

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO.1759 OF 2001

IN THE MATTER OF THE ESTATE OF JACKSON KINYUA MUTURI (DECEASED)

ISAAC NDUATI KINYUA.....APPLICANT

VERSUS

HARRISON MUTURI KINYUA.....RESPONDENT

R U L I N G

On 7th July 2008, Onyancha J dismissed with costs the applicant's application seeking to revoke or annul the grant that was issued by this court to the respondent. The learned judge dismissed the application for want of prosecution. On 18th July 2008, the applicant filed an application before this court seeking the setting aside or variation of the order issued by the court dismissing the summons for revocation of grant. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of James Okao and Isaac Nduati Kinyua. The application is opposed. Harrison Muturi Kinyua swore a replying affidavit in opposition to application. At the hearing of the application, this court heard oral submissions made by Mr. Okao for the applicant and by Miss Njoroge for the respondent.

Having considered the facts of this case, the issue for determination by this court is whether the reasons advanced by the applicant in failing to attend court on the day that the case was scheduled to be heard are excusable. The trial judge considered the applicant's application seeking the adjournment of the case. It was evident that the judge did not believe that the applicant's advocate was at Kisii attending to another case. The applicant sought to convince this court that indeed the advocate was in Kisii on the day the suit was scheduled to be heard. The applicant annexed copy of an application dated 17th December 2007. The said application, on the face of it, was scheduled to be heard on 10th April 2008. No other evidence was placed before the court to support the applicant's counsel assertion that he had travelled to Kisii on 4th July 2008 to attend the hearing of the particular case. One would have thought that the applicant ought to have annexed a copy of the Cause List or a copy of the hearing notice which was served upon him by the opposing side to establish that indeed he was required to be at the High Court at Kisii on 7th July 2008. This court's reading of the proceedings before the trial judge established that the learned judge reached the decision after taking into consideration the applicant's previous conduct. This court sees no reason to interfere with the said decision. It was apparent to this court that the applicant has used the pending proceedings in court to frustrate the administration of the estate of the deceased. Even though the applicant filed the present application, he did not bother to fix the same for hearing after the same had at one point been stood over generally. It was clear to this court that the applicant has been an indolent litigant. He cannot blame the advocate for the travails that he finds himself in. It is trite that a case is owned by a litigant and not by his advocate. It is the duty of the litigant to pursue the hearing of his case. This court is not convinced that the applicant has been a diligent litigant.

For the above reasons, the application seeking the setting aside of the order issued by this court dismissing for want of prosecution the applicant's summons for the revocation or annulment of grant is unmeritorious and is hereby dismissed with costs to the respondent.

DATED AT NAIROBI THIS 16TH DAY OF NOVEMBER, 2010

L. KIMARU
JUDGE