



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 182 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE PETER KARANJA KARIUKI (DECEASED)

ALICE WAMBUI KINUTHIA.....APPLICANT

VERSUS

DORINE WANGARI KARANJA.....1ST RESPONDENT

BONIFACE KARIUKI.....2ND RESPONDENT

RULING

1. The application before Court is dated 11/7/2017. The orders sought are;

1. Spent.

2. THAT this Honourable Court be pleased to grant an order setting aside the ruling dismissing the Objector's Application dated 30th April, 2013 and subsequent orders for want of prosecution.

3. THAT this Honourable Court be pleased to grant an order setting aside the ruling dismissing the Objector's Application dated 30th April, 2013 and subsequent orders for want of prosecution.

4. THAT the cost of the Application be in the cause.

2. The application is based on the following grounds;

1. **THAT** this application was fixed for hearing on the 28th June, 2017 but the Applicant's counsel had attended to her Doctor's Appointment in Nairobi Aga Khan Hospital.

2. **THAT** the Applicant counsel had requested a junior counsel to hold brief on her behalf to extend the interim orders and fix another date.

3. **THAT** the file was called when the advocate who was to hold brief for the Applicant's counsel had attended a matter in another Court, hence dismissal of the Applicants' case.

4. **THAT** the Respondents have taken advantage of the Order for Dismissal to subdivide the land harassing and intimidating the occupiers.

5. **THAT** application is not scandalous, frivolous or vexatious as the subject matter discloses serious cause of action relating to the Applicant's rights of inheritance.

6. **THAT** there was misrepresentation of material facts pertinent to this case since we have filed the witness statement and agreed on the modalities of proceedings therefore showing significant progress on the Applicant prosecuting her case.

7. **THAT** this Honourable Court does not exercise discretion to reinstate the application.

8. **THAT** I pray for this Honourable Court to exercise its discretion and set aside dismissal orders and reinstate the application and to

grant leave to the Applicant to fix the matter for hearing.

3. It is supported by the affidavit of Jane Wambui Ndung'u sworn on the 11/7/2017.
4. The gist of the application is that the applicant's application dated 30/4/2013 was dismissed by Court on 28/6/2017 for want of prosecution. It is explained that the Applicant's counsel had attended to her doctor's appointment at Aga Khan Hospital, Nairobi.
5. Counsel had detailed a junior counsel to hold her brief but the matter was called when the said counsel was attending to another matter in a different Court.
6. It is urged that the Applicant's rights to inheritance would be adversely affected.
7. It is stated that the Applicant was present in Court on the material day but did not understand the proceedings of the day.
8. Counsel annexed a bundle of documents to prove she had a doctor's appointment at the Aga Khan Hospital. It is her case that the mistake of counsel should not be visited on the Applicant.
9. The application is opposed and in a replying affidavit Dorine Wangari Karanja (1st Respondent) with authority of the 2nd Respondent has deponed that the Applicant has been indolent in the prosecution of her summons for revocation of grant and she had been perpetually adjourning the matter.
10. It is the Respondent's case that on the material day, counsel intimated to the Court that the Applicant's counsel would be ready to proceed with the matter at 11.00 a.m.
11. Neither the Advocate nor the Applicant appeared for hearing at 11.00 a.m. as scheduled and the application was dismissed. Counsel holding brief did not at any time indicate that counsel for the Applicant had gone to see a doctor in Nairobi.
12. The power of Court to set aside its orders is bestowed on the Court to avoid hardship or injustice arising from an excusable error or mistake. The same is however not available to a party who is intent on abusing the court process.
13. Given the history of the endemic backlog in our Courts and the incessant back and forth in many matters before Court owing to lethargic parties and their counsels, the Court must of necessity take a deliberate interest in ensuring that delay in hearing of cases is avoided at all costs. In our instant suit the Court must be satisfied that a sufficient reason is given for it to set aside its orders. Was there an excusable error or mistake arising from inadvertence?
14. The mainstay of this application is that the Applicant's Counsel was on the material day attending an appointment with her doctor at the Aga Khan Hospital Nairobi.
15. At paragraph 18 of the affidavit Counsel depones that she had a doctor's appointment and refers to an annexure marked "JWN2" being a bundle of documents. Strangely, I do not find this attachment to the affidavit.
16. This is a serious omission and it brings into serious doubts the bonafides of the application at hand.
17. Be thus as it may, I have considered the issues requiring resolution in this matter. The matter is about inheritance and its resolution would have ripple effects affecting generations to come. For that reason only, I will be reluctant to punish the Applicant for the mistake of Counsel.
18. Consequently, I very reluctantly allow the application dated 11/7/2017 in terms of prayer 2 & 3. The Respondent shall have costs assessed at Kshs. 15,000/= payable before any further step is taken in the matter.

Dated and Signed at Nakuru this 25th day of July, 2018.

A. K. NDUNG'U

JUDGE