

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO.2663 OF 2000

**IN THE MATTER OF THE ESTATE OF KAMAU KARIUKI alias
KAMAU KARIUKI (A) – (DECEASED)**

ESTHER WAMBUI KAMAU & OTHERS.....APPLICANTS

VERSUS

**JOSEPH KARIUKI KAMAU &
ANOTHER.....RESPONDENTS**

R U L I N G

Before me is an application filed by the applicants pursuant to the provisions of the then **Order IXB Rule 8 (now Order 12 Rule 7)** of the **Civil Procedure Rules** seeking the orders of this court to set aside the order earlier made on 21st January 2009 dismissing the applicants' application dated 19th December 2000 for non- attendance and for want of prosecution. The applicants further prayed that the court do reinstate the said application to hearing so that the same may be heard and determined on its merits. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Njambi Waigera, the advocate for the applicants. The application is opposed. The respondents filed grounds in opposition to the application.

At the hearing of the application this court heard rival oral submissions made by Mr. Kamere for the applicants and by Mr. Akoto for the respondents. This court has carefully considered the said submissions. The issue for determination by this court is whether the applicants have made a suitable case for this court to set aside the said order of dismissal. This court has unfettered discretion to set aside any order issued ex-parte provided that the issuance of such order will advance the cause of justice and will not cause undue prejudice to the opposing party. The facts of this application are not in dispute. The applicants' application was dismissed due to the absence of the applicants' counsel in court when the file was being called out. The said counsel explains that on the material day, although the cause list indicated that the cases would commence as from 9.00 a.m., the court in fact started its hearing of cases at 8.30 a.m. The said counsel was not aware of this change of time. She arrived in court at 9.00 a.m. only to learn that the application had been dismissed for non-attendance. This fact has not been controverted by the respondents. Upon dismissal of the application, the applicants did not take long before filing the present application seeking the setting aside the said order of dismissal. In the application that was dismissed, the applicants sought to annul the letters of administration that were issued to the respondents on the grounds that the respondents had obtained the said grant by concealing material facts of the court. The applicants were aggrieved that they had been excluded as the dependants of the deceased, yet they claim they are children of the deceased. It is this court's considered opinion that it would serve the ends of justice for the applicants to be allowed to ventilate their case. Administration of estates of deceased persons require that the properties that belong to the deceased be inherited by the dependants of such deceased persons. If some dependants claim that they were excluded during the distribution of the estate of the deceased, it is only just that the court hears and determines their case on its merits. The respondents will not suffer any prejudice that cannot be compensated by an award of costs.

In the premises therefore, this court will allow the applicants' application dated 4th February 2009. The order issued by this court on 21st January 2009 dismissing the applicants' summons for revocation of

grant dated 19th December 2000 for want of prosecution is hereby set aside. The said application is reinstated to hearing. The applicants' shall be at liberty to fix the said application for hearing at the registry. The respondents shall be paid thrown away costs of Kshs.5,000/-. The said amount shall be paid within thirty (30) days of today's date or in default thereof the respondents shall be at liberty to execute. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF APRIL, 2011

L. KIMARU
JUDGE