



In re Estate of Elkana Choro Osuka (Deceased) (Succession Cause 252 of 1994) [2024] KEHC 315 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 252 OF 1994
RE ABURILI, J
JANUARY 24, 2024**

IN THE MATTER OF THE ESTATE OF ELKANA CHORO OSUKA (DECEASED)

BETWEEN

BERTHA ANYANGO ADERA APPLICANT

AND

MESHACK OWIRA OSUKA 1ST RESPONDENT

PETER OMONDI CHORO 2ND RESPONDENT

RULING

1. Vide an application dated 16th November 2023, the objector herein Bertha Anyango Adera seeks orders that this court sets aside, review or vary the orders made on 16th October 2023 dismissing her summons for revocation of grant filed on 24th January 2022. She also prays that the said summons for revocation of grant be reinstated and that she be allowed to file her submissions to canvass the same.
2. The Applicant swore a supporting affidavit reiterating her grounds that she had instructed an advocate, a Mr. Robert Okumu to represent her in the objection but that he failed to attend court when required to do so hence she should be accorded an opportunity to be heard on merit. She deposes and argues that mistake or failure by her advocate to appear and represent her should not be visited on her as a litigant who is representing her family. That no prejudice shall be occasioned to the Respondents if the application is granted but that the deceased's estate shall suffer irreparable loss and damages. That the application is made timeously and in good faith.
3. In her sworn affidavit, she deposes that she is a bonafide beneficiary of the estate of the deceased Elkana Choro Osuka and that she blames her advocate for failing to attend court or to inform her to attend court.



4. She laments that the deceased's estate is being wasted and mismanaged by the Petitioners herein hence she should be given an opportunity to argue her application seeking to have the grant as issued and confirmed in favour of the two petitioners herein revoked.
5. The Petitioners opposed the application through the Replying Affidavit sworn by the 1st petitioner, Meshack Owira Osuka on 18th December 2023.
6. According to the Petitioners, the Applicant has concealed from this court the fact that on 26th June 2023 she was duly served with the order dated 20th June 2023 and that her advocate was also served with the said order on the same day and an affidavit of service filed in court to confirm that they were served. That further, the Applicant and her advocate were on 14th October 2023 served with Notice of the date of the Ruling dated 5th October 2023 hence her with her advocate were fully aware of the court proceedings and they wilfully disregarded and disobeyed court orders, expecting to reap sympathy with the court.
7. That it therefore follows that the application is an abuse of court process and hence it should not be entertained by this court.
8. On the deposition by the Applicant that she was a beneficiary of the subject estate, it was deposed that applicant objector is neither a wife or daughter of the deceased Elkana Osuka Choro and that the rightful beneficiaries are identified by the Chief's letter dated 17th December 2015.
9. That the application sought to be reinstated is non-existent because her advocate withdrew it in 2022 hence the Ruling of 16th October 2023 cannot be set aside in favour of a non-existent application.
10. That it is fool hardy, wild, baseless and arrogant of the Applicant to allege that the deceased's estate was being mismanaged yet her late father Patrick Adera Choro got his share of the estate where she has constructed a house for her brother and is cultivating and benefiting from crops thereon while she intimidates neighbours over imaginary boundary disputes, posing herself as the court Appointed Administrator of the estate.
11. That it is the Respondents and other beneficiaries who will suffer irreparable loss as there is a liability owned by the estate amounting to Kshs.105,000,000 which is subject of litigation in a Kakamega Court but that they cannot resolve it with such applications challenging them being administrators of the estate of their late father; which dispute might lead to auctioning of the property or estate entirety to settle the outstanding debt.
12. That the application and supporting affidavit are incurably defective for failure to disclose the service executed upon the Applicant and her advocate. That having disobeyed court orders, the Applicant should not be entertained by this court.
13. The Respondents urged this court to dismiss the application and strike out all the attachments thereto.
14. The application was argued orally albeit the 1st Respondent also filed written submissions which he highlighted in his oral arguments. The Applicant did not file written submissions as directed and was allowed to argue her application orally after indicating to court that she had entrusted her advocate (who was not on record) with all her documents but that when she called him, he said he was attending a funeral.
15. The applicant prayed that she be allowed to argue her application and she was granted leave to proceed orally.



16. She urged the court to set aside and review the order of 16th October 2023 dismissing her summons for revocation of the grant issued to the Petitioners/Respondents herein.
17. She reiterated her grounds and affidavit in support on the reasons why she did not attend court or file her submissions as directed by this court, blaming it all on her advocate's ineptitude.
18. On the part of the Respondents, Meshack Owira submitted reiterating his deposition that the Applicant was duly served but that she deliberately failed to attend court and or file her written submissions to canvass her summons for revocation of grant. He submitted that the Applicant is a wounded person who had by all means tried to use her father to acquire the entire estate of the deceased at the expense of the rightful beneficiaries and that in 2015 when her father, the then administrator was very ill, the Applicant tried to have the entire estate transferred to her now late father Patrick Adera Choro albeit she was not successful. That the Applicant has contributed to the delay in the full administration of the estate since 1994 hence the application is intended to prejudice the Respondents and the actual beneficiaries of the estate which require timely administration thereof. He urged the court to dismiss the application dated 16th November 2023.
19. In the application dated 15th November 2023, the 1st Petitioner applicant seeks for rectification of the grant issued and confirmed on 6th November 2017 to him and Peter Omondi Choro.
20. The rectification requested involves alleged misspelling of names of the 1st Petitioner written as Owira instead or Owira, Godfrey Ombok Choro instead of Godfrey Ombok Osuka, a beneficiary; Amos Odongo Choro instead of Amos Apollo Odongo Choro; George Osuka Choro instead of George Gor Choro; Wilson Ochodho Choro instead of Wilson Ochuodho Osuka.
21. The Petitioners also sought for substitution of beneficiaries who have since died with those who are surviving them namely; Naftali Okoth Choro with Martha Okoth Kirwa; Chrispinus Ogada Choro with Polycarp Ogada Mboya; Patrick Adera Choro with Eric Kenneth Ochieng Adera; (parcel Kisumu/Marera/1457; David Osuka Choro with Elizabeth Akoth Owang; David Osuka Choro with Jacob Ogada Osuka; Patrick Adera Choro with Susan Wanjiru Adera (for a different parcel of land Kisumu/Karateng/1459; Samuel Odiero Choro with Stephen Otieno Odiero; Naftali Okoth Choro with David Ochieng Okoth (for a different parcel); Wilson Ochuodho Osuka with Beatrice Rubai Ochuodho and the inclusion of Erick Kenneth Ochieng Adera as a beneficiary in LR No. Kisumu/Karateng/1618.
22. The Death Certificate for the deceased beneficiaries and National Identity cards for the surviving proposed substitutes are annexed to the supporting affidavits.
23. The court did not get any response to this application by the Objector. I will therefore determine both applications but first, the Objector's application dated 16th November 2023.

Determination

24. Having considered all the above pleadings and depositions, the issue is whether the objector's application for reinstatement of her application dismissed for failure to file submissions to prosecute the same is merited and secondly, whether the petitioners' application for rectification of grant and substitution of beneficiaries is available at this stage.
25. Albeit the Applicant did not cite any provisions under which the application for review and setting aside the court's order was made, Rules 49 and 73 of the Probate and Administration Rules gives this court the discretionary powers to make such orders as it deem necessary that meets the ends of.



26. However, the discretion must be exercised judiciously and not capriciously or with a view to rewarding an indolent party who goes to slumber and wakes up later to take the court and the parties into circles through delaying tactics.
27. See Aloys Kaveen Chepkwony vs Development Bank of Kenya & 2 Others Nrb HCC No. 387 of 2008 citing with approval *Patel vs Cargo Handling Service Limited* [1975] EA 75 that:

“The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. *Shah Vs. Mbogo* [1967] EA 116. In exercising the discretion the court should consider among other things, the facts and circumstances both prior and subsequent, and all the respective parties. The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by setting aside the judgment should be considered and it should always be remembered that to deny a person a hearing should be the last resort of the court.”
28. In the instant case, the Applicant has explained the reasons for her failure to file submissions being that she had instructed an advocate to represent her and to appear in court and prosecute the application on her behalf only for the advocate to fail to do so and no reasons were given to her. That her advocate’s failure or mistake should not be visited upon her; that she is a beneficiary and is representing other beneficiaries who have issues with the manner in which the Petitioners are administering the estate including mismanaging it hence the reasons for the summons for revocation of the grant issued and confirmed in their favour.
29. The Petitioners on their part have opposed the application blaming the Applicant for being stubborn and wasting the court’s time and abusing court process because she is not even a daughter or wife of the deceased. That she was served with directions and orders of this court but she defied and that her intentions are sinister as she tried to use her father to get the entire estate transferred to him while he was ill which plan failed, among other allegations reproduced hereinabove as deposed. Finally, that her alleged application was withdrawn by her advocate in 2022.
30. It is indeed not in dispute that the Applicant was served with directions of the court on how to canvass her now dismissed application by way of summons for revocation of grant but she never complied with directions of 20th June 2023.
31. On the allegation that the summons for revocation of grant was withdrawn in 2022, I have perused the proceedings herein and albeit there was an attempt to have the summons withdrawn so that the grant is confirmed, which was on 31st January 2022, there was no withdrawal orders as Mr. Okumu Advocate for the Applicant/ objector qualified the proposal to withdraw the Objection by submitting that the 2nd Petitioner Peter Omondi Choro had not been heard from for over 20 years hence he could not even be found to sign documents for distribution of the estate even if the objection was withdrawn and summons for confirmation of grant filed.
32. That is how this matter of 1994 has remained in this court for all the years now 30 years with a grant but which grant has not been confirmed due to the wrangles between siblings and the Applicant herein who is a granddaughter of the deceased and daughter of the initial Administrator who has since died.
33. What is now clear is that the grant herein reissued to the two Administrators despite being confirmed on 6th November 2017 by Majanja J, the estate has never been fully distributed hence the estate is likely



to waste away since from their own application for rectification of grant, most beneficiaries have died hence, the prayers for substitution of beneficiaries being sought.

34. Obviously, with the demise of most beneficiaries before distribution of the estate, there is bound to be issues and this is caused by delay in the distribution of the estate. My observation is that even if this court was to rectify the grant, in view of the wrangles, distribution will be impossible unless the administrators give a true and accurate account of what they have been doing with the estate.
35. For the above reasons and in order to accord the applicant an opportunity to be heard, I find that it is in the interest of justice to allow the application for review/setting aside the dismissal order of 16th October 2023 to allow the Applicant ventilate her grievances fully before this court before the court can determine whether to allow the administrators to continue with the distribution of the deceased's estate.
36. Accordingly, I exercise discretion and review and set aside the order of 16th October 2023 dismissing the applicant's summons for revocation of grant filed on 14th December 2020.
37. I reinstate the said summons for hearing on merit and grant the applicant ten (10) days of today to file and serve written submissions.
38. On the application by way of summons for rectification of grant to correct names of the 1st Administrator and other beneficiaries and to substitute the deceased beneficiaries, I find that the application is premature at this stage when the grant as issued and confirmed is being challenged.
39. The application is declined and struck out although Administrators can apply at a later stage after the court has considered on merit the summons for revocation of grant. This being a family matter, each party to bear their own costs of the two applications.
40. Mention on 7/2/2024 to fix a Ruling date on the summons for revocation of grant.
41. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY, 2024

R. E. ABURILI

JUDGE

