

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.3330 OF 2003

IN THE MATTER OF THE ESTATE GICHANE GITHIOMI (DECEASED)

MARY WAMAITHA.....APPLICANT

VERSUS

LUCY NYAMBURA WARUIRU.....RESPONDENT

RULING

On 9th October 2009, Rawal J (as she then was) delivered a Ruling in which she held that Lucy Nyambura Waruiru, the Respondent was not a widow of the deceased and therefore not a beneficiary of his estate. The Learned Judge ordered the name of Lucy Nyambura Waruiru to be deleted from the grant of representation that was issued by the court on 27th February 2006. The court further ordered that Mary Wamaitha, the Applicant (the daughter of the deceased) be issued with a grant of letters of administration. The same was confirmed to her. After the delivery of the Ruling, the Respondent lodged a notice of her intention to appeal against the said decision to the Court of Appeal. There is however no evidence that such appeal was ever lodged or prosecuted before the Court of Appeal. However, on 4th February 2011, the Respondent filed a notice of the withdrawal of the Notice of Appeal.

On 1st February 2011, the Applicant filed a Notice of Motion pursuant to the provisions of **Order 45 Rule 1(1)(a) and 2(a)** of the **Civil Procedure Rules** seeking to have the Ruling of Rawal J made on 9th October 2009 either set aside or reviewed on the grounds that she had discovered new and important matter that was not considered by the court when it rendered its Ruling. She stated that the decision was arrived at without her being afforded an opportunity to give her evidence fully in the presence of her advocate. In essence, the Respondent was saying that she was denied a right to fair hearing. She further prayed that the court issues an order staying the execution of the decision of the court pending the hearing and determination of the application. The application was opposed. The Applicant filed grounds in opposition to the application. The application was fixed for hearing by this court on 16th February 2011 for the 6th April 2011. The date was fixed in the presence of counsel for both parties. On 6th April 2011, it was only the counsel for the Applicant who was present in court. Maraga J (as he then was) dismissed the application with costs for want of prosecution.

The Respondent was undaunted. On 14th July 2011, she filed another application seeking to have the application dated 1st February 2011 reinstated to hearing. It is instructive that this application was filed after the Applicant had sought to evict the Respondent from a parcel of land that was the subject of the inheritance dispute. The Respondent further prayed that the order dismissing her application be set aside. The Applicant explained her reason for failure to attend court to have been occasioned by her advocate misdiarising the date that he was supposed to appear in court. She urged the court not to punish her on account of the mistake of her advocate. She further urged the court to take into consideration the broader interest of justice to arrive at a decision that would enable her to have her case heard and determined on merit. She stated that if her application was not allowed, she would be evicted from a place that she has called home for many years. The application is supported by the annexed affidavit of the Respondent. The

Applicant opposed the application. She filed grounds in opposition to the application.

Prior to the hearing of the application, the respective counsel for the parties herein filed written submission. This court also heard oral submission made by Mr. Nyakiangana for the Respondent and by Mr. Kitheka for the Applicant. The issue for determination by this court is whether the Respondent made a case for this court to set aside the order of dismissal that was made by Maraga J. This court in considering an application to set aside any order of dismissal is exercising judicial discretion. This discretion is not exercised capriciously. The court has to weigh the conflicting interests of the parties. In the present application, it was clear that the Respondent failed to attend court when the application was fixed for hearing by the court. The Respondent was represented by an advocate. The explanation of the advocate is that he misdiarised the date. This court did not see a copy of the diary entry made by the advocate to confirm his claim that he had indeed misdiarised the date. In determining whether or not to set aside that order of dismissal, this court, of necessity, will consider the conduct of the parties prior and subsequent to the filing of the application. As stated earlier in this Ruling, immediately after Rawal J rendered her Ruling, the Respondent lodged a notice of her intention to appeal against the decision. The Respondent took no action for nearly two (2) years. It was when the Applicant sought to execute the judgment that was rendered in her favour that the Respondent rushed to court with the application that is sought to be reinstated. Subsequent thereafter, she has been prompted to move the court to list her application for hearing when the Applicant sought to execute the judgment.

Having carefully evaluated the reasons that the Respondent advanced for her failure to attend court on the date the application was listed for hearing, this court is not persuaded that the Respondent has given cogent reasons for this court to exercise its discretion her favour. The Respondent has been an indolent litigant. Further, even if this court were to consider the merits of the application for review, it is doubtful that this court has jurisdiction to entertain such application. This is because what the Respondent is essentially seeking from the court is a determination on the merits of the case in respect to a decision rendered by a court of concurrent jurisdiction. The only remedy available to the Respondent is to appeal against the said decision to the Court of Appeal.

In the premises therefore, this court finds no merit with the Respondent's application seeking the reinstatement of the application that was dismissed for want of prosecution. The application is dismissed with costs.

DATED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2014.

L. KIMARU

JUDGE