**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1662 OF 2013**

**IN THE MATTER OF THE ESTATE OF FLORENCE WANGARI MBURU alias WANGARI MBURU(DECEASED)**

**JOSEPH IRUNGU NDITU.....APPLICANT**

**VERSUS**

**WAINAINA TURIA.....1ST RESPONDENT**

**NAHASHON GICHARU RURIA** (*deceased*)**.....2ND RESPONDENT**

**RULING**

1. The deceased Florence Wangari Mburu alias Wangari Mburu died intestate on 30th September 2012 Her estate comprised –

(a) LR No. Nairobi/Block 114/294 Mwiki – Kasarani;

(b) plot No. 7 – Kantafu;

(c) plot No. 8 – Kantafu;

(d) Equity Ban A/C No. [xxxx];

(e) shares with Barclays Bank;

(f) shares with Equity Bank; and

(g) shares with Gatundu Women H. Growers Association.

2. On 12th July 2013 Joseph Irungu Nditu (applicant) and Nahashon Gicharu Tiria (brother to the deceased/2nd respondent) petitioned the court for the grant of letters of administration intestate. The applicant stated that he was the widower of the deceased. The grant was issued to them on 24th October 2013, and confirmed on 3rd June 2014. They were to share each asset equally, except for the shares in Gatundu Women H. Growers Association which were to all go to the applicant.

3. On 3rd May 2016 Wainaina Turia (the 1st respondent) filed summons for the revocation of the grant. He is brother to the 2nd respondent and the deceased. He complained that the petition had been filed without his knowledge and consent; that the deceased was not married to the applicant, and it was therefore an act of fraud for him to pose as the deceased's widower to inherit her estate; and that he was a beneficiary of the estate of the deceased who had been excluded from the estate.

4. On the basis that the application had been served but the petitioners had not responded, the court heard the matter and on 27th June 2017 delivered a ruling which revoked the grant and set aside the certificate of confrimation. A fresh grant was issued to the respondents. It was ordered that the respondents would pursue the distribution of the deceased's estate equally and that the 2nd respondent would have to prove that he was married to the deceased.

5. On 17th January 2019 the applicant filed this application seeking to have the court set aside the orders of 27th June 2017, and he be granted leave to respond to the application for revocation dated 26th April 2016. His case was that upon being informed of the application he visited his advocates then on record. He signed documents in response to the application. His advocates told him there was no need for his attendance, and that he would be informed of the progress of the case. He fell ill and this is why he could not follow up the progress of the case. The 1st respondent filed an application dated 5th October 2018 seeking to have cancelled the registrations to the titles of land that had been effected subsequent to the confirmation that had been issued to the applicant and 2nd respondent. When the new application was served on the applicant's advocates, they informed him and also informed him that the grant had infact been revoked. He instructed the present advocates who filed the instant application. He stated that he stands to be unjustly disinherited if the application is not granted. He seeks an opportunity to show that the deceased was his wife.

6. The 1st respondent swore a replying affidavit to state that the applicant had been served with the application for revocation and had not responded. He had also been served with a hearing notice. He could not blame the inaction on his advocates when he himself had failed to follow up the application. His case was that the grant had been revoked because it had not been proved that he was married to the deceased. It is notable that the issue whether the applicant and the deceased were married has not been heard or determined.

7. The petition belonged to the applicant. He had instructed counsel to represent him, but it was still his responsibility to diligently pursue the matter, and to keep checking on his counsel to be informed on the status of his case. It is true that the court should not punish a litigant for the failures of his counsel, but the litigant has, on his part, to demonstrate due and reasonable diligence in the pursuit of his case **(Savings and Loans Limited –v- Susan Wanjiru Muritu (Milimani) HCCC No. 397 of 2002).**

8. I appreciate that the applicant is seeking the exercise of the court's discretion to set aside the ruling that was arrived at following the *exparte* hearing of the 1st respondent's application for revocation. It is trite that the court's discretion must be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material evidence falling on the applicant **(Gharib Mohamed Gharib –v- Zuleikha Mohamed Naaman, civil Application No. Nai. 4 of 1999).**

9. A Court should not be used to aid the indolent or to occasion an injustice that costs cannot be sufficient remedy **(Ruth Kavindu –v- Josiah Mbaya and Another, Nai. HCC No. 209 of 1974).**

10. Lastly, it is always the desire of the law and the Constitution that cases be decided on merits following substantial hearing. It should be in exceptional cases that a litigant is blocked from being heard in a matter where his substantial interests are likely to be affected.

11. There is no dispute that the applicant was served. He states, without demur, that he signed documents to defend the application and the advocate advised that his attendance was not necessary. It was later that he found that he had not defended the application which had been decided against him. His case is that the deceased was his wife and it was on that basis that he petitioned for the grant. The grant has been revoked and given to the deceased's brothers. He was not heard in the matter. He states that he risks being disinherited. In the particular circumstances of this case, I am unable to find that the applicant's conduct, although negligent, was designed to obstruct or delay justice **(Shah –v- Mbogo and Another [1967] EA 116)**. He has made out a sufficient case on merits to justify the setting aside of the orders.

12. In conclusion, I allow the application and set aside the *exparte* proceedings of 13th September 2016 and ruling delivered on 27th June 2017. I allow the applicant 14 days to file and serve a response to the application dated 26th April 2016 and filed on 3rd May 2016 by the 1st respondent. The applicant has been indulged. He will pay costs of this application. This matter will be mentioned on **21st October 2019** for directions on hearing.

**DATED and DELIVERED at NAIROBI this 23RD day of JULY, 2019.**

**A.O. MUCHELULE**

**JUDGE**