



**IN THE MATTER OF THE ESTATE OF: DUSILA OWUOR OGEGA alias DOMITILA OWUOR OGEGA ..... DECEASED**

**BETWEEN**

**JOEL OJWANG OBONGO ..... PETITIONER/APPLICANT**

**VERSUS**

**FESTUS OGEGA SILA ..... OBJECTOR/RESPONDENT**

**RULING**

On 16<sup>th</sup> July 2007 the objector filed an application seeking, *inter alia*, an order striking out the succession proceedings herein which relate to administration of **L.R. NO. KABONDO/KODHOCH EAST/980**, hereinafter referred to as “**the property in dispute**” since the same is registered in his name, the same having been done on 25<sup>th</sup> November, 2005. The application came up for hearing severally but did not take off.

On 27<sup>th</sup> June, 2008 the application was by consent scheduled for

hearing on 27<sup>th</sup> November, 2008. Come the hearing date, Mr. Odongo, the Petitioner’s advocate, did not attend court and no replying affidavit or grounds of opposition had been filed to the said application.

Mr. Oguttu for the objector urged the court to allow the application since it was not opposed and the court obliged him.

On 18<sup>th</sup> May, 2009 the Petitioner, through Mr. Odongo, applied to set aside this court’s orders made on 27<sup>th</sup> November, 2008. If that prayer was granted, the petitioner further urged the court to extend the time for filing a replying affidavit. Counsel said that he did not attend court on 27<sup>th</sup> November, 2008 because he had been misinformed by the registry that the judge was going to be away in Nairobi on the week of 21<sup>st</sup> November, 2008. However, Mr. Odongo referred to a notice which clearly indicated that the judge would be out of the station on 21<sup>st</sup> November, 2008 only.

As regards lack of a replying affidavit, counsel had no explanation, he merely termed it as an anomaly and a mistake on his part for which he urged the court not to punish the petitioner.

Mr. Oguttu for the objector opposed the said application and stated, *inter alia*, that:

- **No sufficient reason was given by Mr. Odongo for his failure to attend court on 27<sup>th</sup> November, 2008.**

- **No sufficient reason was given for failure to file a replying affidavit or grounds of opposition to the objector's application.**
- **There are no triable issues in the application sought to be reinstated since there is no dispute that the property in dispute was registered in the name of the objector on 20<sup>th</sup> May, 2004.**
- **The application is predicated on inapplicable provisions of the law.**
- **There had been unreasonable delay in making the application.**

I have considered the issues that were raised by both parties. The petitioner is asking the court to exercise its discretion to set aside the orders which were made on 27<sup>th</sup> November, 2008. Such discretion must be exercised judicially and upon demonstration of convincing reasons for so doing. The reason advanced by the petitioner's advocate for his failure to attend court on the said date is unacceptable. There was a clear notice to the effect that the court was not going to sit on 21<sup>st</sup> November, 2008. If Mr. Odongo was misled by any registry staff to believe that the court would not sit from 21<sup>st</sup> to 27<sup>th</sup> November, 2008, he did not disclose the name of the person who may have given him such information.

As for lack of any papers in opposition to the petitioner's affidavit, he stated that he **"cannot explain why and how no reply affidavit has been filed in opposition to the Application dated 13<sup>th</sup> July, 2008."** That being the case, the court lacks basis upon which it can hinge its discretion. In any event, the property in dispute does not form part of the deceased's estate.

In the circumstances, I need not consider all the other arguments that were raised as they would have been relevant if only the court had established that its discretion was exercisable in the petitioner's favour.

I find no merit in the petitioner's application and dismiss it with costs to the objector.

**DATED, SIGNED AND DELIVERED AT KISII THIS 16<sup>TH</sup> DAY OF OCTOBER, 2009.**

**D. MUSINGA**

**JUDGE.**

**16/10/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Nyakongo for the Applicant

Mr. Ochwangi for the Respondent

**COURT:** Ruling delivered in open court.

**D. MUSINGA**

**JUDGE.**