



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**SUCCESSION CAUSE NO. 519 OF 2000**

**BENSON ANGOLO NASIBI .....PETITIONER**

**VERSUS**

**1. ROSE APWOKA**  
**2. BERITA KAKAI .....APPLICANTS**

**RULING**

1. On 21.7.2010, I dismissed the Summons for revocation dated 28.9.2006, instituted by Rose Apwoka and Berita Kakai. The reason for the dismissal was that by 3 p.m. when the matter was called out, neither the Applicant nor his Advocate were present.

2. In a Summons premised on the provisions of Rules 59 (1) and 73 of the Probate and Administration Rules, the Applicants seek reinstatement of the dismissed Summons for reasons that;

- i. failure to attend court was not deliberate;
- ii. the Applicants were unaware of the hearing date;
- iii. the advocate for the Applicants were held up at the High Court in Kisumu.

3. In the Supporting Affidavit sworn on 26.7.2010, Rose Apwoka, deponed that on 21.7.2010, she received information that she was required in court and she only made it to court at 3.30 p.m. by which time the Summons had been dismissed. In the meantime, her advocate, Bruce Odeny Esq. also arrived at 3.15 p.m. and they immediately started attempts at setting aside the dismissal order.

4. Another point raised was that the letter informing the Applicants of the hearing date indicated that hearing was slated for 29.9.2010 and not 21.7.2010 which was an inadvertent mistake.

5. In a Replying Affidavit sworn on 2.12.2010, the Respondent/Petitioner deponed that the Applicants had deliberately failed to attend court on 21.7.2010 and that their advocate had requested that the file be kept aside until 2 p.m. but still failed to turn up by 3 p.m. That there was therefore no reason to allow the present Application.

6. On my part, the proceedings before me are Succession Proceedings and so ordinarily it should relate to the distribution of the deceased's estate. The Summons for Revocation raises issues as to whether the Applicants were entitled to the estate as daughter-in-law and widow of the deceased respectively. Justice would demand that their claim be investigated and be determined on the merits.

7. Further, on 21.7.2010, the record would show that Mr. Odeny for the Applicants had sent Mr. Momanyi advocate to apply that the matter be heard at 2 p.m. and Mrs. Muleshe for the Respondent agreed and I so ordered.

8. At 3 p.m. when neither Mr. Odeny nor his client appeared, I dismissed the Summons. Are the reasons given for non-attendance acceptable? In my view, yes. The Applicants have exhibited a letter dated 30.6.2010 requiring them to attend court on 21.9.2010 and not 21.7.2010 and so on the latter date, they went about their normal business until they were informed later in the day that they were required in court. They did so but arrived after the Summons had been dismissed and they then filed the present application. That conduct was consistent with diligence and failure to attend was not deliberate.

9. In the event, I will accede to the Application dated 26.7.2010 and will reinstate the Summons dated 28.9.2006 and it having been in this court's docket for long, will be given an early hearing date.

10. I shall order each party to bear its own costs.

11. Orders accordingly.

*Delivered, dated and signed at Kakamega this 14<sup>th</sup> day of April, 2011.*

**ISAAC LENAOLA**

**J U D G E**