



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 178 OF 2013

IN THE MATTER OF ESTATE OF THE LATE KIPKEU SIMATWA (DECEASED)

AND

IN THE MATTER OF REVOCATION AND/OR ANNULMENT OF GRANT

BETWEEN

PELINA CHEPKORIOT KAPTUNDUSAPPLICANT

AND

MALUCHO KIPKEU SIMATWA.....RESPONDENT

RULING

1. The application dated 2/10/2015 principally seeks orders that the exparte orders made on 28/9/2015 dismissing the applicant's application dated 23/3/2015 due to non attendance be set aside. The application further seeks orders that the application dated 23/3/2015 be reinstated.
2. According to the applicants in support, the application dated 23/3/2015 came up for directions on 28/9/2015 and not for hearing. That the case was called out and the application dismissed for non attendance on the applicant's part. It is contended that the court was misled when the application was dismissed as the replying affidavit had not yet been served on the respondent for directions to be given by the court.
3. The application is opposed. The respondent filed the grounds of opposition dated 23/11/2015 stating that the application lacks merit and ought to be dismissed as the court properly exercised its discretion.
4. The application was argued by way of oral submissions which I have considered. The applicant's affidavit evidence is not controverted by any other evidence. It is apparent on the face of the record that the application dated 23/3/2015 was coming up for directions on 28/9/2015. The court was prematurely moved when the application was dismissed.
5. The application dated 23/3/2015 is a summons for revocation and/or annulment of grant. It is a matter that can best be settled by being heard on merits. As stated by the Court of Appeal of *Chemwolo -vs- Kubede [1982-88] KAR 103, at 1040* stated as follows:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on

merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.

6. With the foregoing, I allow the application with costs in cause. The exparte orders made on 28/9/2015 and all the consequential orders thereof are hereby set aside.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Kitale this 10th day of March 2016.

B. THURANIRA JADEN

JUDGE