



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CASE NO. 36 OF 1986**

**IN THE MATTER OF JOSIAH GATIMU MIGWI.....DECEASED**

**ESTHER MICHERE GATIMU.....PETITIONER**

**VERSUS**

**1. CHARLES KAMAU MUNGAI**

**2. MICHAEL KAGUMA KIBUGA**

**3. CHARLES KOMU GIKUNJU .....OBJECTORS**

**AND**

**JOSEPH GATERI.....APPLICANT**

**R U L I N G**

Joseph Gateri (hereinafter referred to as the Applicant) has Come to this court under rules 49 and 73 of the Probate and Administration Rules seeking to have the order of dismissal made on 30/3/01 by the Deputy Registrar set aside.

In his supporting affidavit the applicant has explained that He failed to attend court on the material day because his advocate's clerk failed to diarize the matter. Mr. Mbuthia who appeared for the Applicant further submitted that the Deputy Registrar had no jurisdiction to make the orders sought to be set aside. He further urged the court to strike out the grounds of opposition as the same have been filed in contravention of rules 60 and rule 65 (4) of the Probate and Administration Rules.

For the Respondents it was submitted that the application is bad in law and is an abuse of the due process of the law as the same ought to have come under rule 63 which applies the Civil Procedure Rules and not the rules cited by the Applicant. He further submitted that the application was defective as it does not comply with order 41 (50 ?) rule 7 and rule 15 (2) of the Civil Procedure Rules as no grounds for the application were stated on the face of application. It was also submitted that there has been inordinate delay which has not been explained.

At the outset I have to state that the application before the court has been very carelessly drawn and has no air of professionalism at all. The application does not show who are the parties or indeed who is the applicant. It is true as observed by the Respondent's advocate that Order L rule 7 and rule 15 (2) of the Civil Procedure Rules have not been complied with. This however is not crucial as Order 50 of the Civil Procedure Rules is not one of those included in rule 63 of the Probate and Administration Rules as

applicable under the law of Succession Act.

It is further evident that orders IXB of the Civil Procedure Rules, which relates to the setting aside of orders of dismissal is also not one of the orders in the Civil Procedure Rules applicable under the law of Succession Act.

The applicant has come under rules 49 and 73 of the Probate and Administration Rules which are general provisions. The correct provisions ought to have been Order XLIV of the Civil Procedure Rules relating to review, so that the court can be moved to review the orders made by the Deputy Registrar. It is evident that the special powers given to the Deputy Registrar under order XLVIII of the Civil Procedure Rules are not one of the provisions included in rule 63 of the Probate and Administration Rules as applicable under the Law of Succession Act and therefore the Deputy Registrar had no powers to entertain the application. Notwithstanding the inordinate delay in bringing this application and the lucklustre manner in which the application has been made justice demands that the court puts the situation right by setting aside orders made without jurisdiction.

The court will therefore grant the application to the extent of setting aside the orders of dismissal made by the Deputy Registrar on 30th March 2001.

No orders shall be made on costs.

*Dated, Signed and Delivered this 22 nd day of December 2003.*

**H. M. OKWENGU**

**JUDGE**