining whether or not to exercise its discretion in favour of the Objectors herein, the court was required to consider if the Administrator would suffer any prejudice if the orders that had been sought herein were granted. This court did not see any prejudice that he would suffer or was likely to suffer if the Objectors herein pursued their constitutional right to be heard. If there was any prejudice, he did not demonstrate the same.

36. The above notwithstanding, the failure by the Objectors to follow up on their matter showed that they were indolent and they could ordinarily be condemned to pay costs.

37. However, it was clear that their said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 was dismissed on a mention date. Indeed, this court agreed with them that their said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 had not been listed as a hearing and therefore ought not to have been dismissed for want of prosecution on a mention date.

38. While P.J. Otieno J was of equal and competent status with this court, this court stepped into his shoes to avoid a miscarriage of justice to the Objectors herein. It would be a travesty of justice to shut out the Objectors from prosecuting their matter despite them having been indolent.

39. Taking all the factors hereinabove into account, it was the considered view of this court that it was in the interests of justice (emphasis court) that the Objectors be allowed to have their said Summons for Revocation and/or Rectification of Grant dated 4th April 2022 heard on merit as they would suffer prejudice if they were denied an opportunity to fully present their case to be heard on merit.

40. Given the circumstances under which their Summons for Revocation and/or Rectification of Grant dated 4th April 2022 was dismissed, this court took the view that it would not be fair to condemn them to pay the Administrator’s costs for being taken back in time.

Disposition

41. For the foregoing reasons, the upshot of this court’s decision of the Objectors’ Notice of Motion application dated 2022 and filed on 20th December 2023 was merited and the same be and is hereby allowed in the terms of Prayer Nos (2) and (3) therein.

42. It is hereby directed that this matter will be mentioned on 19th May 2025 for further orders and/or directions.

43. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF JANUARY 2025.

J. KAMAU



JUDGE

