REPUBLIC OF KENYA

IN THE KADHI'S COURT AT ISIOLO

SUCCESSION CASE NO. 29 OF 2009

IN THE MATTER OF THE ESTATE OF IGGE DUALE... DECEASED

ABDILLAHI IGGE

MOHAMED IGGE.....PLAINTIFFS / RESPONDENT

VS

MOHAMED YUSSUF.....DEFENDANT

1. SAIDA BAKAJO

2. ZAMZAM YUSSUF

3. AMINA YUSUF.....APPLICANTS

RULING

1. The applicants' Notice of motion dated 10th August 2018 seeks orders *inter alia* for:

1. THAT the application be certified urgent and he be heard ex parte in the first instance

2. THAT there be a stay of execution of both this court's judgment delivered on the 22nd day of October 2009 and ruling delivered on the 26th July 2018

3. THAT this Honourable court be pleased to set aside the ex parte judgment delivered on the 22nd day of October 2009 and all the consequential orders particularly the ruling delivered on the 26th day of July 2018 and grant the 2nd respondent leave to file her statement of defence.

2. It is supported by the affidavit sworn by Zamzam Yussuf on 10th August 2018. She deponed that she only became aware of this matter through Sadia Bakajo, the 1st applicant when she was served with a Notice of Motion dated the 11th of July 2018 and upon enquiry at the Court Registry, she was informed that a judgment had been entered on 22nd November 2009 and that the defendant was served with summons to enter appearance and a hearing notice. She stated further that the plaintiff did not serve her or any of her siblings with summons to enter appearance and were therefore condemned unheard. She deposed that the dispute involves Plot Nos. 414 and 415 in Isiolo which are registered in the name of her late mother Halima Igge.

3. The application is opposed. The respondents filed a replying affidavit dated 20th September 2018. They deponed that the respondents were served with summons to enter appearance and an affidavit of service is on record and that their father who

attended court on 13th October 2009 and sought adjournment to inform them of the hearing date. They deposed that the matter was scheduled for hearing on 13th October 2009 but the respondents father sought an adjournment which was allowed and the matter scheduled for hearing on 14th October 2009 when the matter proceeded in their absence but were aware of the proceedings. They contend that the applicants were enjoined *suo moto* by court and directed to file their reply to the application dated 11th July 2018 but failed to do so to date. They further deposed that this application amounts to harassment of the bedridden petitioners who are supposed to be allowed to enjoy the inheritance of their father and the orders of the court have already been executed as ordered.

4. The applicants were represented by the firm of Nkunja & Company advocates while the respondents were represented by the firm of Kimathi, Kiberia & Munyungu advocates.

Facts.

5. The facts of this application are the same as in the ruling of the application dated 11th July 2018 delivered on 26th July 2018. I can do no better than reproduce same herein. The applicants filed a succession petition dated 8th July 2009 against Mohamed Yusuf. They contended that Ibadu Farah their mother left Plot No. 1301 Bula Pesa and was survived by three children: Mohamed, Abdillahi and Halima Igge, that the sons were in Saudi Arabia and the daughter had care and custody of the property but she subdivided the plot into Nos: 414 and 415 [the suit property] and registering the biggest portion under her names and upon her death she left the plot under the care of her son, Mohamed Yussuf, the defendant. They seeked orders that the subdivision be declared null and void and proper subdivision be done under the Islamic law of inheritance. The record shows the defendant was duly served with the petition and hearing notice but neither entered appearance, reply or appeared on the date for hearing on 14th October 2009 before Hon. Sheikh Salim Mohamed Salim. His father however appeared for hearing and the matter was adjourned to allow him to contact his daughter Zamzam who was in Eldoret at the time but he did not appear for hearing on the following day. The court entered a ruling on 22nd July 2009 that the Plot No 1301 be subdivided into five [5] equal shares and Mohamed and Abdillahi Igge each to get two shares and Halima Igge to get one share thereof. Armed with this ruling, the applicants applied to the District Surveyor for subdivision of the plot who through letter dated 28th October 2009, requested the Court for orders based on the final ruling to enable combine and subsequently subdivide the plot. A letter dated 28th May 2010 by the District physical Planning officer - Isiolo, indicates the subdivision was complete and a copy sent to the Clerk, County Council of Isiolo for action and registration. On the other hand, Mohamed Yusuf and his sisters allegedly allowed one Saida Bakajo with the suit property without agreement with the applicants on the claim that the property belonged entirely to their mother. On their demand that she vacate she declined as a result the petitioner filed the application dated 11th July 2018 for an order compelling eviction of Saida Bakajo from the estate property. That application was granted, directing 1st respondent to vacate premises within [30] days from date of ruling failure to which eviction would be enforced. The court further directed parties to do valuation and present proposals on distribution before leave to sale estate property could be granted. Aggrieved by this decision the applicants had intimated on appeal but opted to file this application.

Issues

6. Upon reading the application, affidavit and annextures thereto and upon perusal of the suit file and upon hearing the parties, the issue for determination in this application are:

a. whether or not the applicants were properly served and / or were aware of the proceedings before court

b. whether or not the judgment entered on 22nd October 2009 was regular and whether it can be stayed aside nine [9] years after it had been entered.

7. The application was disposed by way of written submissions.

Applicant's Submissions

8. It was submitted that the Civil Procedure Rules (2010) apply to the Kadhi's Courts since rules of practice and procedure for Kadhi's Court have not been made by the Hon. Chief Justice under section 8(2) of the Kadhi's Court Act. It was submitted that Ibadu Farah was survived by three children namely Mohamed, Abdillahi and Halima Igge and that Zamzam, Amina and Mohamed Yusuf are children of Halima Igge who is deceased and therefore any order affecting the estate of Ibadu Farah, the children of Halima Igge should be heard before it is made. It was submitted that Zamzam and Amina Yusuf were not served with summons to enter

appearance and that the hearing was for the 13th October 2009 but the matter was heard on the 14th October 2009 and 21st October 2009. The applicant submitted she was not served and the judgment was therefore irregular and ought to be set aside as a matter of right. He relied on case of ***James Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR*** and ***Sangram Singh v Election Tribunal, Koteh AIR 1955 SC 664.***

Respondent's submissions

9. Mr. Kaberia for the respondents submitted that the respondents were served as evidenced by the affidavit of service sworn by Susan Kabaru on 8th July 2009 and that the hearing notice for 14th October 2009 was taken through consent as the applicants were not present in court by their father was and sought time to contact the applicant. He submitted further that the Zamzam and Amina Yusuf appeared in court on the hearing of the application dated 11th July 2018 and were enjoined in the *suo moto* but were heard by the court despite their failure to file reply as directed. It was submitted that the applicants were served and even appeared in and were heard by court and therefore the case of ***James Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR*** relied by the applicants is different from this one. He contends the respondents were aware of this suit but they deliberately chose not to participate in it by failing to enter appearance in time. He argued that it is nine years since judgment was entered, the applicants have changed their citizenship and reasons they have given are flimsy and intended to defeat justice. It was submitted that setting aside ex parte judgment must be exercised only to avoid injustice and not to assist a person who seeks to obstruct or delay justice. He relied on the case of ***Lazaruz Chomba vs Zakayo Gitonga Kabutha & Another [2001] eKLR.***

Analysis and Finding.

10. It is not disputed that the applicants, Zamzam and Amina Yussuf are children of Halima Igge and therefore entitled to be heard in the estate of Halima Igge or Igge Duale as they have a legal inheritance interest in it. Was the applicant served with the summons to enter appearance for the main petition" An examination of the record will show she was not. However their brother was specifically served and never entered appearance, filed a reply to the petition or even appeared in court. Their father was present in court. The Court takes judicial notice that Zamzam and Amina are currently not residents in Kenya but certainly Zamzam was present in Kenya in 2009 when proceedings were active. Interestingly their brother Mohamed Yusuf who has always been resident in Kenya and was served with the summons to enter appearance seems uninterested in the matter. No reasons has been advanced by his siblings why he does not attend court.

11. The applicable law of procedure in the Kadhi's Court is the Civil Procedure Act, Cap 21 laws of Kenya by virtue of absence of specific rules of procedure for Kadhis court under Section 8(2) of the Kadhi's Court Act, Cap 11, Laws of Kenya which provide:

''Until rules of court are made under subsection (1), and so far as such rules do not extend, procedure and practice in a Kadhi's court shall be in accordance with those prescribed for subordinate courts by and under the Civil Procedure Act.''

12. The Kadhi's court being a court of equity, the court is not envisaged to strictly apply the Civil procedure rules. The rules of natural justice however do apply. **Muchelule J, In Rhoda Wanjiru Kibunja v. Abdalla Mohamed Abdalla,HCCA 92 OF 2012 [NAI] [unreported],** had this to say:

'' I agree that it would be onerous to subject the Kadhi's court to the strict rules that apply to the ordinary courts. However, to keep a record of what the parties said, what while either sworn or not sworn, is the bare minimum expected of the Kadhi's Court. It is upon reading the record that the High Court can agree or not agree with the decision arrived at by the Kadhi. A party appearing before the Kadhi expects to be heard and what he says to be recorded. He expects to be allowed to call evidence. He expects to be cross examined on what he says. The same for his witness. He expects to cross examine the other side also. All these have to be recorded. There is a failure of justice, we find, when such a record is not kept..''

13. The rules of natural justice demand that no person is condemned unheard. Under Islamic law the role of the court is to ensure that all parties affected by the petition before it are aware of and are granted opportunity to participate in the proceedings.

14. In **James Kanyiita Nderitu v Marios Philotas Ghikas & Another [2016] eKLR**, the Court of Appeal at Mombasa differentiated between a regular and irregular judgment. It held thus:

'.. it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one

which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such default is entitled under order 10 rule 11 of the Civil Procedure Rules, to move court to set aside the default judgment and to grant him leave to defend suit.... in an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation the court moved by a party once it comes to its notice that judgment is irregular; it can set aside the default judgment on its own motion..."

15. The Court of Appeal cited with approval the case of **Frigonken Ltd. v. Value Pak Food Ltd, HCCC No 424 OF 2010**, where the High Court held:

"If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court *ex debito justitiae.* Such a judgment is not set aside in the matter of exercise of discretion but as a matter of judicial duty in the order to uphold the integrity of the judicial process".

16. Where a regular default judgment has been entered, the court has wide discretion to set it aside. However the purpose should be to ensure ends of justice and not to delay or cause injustice. In the case of ***Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd*** the court held *inter alia*:-

"The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo)..."

17. This matter was filed on 8th July 2009. Summons to enter appearance was served upon the defendant Mohamed Yussuf, then resident in Bula Pesa - Isiolo on the same day at 10:30 a.m. by Ms. Susan Kaburu process server Isiolo law Court. The minute on the first cover of the record indicate it was listed for hearing on 14th October 2009. Incidentally the hearing notice extracted and served was for 13th October 2009. There is no record the defendant appeared in court on the 13th October 2009. The record is clear the plaintiff and defendant's father appeared in court on the 14th October 2009 where the matter partly proceeded and a further hearing date set for the 21st October 2009. There was an error in the extraction of the hearing notice but there is no doubt all parties, including the defendant's father, were aware of it otherwise they would not attend court on the 14th October 2009. It is, in the circumstances, excusable. In any case the defendant had not entered appearance even after service of summons.

18. The applicant was not served with summons to enter appearance. She was however aware of these proceedings since 2009. Her father was physically present in court on 14th October 2009 and although he refused to take oath and give evidence he specifically requested to call the applicant. The matter was adjourned to 21st October 2009. The Court noted:

'The defendant's father refused to take oath and ask[ed] for time to contact his daughter Zamzam who is in Eldoret. This matter is adjourned to 21st October 2009 at 9:00 in the fore noon.'

19.The purpose of the adjournment could only be to enable the applicants to participate in the proceedings. They failed to appear and the matter properly proceeded. Indeed in her submissions in the application dated 11th July 2018, the applicant stated thus:

"Mother died in 2007. In 2009 uncles filed the case. I didn't hear anything till one month ago."

20. It is factually not correct that none of the children were served with summons to enter appearance. It is factually wrong that the children, specifically, Zamzam the applicant herein, was not aware of the proceedings in this court regarding the estate in issue. I can only find and hereby hold, that the applicant was aware of these proceeding way back in 2009 and therefore the judgment entered was regular.

21. This makes this case different from that cited by counsel for applicants in the case of ***James Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR.*** In that case the Court of Appeal found four factors that led to find the judgment entered was irregular one of which was lack of service of summons to enter appearance.

22. In a regular default judgment the court has wide discretion to set it aside to ensure justice. The court however, must be satisfied that the defendant was not served with summons to enter appearance or failed to attend court due to sufficient cause. In ***Shah vs Mbogo and Ongom vs Owota*** the court held that for Orders to set aside ex parte judgment to issue *inter alia* the court must be satisfied that:-

a. either that the defendant was not properly served with summons; or

b. that the defendant failed to appear in court at the hearing due to sufficient cause.

23. The term 'sufficient cause' has been defined by the Supreme Court of India in the case of ***Parimal vs Veena*** when it observed that:-

*"**Sufficient cause**" is an expression which has been used in large number of statutes. The meaning of the word "**sufficient**" is "**adequate**" or "**enough**", in as much as may be necessary to answer the purpose intended. Therefore the word "**sufficient**" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "**sufficient cause**" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "**not acting diligently**" or "**remaining inactive.**" However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*

24. In the exercise of its discretions, courts should always strive to be guided by judicial principles and not emotion. In the Case of **Gideon Mose Onchwati v Kenya Oil Co. Ltd & another [2017] eKLR, Aburili J,** cited with approval the case of ***Daphene Parry vs Murray Alexander Carson*** *where the court* had the following to say:-

'Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, ...'

25. After consideration of the facts of this case and the law, the applicants failed to demonstrate they deserve the court's discretion to grant their application for setting aside the judgment entered nine years ago in 2009. It matters not that they may have a defence raising triable issues; by not presenting their defence and evidence to court despite their knowledge of the dispute and the proceedings, they either acted in arrogance or in ignorance of the legal process both of which do not qualify for the exercise of the court's discretion in their favour especially considering the duration this matter has been in court and the advanced age of the petitioner / respondents. I sympathize with the applicants as a human being but I am bound to apply judicial principles of fairness and justice in the exercise of judicial authority. Accordingly the application is dismissed with costs.

Dated, signed and delivered in ISIOLO on 4th December 2018

HON. ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

ISIOLO LAW COURTS

In the presence of

Mr. Mohamed Noor Jattan - Court Assistant

Mr. Nkunja for Applicant

Mr. Kaberia for Respondents