**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2725 OF 2013**

**IN THE MATTER OF THE ESTATE OF JOSEPH KITOLE SOLAI (DECEASED)**

**JOYCE WAMBUI MEDUKENYA.....APPLICANT**

**VERSES**

**ANN NAISULA KITULE.....RESPONDENT**

**RULING**

1. The deceased Joseph Kitole Solai died on 17th April 2013 at the Kenyatta National Hospital. On 23rd January 2014 the applicant Joyce Wambui Medukenya petitioned this court for the grant of probate with written Will. Her case was that she was the widow of the deceased and that the deceased had on 23rd May 2012 made a written Will in which he had appointed her as the executrix and also bequeathed her his two properties:- LR No. Kajiado/Kaputiei-North/22630 and LR No. Kajiado/Kaputiei-North/15054 together with all the developments thereon. The grant was issued on 23rd January 2014.

2. On 15th July 2014 the respondent Ann Naisula Kitole filed a motion seeking to have the Will and the grant revoked. She swore a supporting affidavit to state that the deceased was her father who had died intestate, and that during his lifetime he had married her mother Philipina Samba Kitole who had died in 2006. After that, she stated, the deceased had never married again; and that the applicant was not therefore the deceased's widow. She stated that the alleged Will was a forgery, and had been denounced by Sospeter Mwanzele Mwazumbi who was indicated as a witness. The respondent swore that the applicant had been married to one Gideon Lerkenyoke Nareiyo alias Gideon Olorkinyoki Olole Nareiyo who had died on 2nd March 1993, and that she and others had inherited him in **High Court Succession Cause No. 1598 of 2010 at Nairobi.**

3. The applicant on 28th July 2014 filed a replying affidavit sworn on the same day. It was 67 paragraphs in length. She stated that she had married the deceased in 2007, after his wife Philipina had died in 2006. She denied that the respondent was the daughter of Philipina Samba Kitole. She stated the applicant was the daughter between Sabena and Stephen Kuresoi. She was not the daughter of the deceased. She conceded that she had been married to Gideon Olorkinyoki Nareiyo until his death in 1993 and that they got 5 children. Subsequently, she stated, she met and got married to the deceased who also accepted her children. Before the deceased died, she stated, he left the Will. She denied that Sospeter Mwanzele Mwazumbi had denounced his signatures on the Will.

4. Directions were given that parties' counsel do file written submissions on the application. That was done. Subsequently, however, further directions were given that the application be heard orally. It came for hearing on 13th February 2017. The respondent, her witnesses and counsel were present. The applicant and her counsel were absent. There is no dispute that the applicant's advocate had been served with a hearing notice. The applicant states that he did not inform her that the matter was coming for hearing. The court heard the respondent and her witnesses. On 27th July 2017 a ruling was delivered allowing the application. The Will was found to be a forgery, and was nullified. The grant of probate was revoked.

5. In the ruling, the court observed that the applicant had not filed a replying affidavit to oppose the application.

6. Subsequently, the respondent went to the Chief Magistrate's Court at Kajiado in **Succession Cause No. 103 of 2017**, petitioned for, and obtained, a grant of letters of administration intestate in respect of the estate of the deceased. The applicant has filed an application in the cause to revoke the grant.

7. The present application is dated 12th June 2019 by the applicant. She has sought that the orders given on 27th July 2017 be reviewed, and the proceedings in the Kajiado cause be stayed. She complained that she heard of the ruling in July 2018, otherwise she was not aware that

the application had been heard and determined. She stated that she had filed a response to the application, and therefore the court had erred by stating in the ruling that there was no replying affidavit filed. She pleaded for an opportunity to be heard in defence, otherwise she would be greatly prejudiced. Part of her defence to the application, she stated, was an affidavit sworn by the deceased in 2012 stating that he was married to her.

8. The application was opposed by the respondent who stated that the application had been heard after the court was satisfied that the applicant had been served with hearing notice but had, together with her advocate, not attended. She stated that the fact that the court had in the ruling indicated that the applicant had not filed a replying affidavit was not fatal as the fact that she had not attended the hearing was what was material.

9. The application was brought under **Order 45 rule 1** of the **Civil Procedure Rules** and **rules 49, 59(1), 67, 70,** and **73** of the **Probate and Administration Rules.** Mr Githuka for the applicant and Ms Njogu for the respondent filed written submissions which I have read and considered.

10. The substance of the applicant's application is that, she seeks that the proceedings of 13th February 2017 and the ruling of 27th July 2017 to be reviewed and set aside so that she can be heard on the application for it to be determined on merits. She had filed a replying affidavit, and stated that she would have attended the hearing had she known the matter was coming up. She was represented. It does appear that her advocate, who was served with the hearing notice, did not bring her to speed.

11. The court has unlimited discretion to set aside or vary a decision rendered in default of appearance, but as usual all discretionary powers have to be exercised judicially with the sole purpose of doing justice to the parties in the matter **(Kenya Commercial Bank Ltd –v- Reuben Waweru D. Kigathi and Another, Nairobi (Milimani) HCCC No. 325 of 1999).** The ruling herein was regular in the sense that the applicant had been served with the hearing notice. The court will usually not set aside such a ruling unless it is satisfied that there is a defence on the merits; a defence that raises triable issues that should go to trial **(Patel –v- E.A. Cargo Handling Services Ltd [1974]E.A 74).** In exercising its discretion, the court should consider whether the default or error cannot be put right by the payment of costs. As was said by Apaloo J.A in **Philip Chemwolo and Another –v- Augustine Kubende [1986]KLR 492, 502** courts exist –

> **"for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."**

Lastly, the court should guard against a situation where the applicant is, by making the application, seeking to delay or obstruct the cause of justice. There should be no intention to defraud or to overreach.

12. There is no dispute that the applicant replied to the application, and had, as ordered, filed written submissions to the application. This is clear demonstration that she intended to defend the application. There is no evidence that the applicant had a previous record of not attending hearing. I consider that this dispute involves the succession of the estate of the deceased, with the applicant saying he had left a Will bequeathing his entire estate to her. The respondent stated that the Will was forged, and she stated the Will was not a genuine one. Her case was that this was an intestate succession.

13. What has disturbed me, however, is the fact that the applicant learnt of the ruling in July 1918 and it was not until 12th June 2019, about one year later, that she brought the application. She has not sought to explain this delay. I say so because, under **Order 45 rule 1(1)(b)** of the Civil Procedure Rules the application ought to have been brought without unreasonable delay. I further consider that there was no demonstrable effort on the part of the applicant to find out from her advocate how the matter was proceeding, and what had become of the application seeking to revoke the grant of probate issued to her **(J.G. Builders –v- Plan International [2015]eKLR).** Diligence was required of her.

14. Nonetheless, I have considered the nature of the dispute and the particular facts of this case. I consider that there has been no confirmation, either in this cause or in Kajiado. The estate is still intact. I consider that costs would sufficiently compensate the respondent for all the delay and inconvenience caused. In reaching this decision, I bear in mind that the court fell into error when it stated that the application for revocation had not been defended by the applicant, when on record there was a replying affidavit raising substantial issues.

15. For all these reasons, I allow the application. This will enable the applicant to be heard in defence on the application dated and filed on 15th July 2014 by the respondent. The proceedings of 13th February 2017 and the ruling of 27th July 2017 are hereby reviewed and set aside. The parties shall be given a priority date at the registry for the hearing of the application.

16. When the respondent filed **Cause No. 103 of 2017** at Kajiado Chief Magistrate's Court she knew that, in respect of the same deceased and estate, the present proceedings were going on. No two separate succession causes should be filed in respect of one deceased. This is the reason why I transfer **Succession Cause No. 103 of 2017** to this court for hearing and disposal. This order should be served on the Chief Magistrate, Kajiado Law Courts.

17. I order that the costs of this application be borne by the applicant who has been indulged.

**DATED and DELIVERED at NAIROBI this 18TH day of FEBRUARY 2020**

**A.O. MUCHELULE**

**JUDGE**