



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 1240 of 2000

IN THE MATTER OF THE ESTATE OF LILIAN MUTHONI GAKUYA

(ECEASED)

**GEOFFREY MUKENGA GAKUYA.....
APPLICANT**

VERSUS

FRANCIS GACHUNGA GAKUYA

JOHN KINYUA GAKUYA

TABITHA KAGUYA

SAMUEL GAKUYA MUKUNYA.....RESPONDENTS

RULING

Before me is a Summons dated 9th March 2006 filed by Oronga Esonga & Company advocates on behalf of Geoffrey Mukenga Gakuya. It was filed on 15th March 2006 and seeks for orders that –

1. The order dismissing the application dated the 10th March 2005 (sjpi;d be 4th March 2005), made on 18th October 2005 in the absence of the advocate for the respondent/applicant by this Honourable court be set aside.
2. The application dated 4th March 2005 be reinstated and set down for hearing.
3. Costs of this application be provided for.

The application has one ground on the face of the summons

that the respondent's application raises substantive issues and if the same is not heard his interests and the interests of other beneficiaries are likely to be prejudiced as the caution is only meant to delay the subdivision and distribution of the estate of the deceased. The application is supported by the affidavit of ROSELYNE ORONGA ESONGA, counsel for the applicant sworn on 9th March 2006.

In response to the application, the counsel for the appellants Francis Gachunga Gakuya, John Kinyua

Gakuya, Tabitha Gakwa and Samuel Mukunya Gakuya – Ms. Macharia Kenneth and Associates advocates filed a Notice of Preliminary Objection dated 10th April 2006. The Notice of Preliminary Objection was based on the following grounds –

- (i) The application whose order is sought to be reviewed was not dismissed for non-attendance, but was dismissed on merits.
- (ii) The orders sought to be set aside can only be appealed against.
- (iii) The affidavit in support of the present application is incompetent.
- (iv) The orders sought in the present application are unavailable.

The application came for hearing before me on 20/9/2006. At the hearing, Mrs. Esonga appeared for the applicant while Mr. Macharia appeared for the appellant.

Mrs. Esonga submitted that it was an application under Order IXB rule 8 Civil Procedure Rules. The applicant wanted orders that the orders of Hon. Justice Koome, which were made in the absence of counsel for the applicant, be set aside, and that the application which was dismissed by those orders be reinstated. It was her contention that the dismissed application raised substantial legal issues which needed to be addressed in the interests of justice for all the parties and beneficiaries. If that was not done, the applicants and beneficiaries would be prejudiced as there was a caution lodged on the land asset of the estate, which was still in force.

She submitted that, on the date set for the hearing of the application which was dismissed by the court, she had another matter before Hon. Justice Mutungi. She instructed Mrs. Muhoho and later Ms. Ngala to hold her belief, but the said lawyers were called to their respective offices. Her client appeared before Hon. Justice Koome but the application was dismissed without counsel for the applicant being given an opportunity or chance to be heard and to demonstrate their case to the Judge.

Mr. Macharia opposed the application. He based his opposition on the grounds of objection filed. He contended that the previous application was dismissed on merits, not for non-attendance. Therefore this application was wrongly brought under Order 9B rule 8 Civil Procedure Rules. He also submitted that the application that was dismissed was so dismissed after the Judge considered the application and replying affidavit. He further submitted that the orders sought in the present application were not available. The decision of Hon. Justice Koome could only be appealed from or reviewed, not set aside.

In a short response Mrs. Esonga submitted that the order or decision of the court was ex-parte as counsel on record did not appear before the court. The court also did not give a chance to the applicant to prosecute the application. She contended that the court can set aside the decision of Hon. Justice Koome.

This application is clearly an application to set aside an Order or decision of the court under Order 9B rule 8 Civil Procedure Rules. The rule grants jurisdiction to the court, to set aside or vary a judgment or order entered for non attendance of a party to proceedings. It provides –

“8. where under this Order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such terms as are just”

Counsel for the respondent has argued that the orders for setting aside are not available, as the Judge did not make a decision ex-parte. I have perused the record. At the hearing of the application on 18/10/2005, the learned Judge recorded thus –

“12.15 p.m.

Macharia for the respondent

N/A by Mrs. Wesonga”

Then the learned Judge heard some submissions from Mr. Macharia and proceeded to dismiss the application. Though both parties counsel appear to agree that the applicant himself was before the learned Judge, the record shows that the proceedings were conducted ex-parte. The applicant was not recorded as having been present, nor did he address the court. I have to go by the record of the court. Therefore, I find that the decision on the application dated 4/3/2005 was made in the absence of counsel for the applicant, and without giving the applicant an opportunity to be heard. Therefore it was an ex-parte order, to which rule 8 applies. Therefore an order to set aside the decision is available to the applicant.

I now turn to the merits of the application. The principles to be followed in an application to set aside an ex-parte judgment or order were set out in the case of Patel –vs- E.A. Cargo Handling Services Ltd [1974] EA 75, at page 76 where Duffus P. stated –

“I also agree with the broad statement of the principles to be followed. The main concern of the court is to do justice to the parties concerned, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules”.

Though the discretion of the court is unfettered, an applicant has to show good reasons why the court should exercise its discretion. The reasons given for the non attendance of counsel for the applicant is that he was engaged in another court. Indeed on the same day, before the application was heard, Mrs. Muhoho held brief for Mrs. Esonga for the applicant. That was put on record by the learned Judge. She requested that the application be put off to 12.15, which the court granted. At 12.15 p.m. counsel for the applicant did not appear in court, resulting in the dismissal of the application. The supporting affidavit to this application explains the reasons why the applicant’s counsel did not attend court. The respondent’s counsel has merely relied on technical grounds to object to the application. He has not challenged the grounds given by the appellant’s counsel for the failure to attend court. On the basis of the facts before me, I find that I am inclined to allow the application herein, as there is no challenge to the grounds given.

However, the court’s decision dismissing the application dated 4/3/2005 was made on 18/10/2005. Obviously counsel for the applicant knew that the application, which was filed by her was to be heard on 18/10/2005. She asked through counsel holding her brief that the hearing to be put at 12.15 p.m., which was granted by court. She did not attend court at 12.15 p.m. She filed this application before me on 15/3/2006. That was a period of almost five months. No explanation has been given for such a long delay in bringing this application. She submitted that his client was present in court. He must surely have known on the same date 18/10/2005 that the application was dismissed. Counsel has not endeavoured to explain the delay infilling this application. In my view, the delay is unjustified. It is inordinate delay. However, on the other hand counsel for the respondent has not raised the issue of delay. He has as I have stated earlier, challenged the application merely on technical grounds. I cannot speculate for him as to the reason why he did not raise the issue of delays. As this is a succession matter, which involves a number of beneficiaries, I will give the benefit to the applicant and reluctantly give him another chance.

Consequently I allow the application and grant Prayers (1) and (2). However, this will be subject to the applicant paying costs of this application which I assess at Kshs.4,000/= to the respondent’s counsel within 30 days from today. Failure to which the application dated 4th March 2005 will stand dismissed as earlier ordered by Hon Justice Koome on 18th October 2005. it is so ordered.

Dated and delivered at Nairobi this 3rd day of September 2006.

George Dulu

Ag. Judge

In the presence of –