



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Succession Cause 114 of 2003

IN THE MATTER OF THE ESTATE OF M'IMWITHIA KATHUMA MBARE (DECEASED)

KANGAI M'MWITHIAPETITIONER

VERSUS

ALICE MUKWANJIRU M'IMWITHIA.....CO-PETITIONER

AND

MARGARET MUKWANYAGA M'IMWITHIA.....APPLICANT

RULING

The applicant, Margaret Mukwanyaga M'Imwitha filed an application dated 28th March 2007. That application came up for hearing before court on 9th December 2009. It had been adjourned to that date by consent of all counsels on record. On the 9th December 2008, it was dismissed for non-attendance of counsel appearing for the applicant. The applicant has now filed a Chamber Summons dated 12th January 2009 which is brought under Rules 49 and 73 of the Probate and Administration Rules. That application seeks to set aside the dismissal of 9th December 2008. It also seeks for reinstatement of the application dated 28th March 2008. The applicant in support of her Chamber Summons deponed in her affidavit that her counsel Kaai Mugambi failed to attend court on 9th December 2008. This failure resulted in the dismissal of her application dated 28th March 2008. She stated that when she sought from the said advocate information of what occurred on 9th December 2008, her counsel's telephone remained unanswered. He has to date, therefore not explained to her the reason for his absence. The applicant requested the court not to revisit the failure of her advocate upon her. The dismissed application dated 28th March 2008 sought review of the distribution of the deceased estate. The respondent petitioner opposed the application of setting aside the dismissal. He opposed the application on the basis that the applicant did not move with haste in filing the same. The dismissal was on the 9th December 2008. The applicant filed her application to set aside that dismissal on 12th January 2009. That was just a little after one month. Considering that the period between the date of dismissal and the date the present application was filed that there was the Christmas vacation, I do not find that there was inordinate delay in filing the application. The other objection raised by the petitioner was that the applicant had failed to pay costs awarded against her to the tune of Kshs. 1,500/=. My response to that opposition is, if the applicant has failed to pay costs awarded against her, the petitioner or any other party entitled can apply to execute for those costs. The fact that those costs are still outstanding is not a basis for refusing to grant the orders that are sought. Rules 49 and 73 give this court wide discretion to make orders necessary for end of justice. Having regard to that discretion, one can indeed borrow the principles enunciated in cases where parties have sought the exercise of the court's discretion to set aside *ex parte* judgment. A case in point is Chemwolo & Another Vs. Kubende Civil Appeal No. 103 of

1984. The court in that case held as follows:-

“The Civil Procedure Rules Order IXA Rule 10 confers upon the Court an unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just.

The concern of the Court is to do justice to the parties and the court would not impose conditions on itself to fetter the discretion.”

Bearing in mind that discretion and considering that this cause is a succession cause, I am of the view that the end of justice would best be served by setting aside the dismissal to allow the applicant to be heard. I therefore grant the following orders:-

1. *The court does hereby set aside its orders of 9th December 2008 dismissing the applicant’s application dated 28th March 2008 and the said application dated 28th March 2008 is reinstated for hearing.*
2. *The costs of the Chamber Summons dated 12th January 2009 are awarded to the petitioner in any event.*

Dated and delivered at Meru this 4th day of June 2010.

MARY KASANGO
JUDGE