



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 118 OF 2012

IN THE MATTER OF THE ESTATE OF HARRISON KIMITI KIMANI (DECEASED)

JOSEPH KAMAU GATHERU.....RESPONDENT

VERSUS

PETER KIMANI KIMITI.....RESPONDENT

AND

BENJAMIN MBUGUA KAMAU.....APPLICANT

R U L I N G

1. The Applicant brought the application dated 19th November 2014, seeking to vacate or vary and/or set aside the orders issued on 19th November 2014 dismissing the application dated 3rd October 2014. He prayed that the court do reinstate the application dated 3rd October 2014 for hearing and determination on merit.

2. The application is based on grounds that the Applicant through Mbiyu Kamau & Co. Advocates filed the application dated 3rd October 2014 seeking to be recognised as a dependant. That application was fixed for hearing on 19th November 2014, and when the matter was called out on that date for hearing, neither the Applicant nor the counsel representing him was present. The matter was therefore dismissed for non-attendance since it was the Applicant who had served the hearing notice. That the non-attendance was not deliberate but was actuated by counsel having a matter before Justice Lesiit.

3. Mr. Thuo counsel for the Respondent filed a replying affidavit, and deponed that he was in court when the application dated 1st October 2014 came up for hearing and there was no response by the Applicant or his counsel when the matter was called. That the counsel for the Applicant has not stated the counsel he had instructed to hold his brief. Mr. Thuo argued that contrary to what the Applicant has stated, the matter would not have gone for directions since the Applicant had been made a party. That in any event the Applicant and his counsel should have been in court to seek whatever directions they required. Further that the Applicant in his own admission is not a relative or an heir to the deceased's estate and should therefore not be allowed to delay this cause. Mr. Thuo urged the court to dismiss the application.

4. Mr. Kamau learned Counsel, for the Applicant, urged the court in his submissions to allow the

application dated 3rd October 2014 as sought. That its dismissal on 19th November 2014 was because he had another matter before Justice Lesiit and the counsel who held his brief failed to inform the court as much. Counsel submitted that he took urgent remedial action and on 20th November 2014 filed an application to reinstate the dismissed application.

5. The Respondent through an affidavit sworn by his counsel stated that the Applicant's counsel had not instructed anyone and it was necessary for the Applicant and his counsel to have been present during the hearing. It was Mr. Kamau's contention that since the Applicant was fully and competently represented, his presence was not mandatory and his failure to be present was not due to disinterest in the matter.

6. Counsel further urged that there would be a misapprehension of facts, if counsel for the Respondent was to make any assertions on the Applicant's relation with the deceased, as these are matters to be canvassed at the hearing of the application dated 3rd October 2014.

7. I have read the supporting and replying affidavits and considered the submissions of Mr. Kamau appearing for the Applicant together with the authorities of **Shah vs Mbogo & Another [1967] E.A. 116 and Johnson Ndungu Njoroge vs George Waweru Muchai** to which he referred this court. The court has an unfettered discretion to set aside or vary dismissal orders, *inter alia*, upon such terms as are just. It is a judicial discretion that must be exercised judicially upon settled principles.

8. The court will exercise the discretion in favour of an applicant in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. But it will not exercise the discretion in order to assist an indolent litigant, or one who has deliberately sought, by evasion or otherwise, to obstruct or delay the course of justice. See the well-known case of **Shah vs Mbogo & Another [1967] E.A. 116 Section 47 of the Law of Succession Act** also enjoins the court to act in the interest of justice and gives the court extensive discretion in the discharge of this mandate.

9. The reason given for failure of the Applicant's counsel to attend court was that he was before another court. The reason is not entirely satisfactory since counsel ought to maintain a diary to ensure all his matters are attended to and at the very least he ought to have instructed another counsel who was instructed to hold his brief.

10. I however note from the record that the Applicant has always attended court and to shut him out when this was the first lapse on his part does not lend itself to the cause of justice. The court has not been told that the Respondent stands to suffer any prejudice if the application dated 3rd October 2014 is reinstated. See - **Johnson Ndungu Njoroge vs George Waweru Muchai**. It is meet for matters to be heard and determined on merit where possible instead of shutting out a party. In any event Mr. Kamau moved with alacrity to come to court seeking to reinstate the application. That speaks in the Applicant's favour.

11. Having considered the matter placed before the court, and the principles applicable to applications of this nature, I find that it is in the interest of justice that for the Plaintiff to be given one more opportunity to prosecute its case. For that reason I allow the application dated 19th November 2014 and set aside the order of dismissal of 19th November 2014. The suit is hereby reinstated for hearing. The Defendant shall have the costs of this application and any thrown-away costs that it may have been incurred as a result of the order of 19th November, 2014.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **23rd day of November, 2015.**

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L. A. ACHODE

JUDGE