



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 315 OF 2002

IN THE MATTER OF THE ESTATE OF NYAGA RUDIA (DECEASED)

TERESIA KARANJA.....ADMINISTRATOR/APPLICANT

VERSUS

PIOUS NJIRU..... RESPONDENT/CLAIMANT

R U L I N G

1. This is the application dated 3/12/2015 seeking that the the court orders made on 23/4/2015 dismissing her application for non-attendance be set aside and that the application be reinstated. The application is supported by the affidavit of the applicant Teresia Karanja. In the affidavit, it is stated that she was absent when the ruling was delivered on 23/4/2015 in favour of the respondent. Her non attendance was not inordinate and inexcusable.
2. The respondent filed a replying affidavit stating that the hearing date was given when both parties were present in court. He added that the other issues raised in the affidavit were not relevant to the application. The further affidavit is about the content of the dismissed application which are not relevant to the application for reinstatement of suit.
3. The applicant in her submissions stated that she failed to attend court on the said date and later learnt through the registry that that he hearing date of the said application was 25/4/2015.
4. The respondent submitted that the application should be dismissed as the hearing date was taken by consent. He argued that no good reason was given as to why the application should be reinstated.
5. The application has been brought under the provisions of the Civil Procedure Rules and Civil Procedure Act. The application that was dismissed is the one dated 8/12/2014 seeking to review the grant confirmed on 20/3/2008.
6. Section 49 of the Probate and Administration Rules provides that;

A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.

7. Section 63 of the Probate and Administration Rules provides:-

(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.

8. Section 73 of the Probate and Administration Rules provides:-

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

9. In view of the provisions of Section 63 of the Probate and Administration Rules, the application herein for setting aside orders and reinstatement of application is not governed by the Civil Procedure Rules and the Civil Procedure Act.
10. In the case of Priscilla **VUGUTSA KAMALIKI V MARY RUNYANYI OCHIENG [2016] eKLR** the court held that the bringing the application under the Civil Procedure Rule while the Law of Succession Act was a self contained Act was a fatal defect. Seeking refuge under the provisions of Article 159 (2) of the Constitution was also not helpful as there were specific laws to be applied.
11. The applicant should have brought the application under Rule 73 of the Probate and Administration Rules which clothed the court to make orders similar to the ones under sections 1A, B and 3 A of the Civil Procedure Rules.
12. In the case of **BELINDA JERUTO CHESIRE VS KIPTOO CHESIRE & 4 OTHERS [2015] eKLR** the court held that the provisions of the Civil Procedure Rules were not applicable in matters arising under the Law of Succession Act. Since the applicant had brought the application under all enabling provisions of the law, the court relied on the provisions of Article 159(2)(d) of the Constitution and proceeded to consider the application on its merits.
13. In the case of **WANGARI GICHUKI VS DANIEL WANJIGO MUCHEMI [2014] eKLR** the court held that the provisions of section 63 of the Probate and Administration Rules are clear on the particular provisions of the Civil Procedure Rules that are applicable in matters relating to the Law of Succession.
14. The court cited the decision of Hon. Mr. Justice Lenaola in **RE ESTATE OF ISAKA MUTHEMBWA KITHOME** where he stated that Forms are a technical matter and that failure to follow a format should not stop the court from dealing with any clear issue regarding the estate.
15. The court concluded by holding that the failure of the applicant herein to follow the right form and refer to the correct section and Rules cannot be a basis to deny her a hearing and determination of her application on merits.
16. In the present case, it is my considered opinion that the court should disregard the want in form and determine the application on merit.
17. The applicant's reason for not attending court was that she confused the date of hearing and came to court on 29/4/2015 instead of 23/4/2015. The date had been fixed by consent of the parties and the applicant ought to have noted the correct date.
18. For the reason that the applicant is not represented, I give her the benefit of the doubt and accommodate her in this application. The respondent will not suffer any prejudice if the orders sought are granted.
19. I hereby allow the application by setting aside the orders made on 23/4/2016 dismissing the plaintiff's application.
20. The application dated 3/2/2015 is hereby reinstated with the condition that it is fixed for hearing within 21 days.
21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF MAY, 2016.

F. MUCHEMI

J U D G E

In the presence of:-

Both parties