



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
OF KISII

Succession Case 93 OF 2004

IN THE MATTER OF THE ESTATE OF MOREKA SIMWAGA DECEASED

AND

CHARLES KANGWANA PETITIONER/RESPONDENT

AND

1. ANDREW ATANDI MATUNDURA)

2. HENRY KISINGER MOMANYI) OBJECTORS/APPLICANTS

RULING

The applicant filed an application by way of a chamber summons under **Order 1XB rule 8** of the **Civil Procedure Rules**. He sought to have the orders dismissing an application dated 22nd October 2007 set aside. The orders were issued on 18th February 2008 because of non-attendance of counsel for the applicant. In his affidavit in support of the application, the applicant deposed that he was in court on the material day but his advocate, Mr. S. B. Mbeche, was late due to traffic jam at Daraja-Mbili area within Kisii Town. He stated that his advocate arrival in court at around 9.10 a.m. just after the dismissal order had been made.

The petitioner opposed the said application and in his replying affidavit stated that in the grounds stated on the face of the application, it was indicated that the applicant's advocate arrived in court at 10 a.m. He further deposed that no good reason had been given to justify the advocate's absence in court on the material day.

I have considered the rival arguments advanced by the parties herein. This is a dispute relating to the estate of a deceased person. The application that was dismissed is dated 8th October 2007 and not 22nd October 2007. The application sought issuance of some restraining orders against the respondent from trespassing into, cultivating, destroying the boundary or using in any manner parcel of land known as **Wanjare/Bokeire/1481**. The applicant's advocate was late in arriving in court because of traffic jam within Kisii Town. He showed up in court within the morning hours after the court had dealt with the application dated 8th October 2007. He filed the present application on 19th February 2008. There was no delay in so doing. Considering the nature of the dispute herein I am of the view the interests of justice would be better served by allowing the present application so that the substantive application can be determined on its merits.

I therefore set aside the orders made on 18th February 2008 dismissing the application dated 8th October 2007. The applicant's advocate will bear the costs of the application.

DATED, SIGNED and DELIVERED at **KISII** this 6th day of June, 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence:

Mr. Nyakundi HB for Mr. Mbeche for the Applicant

Mr. Momanyi for the Respondent

D. MUSINGA

JUDGE