



REPUBLIC OF KENYA



In re Estate of Joseph Kipkurui Tuitoek (Deceased) (Succession Cause E007 of 2023) [2025] KEHC 1411 (KLR) (26 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1411 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
SUCCESSION CAUSE E007 OF 2023
RB NGETICH, J
FEBRUARY 26, 2025**

IN THE MATTER OF THE ESTATE OF JOSEPH KIPKURUI TUITOEK - (DECEASED)

BETWEEN

JOYCE KIPKURUI TUITOEK PETITIONER

AND

**RENISON KIBET SEGUTON (SUING AS THE LEGAL ADMINISTRATOR
OF THE ESTATE OF THE LATE ZEPHANIA KIPKEBUT
CHEPKONGA) OBJECTOR**

RULING

1. The objector/Applicant has moved this court vide summons dated 31st July 2024 brought under Section 47 of the Laws of Succession Act, Cap 160 Laws of Kenya, Rule 73 of the Probate and Administration Rules seeking the following orders:
 - a) Spent.
 - b) Spent.
 - c) This Honourable Court be pleased to review, vary, set aside, and or vacate the orders made on 23rd July, 2024 and reinstate the objection of making grant dated 22nd June, 2017.
 - d) This cost of this application be provided for.
 - e) This Honourable court be pleased to issue any other order that it deems fit and just to grant.
2. The application is supported by the affidavit sworn by Tarigo Kiptoo. He avers that on 19th July, 2024 or thereabouts the matter had been scheduled for hearing of objector's objection dated 22nd June, 2017 while the matter was still in Eldoret High Court and this court gave directions that the matter be heard by way of viva voice evidence.



3. He further avers that when the matter came up on 29th February, 2024, the parties had not filed their documents, and were granted 7 days to file documents and the matter fixed for hearing on 22nd April, 2024. On 22nd April, 2024 when the matter was coming up, their clients had not executed their statements for filing and the matter was referred to Court Annexed Mediation. parties were not able to settle the matter through mediation and the matter was referred back to court for determination.
4. That on 23rd July, 2024 the Objector and his witnesses had not filed their statements and the matter was not therefore ready for hearing. On the said date, Ms. Kanda Advocate who was holding his brief indicated that they had no further instruction from their clients regarding this matter. He further avers that he had instructed Ms. Kanda to hold his brief as he was handling other matters in other courts, and she was appearing virtually while in Eldoret.
5. He stated that Ms. Kanda informed him that the matter was given time allocation for hearing at 11:00am and since the matter was initially called out between 9:30 am - 9: 45 am, they could not make it to open court for hearing at 11:00am and he requested counsel holding brief to log in back to court at 11:00am to address the court on the pertinent issues at stake but at 11:00am, she was not able to address the court since the court was handling the matters in open Court and he later learned that the objection to making Grant dated 22nd June, 2017 had been dismissed based on the application made by the Petitioner's Counsel.
6. He further avers that it is as the result of lack of mention dates that they were not able to inform the court of the challenges they were facing after their clients failed to give them further instructions and also attend their offices for the purposes of executing their statements. He avers that this Court has failed to accord the Objector the right to be heard as enshrined in *the Constitution* of Kenya, 2010, and the principles of natural justice.
7. He further avers that it is worthy nothing that the matter has been active for less than one year in Kabarnet High Court, and there has been no delay so far and it is only fair, and just that this court is set aside, vary, vacate, discharge the orders made on 23rd July, 2024 dismissing the Objection dated 22nd June, 2017 and reinstate the Objection dated 22nd June, 2024 and fix it for hearing and in the alternative give his firm a chance to file application to cease acting after the said application has been reinstated.
8. Further that there is need for the further proceedings to be stayed pending hearing and determination of this application as the looming danger is that the estate of the deceased herein may be distributed without the objector who is the creditor of the estate being heard.

Response

9. In response, the Petitioner/Respondent Joyce Kipkurui Tuitoek filed a replying affidavit and avers that the Summons herein is incompetent as the supporting affidavit is invalid. Further that the Summons sought to be reinstated has been pending hearing for 7 years and the Applicant cannot claim that there has been no delay in its prosecution.
10. That in reply to paragraphs 11 to 14, on 23rd July, 2024, counsel holding brief for Tarigo advocate sought an adjournment but the application was declined and the court directed that the matter would proceed at 11:00 a.m. and counsel for the applicant did not inform court that he would not make it to court by the time set for hearing.
11. Further, the Objector and his counsel were absent as at the time scheduled for hearing, and she heard counsel apply for dismissal of the Objector's Summons on 2 grounds of Non-attendance & want of prosecution; that the Objector had not complied with the order first made on 29th November, 2023



and extended severally directing parties to file witness statement within 15 days; and upon perusing the court file, the court made several observations that informed the decision to dismiss of the Applicant's Summons for revocation of grant.

12. The Respondent disagrees with the claim that the court violated his right to be heard by not listing the matter for mention for compliance for the following reasons: -
 - i. The matter was listed for mention for directions on 26th October, 2023 at the instance of the Applicant.
 - ii. However, the Applicant failed to attend court and a further mention was rescheduled to 29th November, 2023 where the Applicant's Counsel appeared ex parte and took directions and on 6th December, 2023, he wrote to his advocate to inform him of the directions given on 29th November, 2023 as follows-
 - i. "Summons for revocation of grant be heard by way of viva voce evidence.
 - ii. Parties to file and exchange documents and statements within 15 days each.
 - iii. Matter be fixed for hearing on 29th February, 2024.
13. The Respondent/Petitioner avers that parties had not filed their respective statements when the matter came up for hearing on 29th February, 2024, and the court was kind enough to adjourn hearing to 22nd April 2024 and extend by consent of parties, time to file statements by 7 days.
14. That on 22nd April, 2024, hearing was rescheduled to 23rd July, 2024 on ground that counsel for the Applicant was unwell and counsel holding brief was granted 3 days within which to file witness statement, which the Applicant failed to and in total, the Applicant has had 4 reminders in a span of 7 months to comply with pre-trial directions but failed to comply and their contention therefore, that his right to be heard was violated allegedly because a chance to file statement was denied is a red herring.
15. Further, the Applicant is blaming the court for the consequence of his indolence and prayers sought lack merit and urged this court to dismiss the application herein with costs.
16. The application was canvassed by way of written submissions.

Applicant's Submissions

17. The Applicants submits that the issue for determination is whether this court should set aside the Ruling/Order delivered on 23rd July, 2024 dismissing the Applicant's Objection dated 22nd June, 2017 and reinstate the Objection dated 22nd June 2017 for determination on merit. The applicant relied on the decision by Court of Appeal decision in Murtaza Hussein Bandali T/A Shimoni Enterprises vs. P. A. Wills [19911 KLR 469; 11988-921 where the court held that there is inherent power to restore a case for hearing after it has been dismissed.
18. Counsel further submits that the discretion should be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously; that Court's discretion being judicial must be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the applicant for such orders and further relied on the case of Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.



19. Counsel submits that counsel appeared virtually in Eldoret at 9.45am and there is no way he could have travelled to Kabarnet court at 11.00 am for hearing of the matter. That the general position was restated in Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 7.
20. Counsel further submitted that the court ought to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to ensure that any transitional motions before the Court do not render nugatory the ultimate end of justice. That the Court, in exercising its discretion should therefore always opt for the lower rather than the higher risk of injustice as was held in the case of Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589; and submitted that the applicant has shown sufficient cause to warrant this court to set aside the order and reinstate the objection.

Respondent's Submissions

21. The Respondents on their part submits that the issues that arise for determination are whether the court denied parties a chance to file witness statements and whether Application is merited.
22. On whether the court denied parties a chance to file witness statements, they submit that in paragraphs 16 & 17 of the supporting affidavit, the deponent, who is the Applicant's counsel on record stated that he is shocked as to why the court did not give mentions for the matter to enable parties to comply but always opted to give hearing dates as opposed to mentions and it is as a result of the lack of mention dates that they were not able to inform the court of the challenges they were facing after their clients had failed to give them further instructions.
23. The Respondent further submit that the Applicant's Summons dated 22nd June, 2017 was dismissed for failure to attend court, prosecute his motion and comply with the court's pre-trial directions directing parties to file their statement before the date of viva voce hearing; that when the matter was called out, the Applicant's counsel applied for adjournment on grounds that they had not filed witness statement and the court considered the Application and declined the request and directed that the matter proceed with hearing at 11:00 am. However, counsel did not indicate to the court that they were based in Eldoret and could not make their way to Kabarnet in time to proceed as scheduled.
24. That the applicant and his counsel were absent when the matter was later called out in the open court and upon the respondent's application, the court allowed the Respondent's prayer for Applicant's Summons dated 22nd June, 2017 to be dismissed for non-attendance and want of prosecution.
25. The Respondent further submit that this honorable court's order dismissing the Summons was appropriate in the circumstance as neither the Applicant nor his counsel were present at the time set for viva voce hearing and the applicant counsel's contention that the Applicant had hoped to proceed virtually is neither here nor there for the following reasons: -
 - a) Parties have earlier been attending court physically for viva voce hearing.
 - b) Applicant's counsel did not request to proceed virtually during hearing.
 - c) The Applicant's counsel stated that they had lost touch with their client.
26. They therefore submit that counsel's virtual presence when his client was virtually and physically absent would not have served any useful purpose as counsel did not have his client to lead in his testimony.



27. On argument that the court has never listed the matter for mention for compliance with pre-trial directions including filing of witness statement, the Respondent submit that court record is replete of evidence that the matter has been listed for mention for compliance on several occasions and has also been adjourned severally at the parties' request to enable them file their witness statements, but the Applicant failed to comply with court's directions to file documents and submit that the Applicant's brazen attempt to make the court a scapegoat for his failure to file written statement is dishonest and unfair.
28. Respondent's counsel relied on the case of Union Co. of Kenya ltd vs Ramzan Abdul Danji Civil Application no. Nai 179/1988 and argued that the court gave parties 4 chances to file witness statement and, in each adjournment, parties agreed amongst themselves on how much time they thought was sufficient and the court gave dates as agreed by parties. They therefore submit that the applicant did not utilize the time given to comply with the court's directions and there is no valid reason to blame the court for their failure to file statement in time.
29. On whether the prayers sought have merit, the Respondent submits that the prayers sought can be granted only if there is an error apparent on the face of the record or if there is discovery of a new and important fact that was not within the Applicant's knowledge at the time the order was made or for any sufficient reason.
30. The Respondent further submit that the only reason the Applicant is seeking review was that the court did not grant mention dates to enable counsel explain why he could not trace his client to record the witness statement and argue that this is not sufficient reason to warrant the setting aside or review of the order in issue. It is the Respondent's further submissions that the given circumstance of this case, the Applicant ought to have appealed against court's decision to decline application for Adjournment as opposed to seeking review or setting aside dismissal orders.
31. Further that applicant's counsel averred that he has not been able to trace his client and intend to file application to cease acting and the question that arise is who gave counsel instructions to file this Summons when the client does not even know that his summons has been dismissed and if granted, of what use will the order be if the applicant cannot be traced, and why would counsel seek to reinstate the Summons only to follow it up with an application to cease acting for the applicant. The applicant urges this court to find that the motion lacks merit and the same be dismissed with costs.

Analysis And Determination

32. I have considered averments and submissions herein and wish to consider whether the applicant has demonstrated reason to reinstate the application dated 22nd June, 2017. Article 159 (2) of *the Constitution* of Kenya 2010 sets out the principles which guide the courts and tribunals when exercising judicial authority as set out hereunder: -
 - a. Justice shall be done to all, irrespective of status;
 - b. Justice shall not be delayed;
 - c. Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promoted, subject to clause (3);
 - d. Justice shall be administered without undue regard to procedural technicalities;
 - e. The purpose and principles of this constitution shall be protected and promoted".



33. Section 1A of the *Civil Procedure Act* provides that: -

- “(1) The overriding objective of this Act and rules made thereunder is to facilitate the just expeditious, proportionate, and affordable resolution of the Civil disputes governed by the Act.
- (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the process of the court and to comply with the directions and orders of the court”

34. In the case of *Mbogo v Shah* [1966] EA 96 at page 195 when discussing the exercise of discretion by courts, the court stated as follows: -

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or error, but is not designed to assist the person who had deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice”

35. Further, in *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48 Briggs JA (as he then was) said at page 51: -

“I consider that under order 9 Rule 20 the discretion of the court is perfectly free and the only question is whether upon the facts of any particular case it should be exercised. In particular mistake or misunderstanding of the Appellant’s legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised”.

36. I now wish to consider whether the applicant has demonstrated reason to warrant exercise of discretion by this court. What come in focus is the conduct of the Objector/Applicant. Record show that the Objector/Applicant filed her objection in the year 2017 in Eldoret before the matter was transferred to Kabarnet for hearing and determination. This matter was first placed before me on the 26th October,2023 and on the said date, counsel for the Petitioner was present while counsel for the Applicant/Objector was absent. The matter was fixed for mention on the 29th November,2023 when counsel for the Objector/Applicant took directions ex-parte in respect to the summons for revocation of grant dated 22nd June,2017.The court gave directions that the summons for revocation of Grant dated 22nd June,2017 to proceed by way of viva voce evidence and parties were granted 15 days each to file and serve witness statements/affidavits beginning with the objectors and the matter was fixed for hearing on the 29th February,2024.

37. On the 29th February,2024, counsel for the Applicant/Objector informed the court that they were not ready to proceed for the reason that they had not been able to file documents and he sought 7 days to do so. Counsel for the Respondent/Petitioner did not oppose prayer by counsel for the objector to be granted more time to file documents; the court then fixed the matter for hearing on the 22nd April,2024.

38. On the 22nd April,2024, Ms. Kanda who was holding brief for counsel for the Applicant/Objector informed the court that though the matter was for hearing, Mr. Tarigo was not ready to proceed as he



was indisposed. Mr. Esikuri strongly opposed the application for adjournment and urged this court to order the matter to proceed with hearing. Upon considering the application for adjournment and objection by the respondent, I allowed the Objector 3 days to file and serve witness statements. The matter was then referred to mediation. Mediation failed and the matter was referred back to the trial court for hearing on the 23rd July,2024.

39. On the 23rd July,2024, Ms. Kanda holding brief for Mr. Tarigo for the Objectors informed the court that Mr. Tarigo was not ready to proceed since he had not been able to reach out to his clients for further instructions and sought adjournment. Ms. Nderitu holding brief for Mr. Kipnyekwei for the Respondent informed the court that the date was taken by consent and he was ready to proceed and he was on his way to Kabarnet. The court found no sufficient reason was advanced for an adjournment and ordered the case to proceed for hearing.
40. At the time the matter was set for hearing, Petitioner was present while counsel for the objector was absent. Counsel for the petitioner applied for dismissal of summons for revocation of grant dated 22nd June,2017 with costs and the court allowed the application as prayed.
41. From the above sequence of events, it is clear that the Objector/Applicant was granted sufficient opportunity to prosecute summons for revocation. I however take note of the fact that from counsel from averments by counsel for objector, there may have been breakdown of communication between the objector and his counsel and the objector's may be in the dark on the going on in court. Considering the nature of the application herein, I am of the view that mistake of counsel should not be visited on his client and it would be in the interest of justice to allow the objector a final chance to prosecute his summons for revocation.
42. I am guided by the decisions of the Court of Appeal in Harrison Wanjohi Wambugu v Wairimu Chege & Another [2013] eKLR where it was stated that

“Therefore, we have to ask ourselves whether the failure to attend court by the Appellant on the 5th of May, 2008 constituted an excusable mistake or was it meant to deliberately delay the cause of justice. The Appellant contended that he failed to attend the hearing of the appeal because he erroneously confused the date of the hearing as 6th May, 2008 as opposed to 5th May, 2008; and that upon realizing that the appeal had been dismissed when he attended court on 6th May, 2008, he filed an application on 7th May, 2008 seeking reinstatement of the appeal”.

43. By allowing the application dated 31st July,2024 the Objector/Applicant now has a chance to prosecute his application dated 22nd June,2017 on merit and to do so with diligence. The upshot of the foregoing I hereby set aside orders issued on 23rd July, 2024 and reinstate the applicant's application dated 22nd June,2017 and award the Petitioner/Respondent thrown away costs of kshs 30,000 to be paid within 30 days from the date of this ruling failure which the objection to stand dismissed.
44. Final Order : -
1. This court's order issued on 23rd July 2024 is hereby set aside.
 2. Application dated 22nd June 2017 is hereby reinstated.
 3. thrown away costs of Kshs 30,000 to be paid by the objector to petitioner within 30 days from the date of this ruling.
 4. The objector to file witness statements within 14 days from the date of this ruling.



5. Failure to comply with order 3 and 4 above, the objection dated 22nd June 2017 to stand dismissed.

RULING DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 26TH DAY OF FEBRUARY 2025.

RACHEL NGETICH

JUDGE

In the presence of :

Mr. Tarigo for Objector/Applicant.

Ms. Kipyekwei for Petitioner.

Court Assistant - Elvis.

