



**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**SUCCESSION NO. 581 OF 2006**

**ESTATE OF THE LATE PETER KAIRU KIAI (DECEASED)**

**MARY WANGUI KAIRU.....OBJECTOR/APPLICANT**  
**VERSUS**  
**JOSEPH NJOGU KIAI KAIRU....PETITIONER/RESPONDENT**

**RULING**

On 11/7/2011, the application dated 19/4/2011, came up for hearing. It is a summons seeking inter alia that the petitioner/respondent be enjoined from intermeddling with the estate of the deceased, Peter Kairu Kiai; that the respondent should account for all rents collected from the deceased's estate and neutral persons be appointed to manage the estate and the objector be provided for by way of maintenance. When the application was called out, only Mr. Kagucia, counsel for the petitioner/respondent was present. Counsel urged the court to dismiss the application and the court did dismiss the application.

On 1/8/2011, the objector/applicant filed this Notice of Motion seeking to set aside the court's orders of 11/7/2011, dismissing the objector/applicant's application dated 19/4/2011. To reinstate the same. The application is predicated on grounds found on the face of the application; that counsel for the objector was not aware of the hearing date as his diary had been misdiarised; that the objector was ready to proceed, that objector's counsel learnt of the dismissal through a colleague and that this matter is old and the objector is keen to have it heard and determined. Mr. Kimani, counsel for the objector/applicant urged that any loss that the respondent may suffer will be compensated for in terms of costs and that if the order is not granted, the objector stands to be shut out of the deceased's estate yet she is a widow of the deceased.

The petitioner/respondent opposed the application and filed grounds of opposition dated 5/9/2011. They are to the effect that the application is ambiguous, frivolous and an abuse of the court process, prayers sought are bad in law, no good reasons have been given for grant of the orders; the application and affidavit are replete with falsehoods; failure to attend court is inexcusable as the date was mutually taken by representatives from both firms of advocates, upon invitation of the objector's advocate; that the counsel has not offered to file a supporting affidavit detailing reasons for his failure to attend court; that there is no evidence of the colleague who passed on the information; that the affidavit of Mary Wangui Kairu is scandalous and offends provisions of **Order 19 Rule 3** of the **Civil Procedure Rules, 2010**.

The court record shows that on 17/6/2011, both representatives from Kagucia and Co. Advocates and G.N. Kimani Advocates attended the Court Registry to take the hearing date for the application dated 19/4/2011. The objector/applicant's counsel was well aware of the hearing date and it has not been demonstrated that the date was not diarised. In any event, it would be expected that counsel who claims that his diary was misdiarised should have sworn an affidavit to that effect and exhibited to this court that diary. Instead it is the objector who swore to those matters which are not within his personal knowledge.

**Order 19 Rule 3** of the **Civil Procedure Rules** provides:-

**“3(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove; provided that in interlocutory proceedings, or by leave of the court, the affidavit may contain statements of information and belief showing the sairees and grounds thereof.”**

The deponent herein did not seek the leave of the court to swear to those facts. Though the deponent says that she got information from the advocate, there is no evidence to support the allegation that the diary was misdiarised. The advocate on record drew that affidavit and what was so difficult in him swearing an affidavit to confirm the facts himself. The only conclusion one can draw is that what the objector depones to is not the real truth.

I have seen that J. Ouko rendered a judgment in this matter on 11/11/2011 in which he directed that the applicant do make an appropriate application regarding what she claims to be her entitlement. If the court declines to allow this application, it means that the applicant will be locked out of these succession proceedings in which she has a claim to the deceased’s estate. In my view, locking the applicant out would be highly prejudicial and unfair to the applicant. She will have been locked from the seat of justice through no fault of her own. It is counsel who took the dates and failed to attend court. This court is enjoined to do substantive justice to the parties (see **Article 159** of the **Constitution**). Despite the shortcomings of the applicant’s affidavit, this court is of the view that the applicant be given a chance to prosecute her application by setting aside the court’s order of 11/7/2011. Otherwise she will suffer prejudice. Besides, the application for setting aside of orders was made timeously. The dismissal was on 11/7/2011 and this application was filed on 16/8/2011 – about 33 days after the order of dismissal. For these reasons this court will exercise its discretion and allow the application dated 1/8/2011.

I hereby reinstate the application dated 19/4/2011, to be heard and determined on merit. The applicant to pay the respondent’s throw-away costs and costs of the application dated 1/8/2011. The application dated 19/7/2011 be placed before J. Ouko for hearing and determination. It is so ordered.

**DATED and DELIVERED this 28<sup>th</sup> day of November, 2011.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

N/A for the objector/applicant.

Ms Mugweru for the petitioner/respondent.

Kennedy – Court Clerk.