



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 19 OF 1998

RAMADHAN NJOKA MWANDO.....DECEASED

VERSUS

MOHAMED RAMADHAN NJOKAPETITIONER

VERSUS

ZAINABU WAMBETI RAMADHANI NJOKA.....1ST OBJECTOR/RESPONDENT

ABDULKARIM NJERU RAMADHAN.....2ND OBJECTOR/ RESPONDENT

RULING

1. This is an application to reinstate a dismissed application brought by way of notice of motion under Order 12 rule 7 of the 2010 Civil Procedure Rules and Section 18 of the Civil Procedure Act. It is also expressed to be brought under all other enabling provisions of the law. The application is anchored in the supporting affidavit of Stephine Mwanza Gachie dated 11th December, 2015.

2. in his supporting affidavit, the applicant has stated that he was notified that the application for revocation of grant dated 23/02/2012 was dismissed on 9/11/2015 for non attendance. He asserts that he was not aware that the application was coming for hearing on that date. According to him the application was initially scheduled for hearing on 24/09/2015, but it coincided with the Muslim Holy Holiday and for that reason, his clients were unable to attend court.

3. It is his further evidence that on the 8th December, 2015 he sent his clerk to the Embu Registry to confirm if the court diary had been opened and he was informed that the court file was not accessible. As a result he decided to call Ms Rose Njeru to inquire what had happened on 24/09/2015.

4. Furthermore, he was informed there is a person by the name Gachie who held his brief in taking a consent hearing date for 9/12/2015. He was not informed of this date. As a result, his application was dismissed for non attendance.

5. The Respondents filed a replying affidavit of Zainab Wambeti Ramadhan Njoka. She has deponed that this application is an abuse of the court process and that it is meant to delay the cause of justice. It is her further evidence that Counsel for the applicant is not truthful that he was not aware that the application was coming for hearing on 25/09/2015 because, when the date taken for hearing (on 25/09/2015) it was by consent and the firm of Gachie Mwanza was represented by their clerk known by the name Grace. She also stated that on 24/09/2015 the Applicant was duly represented by Mr. Mungai Kivuti who was instructed by the applicant to hold his brief. She states that it was not Rose Njeru

Advocate who was to hold the Applicant's brief.

6. Finally she has stated that the applicant's counsel failure to attend court on 9/11/2015 was intentional and the court therefore should dismiss the application with costs, because this matter has been in court for the past 16 years.

7. I have considered the affidavit evidence and the submissions of both Counsel. I find that the Applicant's counsel was represented in the registry when the hearing date was fixed by consent on 9/11/2015. I do not accept his contention that he did not know the person who appeared on their behalf by the name Grace. I also find that it is Mr. Mungai Kivuti who held the applicants brief and not Ms. Rose Njeru Advocate.

8. This notwithstanding, I find that the dismissed application should be reinstated. The reason being that a party should not be driven from the seat of judgment unless there is compelling evidence. I find that the application should be reinstated upon the condition that the applicant pays court adjournment fees in the sum of Kshs. 2000/-. The applicant should also pay costs to the respondent in respect of this application before the next hearing date. If the costs are agreed upon they should be taxed.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **26th** day of **May 2016**

In the presence of both Mr Wachira holding brief for Mr Gachie and Mr. Nduku and Mr. Mwaniki holding brief for Ms. Rose Njeru for the respondents/objectors.

Court clerk **R. Njue**

J.M. BWONWONGA

JUDGE

26.05.16