



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO. 76 OF 2007

IN THE MATTER OF THE ESTATE OF KIMWENI OKETCH

BETWEEN

LABAN OTIENDE OWINO.....PETITIONER/APPLICANT

VERSUS

ELIZABETH CHEPKOSGEL.....1ST OBJECTOR/RESPONDENT

ESTHER CHELAGAT.....2ND OBJECTOR/RESPONDENT

RULING

1. By a notice of motion dated 28th March, 2017 brought under Order 12 Rule 7 of the Civil Procedure Rules, the applicant/petitioner prays for orders that:-

a. That the Honourable court be pleased to set aside orders issued on 28th February, 2017 and the summons for revocation be reinstated for hearing on merit

b. Costs be in the cause

2. The application is based on the grounds among others that failure to attend court by applicant's counsel was not deliberate and that the petitioner was condemned unheard.

3. The application is supported by an affidavit sworn on 28th March, 2017 by the applicant's advocate, Mr. Lore G. Omondi avers that he had been informed by the applicant that his previous advocate, Mr. Kouko for the applicant did not attend court because he was engaged in other matters before Majanja J. Attached to the supporting affidavit is this court's order issued on 23rd February, 2017 and a copy of Mr. Kouko's diary for the same date.

4. The application is opposed on the basis of a replying affidavit sworn by the 1st objector on 8th May, 2017 and filed on 8th May, 2017 in which she avers that Mr. Kouko has not filed an affidavit to explain his failure to attend court.

5. I have carefully considered the application in the light of the supporting and replying affidavits. Mr. Kouko, advocate for the applicant has not explained on 23rd February, 2017 when the application for revocation dated 18th May, 2015 was allowed. His mistake notwithstanding, it should be the court's last resort to deny a party a chance to be heard on the basis of mistake of counsel.

6. The overriding objective of the law is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Under the powers granted to this court by Order 12 Rule 7 of the Civil Procedure Act, the court makes the following orders:

1. The notice of motion dated 28th March, 2017 is allowed

2. Applicant is condemned to pay Kshs. 5,000/- (Five thousand) throw away costs to the respondents within 14 days from today's date.

DATED AND DELIVERED THIS 26th DAY OF *January* 2018

T.W.CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk - Felix and Carol

Petitioner/Applicant - N/A

Objectors/Respondents - N/A