



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.2069 OF 2005

**IN THE MATTER OF THE ESTATE OF MWANGI NDUGO *alias* MWANGI NDUGO
MBUTHIA (DECEASED)**

**VERONICA WANJIKU MWANGI.....
.....APPLICANT**

VERSUS

**CHARLES NDIRANGU MWANGI.....1ST
RESPONDENT**

**NAOMI WANGECHI MUNENE.....2ND
RESPONDENT**

RULING

Veronica Wanjiku Mwangi, the Applicant herein filed an application pursuant to the provisions of **Rules 49 and 73** of the **Probate and Administration Rules** seeking orders from this court to review, set aside or vary its order of dismissal issued on 15th November 2011. The Applicant further prayed that the summons dated 24th August 2010 be reinstated to hearing and determination on merit. The grounds in support of the application are stated in the face of the application. The application is supported by the annexed affidavit of Veronica Wanjiku Mwangi, the Applicant and Charles Gakuhi Chege, the Advocate of the Applicant. The advocate swore a supplementary affidavit in further support of the application. The application is opposed. Stanley King'ara, the advocate for the Respondent swore a replying affidavit in opposition to the application.

Prior to the hearing of the application, the respective counsel for the parties filed written submissions in support of their respective opposing positions. Mr. Chege for the Applicant in his argument before court submitted that the Applicant's summons for revocation of grant was dismissed on 15th November 2011 for non-attendance. He told the court that he did not attend court on that day because he had been admitted to hospital. He annexed a medical report which indicated that he had been admitted in a hospital from the 13th to 16th November 2011 on account of his ill health. Mr. Chege further submitted that the Applicant had a good case and should be allowed to ventilate her case on its merits. He urged the court to consider the overriding principle of delivering justice to the parties on the basis of the merits of the case. He stated that his client should not be punished on account of his mistake.

Mr. King'ara for the Respondents opposed the application. He submitted that the Applicant and her counsel failed to appear in court when the case had been scheduled for hearing. He explained that the reason given by counsel for his failure to attend court was not acceptable because he had evidence that the said counsel was attending another case before the Nyahururu Magistrate's Court. He stated that even if

the court were to accept the explanation of counsel, the Applicant had not given any reason for her failure to attend court on the material day. He accused the Applicant of indolence even after becoming aware of the dismissal of the case. Learned counsel in particular noted that it had taken more than five (5) months for the Applicant to file the application to set aside the order of dismissal. The Applicant had not explained this delay. In his view, the delay was inexcusable. He urged the court to dismiss the application with costs.

This court has carefully considered the rival submission made by counsel for the parties to this application. It has also read the pleadings filed by the parties in this succession cause. The Applicant filed summons seeking to have the grant issued to the Respondents revoked on the grounds that the Respondent had failed to disclose to the court that she was a widow of the deceased. The Applicant explained that at the time of his death, she was living with the deceased in their matrimonial home situate on L.R. No. Nyahururu Municipality Block 8/790. She had resided on the suit parcel of land since 1999. She accused the Respondents of secretly applying for letters of administration in respect of the estate of the deceased without informing her. She only became aware of the existence of these succession proceedings when she was served with summons to attend court in respect of **Nyahururu PMCCC No.336 of 2009**. This case was filed by the Respondents seeking the eviction of the Applicant from the suit property. When they were served with the summons, the 2nd Respondent filed a replying affidavit denying the Applicant's claim that she had been married to the deceased prior to his death. She accused the Applicant of being a stranger to the estate. In particular, she deponed that the Applicant was an employee of the deceased. This court noted that clearly there was a dispute in regard to whether the Applicant was a wife of the deceased and therefore entitled to be considered as his dependant.

It was this dispute that was scheduled to be heard on 15th November 2011 when the Applicant failed to turn up in court. The summons was dismissed for want of prosecution. Having evaluated the facts of this application, it was clear to this court that the Applicant did not present credible grounds for her failure to attend court. The explanation by the advocate of the Applicant that he had been prevented from attending court because he was sick is excusable. However, what is not excusable is the failure of the said advocate to communicate with the advocate of the Respondents with a view of informing him of his indisposition. Counsel for the Respondents is within his rights to complain that the conduct of the Applicant is such that this court ought not to exercise its discretion in her favour.

This court is aware that in making a decision whether or not to allow an application seeking to set aside an order issued by the court, the court is exercising judicial discretion. This discretion is not exercised capriciously or with a view to rewarding an indolent party. It is exercised to meet the end of justice. Koome J (as she then was) in **Aloys Kaveen Chepkwony –Vs- Development Bank of Kenya & 2 Others Nairobi HCCC No.387 of 2008 (Milimani)** cited with approval the decision in **Patel –Vs- Cargo Handling Services Ltd [1975] EA 75**:

“The discretion is intended to avoid injustice or hardship resulting from accident, in advertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. SHAH VS MBOGO [1967] EA 116. In exercising the discretion the court should consider among other things, the facts and circumstances both prior and subsequent, and all the respective parties. The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by setting aside the judgment should be considered and it should always be remembered that to deny a person a hearing should be the last resort of the court. “

In the present application, applying the principles cited above, it is apparent that although the Applicant has not been of the best behaviour and has not adequately explained her failure to attend court, the interest of justice demands that she be given a chance to ventilate her case. This is a family dispute. The Applicant claims to be a widow of the deceased. That fact has been disputed by the Respondents. The Applicant should not be shut out from the seat of justice just because she failed to attend court on one occasion. This court is of the view that the Respondents can be compensated by an award of costs for the inconvenience occasioned to them as a result of the failure by the Applicant to attend court on the

scheduled date.

In the premises therefore, this court will allow the Applicant's application dated 18th April 2012. The order of dismissal made by this court on 11th November 2011 is hereby set aside. The summons for revocation dated 24th August 2010 is hereby reinstated back to hearing. The parties shall be at liberty to list the said summons for hearing at the Registry. The Applicant shall pay the thrown away costs of the Respondents. This court assesses the said costs at Kshs.15,000/-. The same shall be paid by the Applicant to the Respondent within thirty (30) days of the delivery of this Ruling. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF APRIL, 2014

L. KIMARU

JUDGE