



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 842 OF 2010

IN THE MATTER OF THE ESTATE OF TABITHA NZASU KITUNGU - (DECEASED)

PATRICK MUSILI KITUNGU APPLICANT

VERSUS

EMMA SYOMBUA MALUKI1ST RESPONDENT

REGINA KYAMBATI MANG'OLE2ND RESPONDENT

RULING

1. The application via summons dated 11th March, 2012 seeks setting aside of orders of 28th February, 2012 and summons dated 24th November, 2010 be reinstated for hearing. The same is supported by the affidavit of Muigai Gachau sworn on 1st March, 2012. The application is opposed via affidavit of Emma Syombua Maluki sworn on 23rd March, 2012.
2. The applicant case is that his application dated 24th November, 2010 was scheduled for direction on 28th February, 2012 but the applicant advocate could not attend court as he was indisposed and thus he deputized a clerk to instruct an advocate to hold brief and take directions.
3. However, the instructed advocate stepped out of court and thus the matter was called out and as there was no response, the application was dismissed for want of prosecution.
4. In rejoinder, the respondent stated that there are no explanation offered to court when the matter was called as to the absence of applicant's advocate. There was no advocate to hold brief for applicant's advocate nor a letter written to court to indicate the healthy status of the applicant's advocate.
5. The applicant submits that a mistake by an advocate should not be visited upon innocent party. He relies on the case of **CREDIT BANK LTD VS BARCLAYS BANK KENYA LTD NAIROBI C.A 178/98** and submits that in line with the said case, the court should adopt holding that in the overriding principle must be of necessity for the court to do justice between the litigants. Further in the case of **SHAH VS MBOGO & ANOTHER(1967) EA** page 116, court summarized powers of setting aside orders or judgment in which the case of **OOKO OTANGA VS PHILISTER MARY NABUNJO(1964) EA** page 384 was cited. The bottom line being to let a party have a day in court and not to send away the applicant from the seat of justice empty handed. On the respondent's submissions, it is submitted that the failure to attend court was in excusable and reasons given are not genuine.
6. The court has gone through the materials before it in affidavits and submissions.
7. It is not in dispute that the application dated 24th November, 2010 was not scheduled for hearing

- but directions. The Applicant was not represented in court and there was no explanation tendered as to the absence of the applicant or his advocate.
8. The record of 28th February, 2012 shows that only the advocate Kamolo holding brief for Mbaluka for the respondent was present. He did not inform court that the matter was not for hearing but directions. This is because the record of 10th November, 2011 shows the applicant's advocate fixed the same application for direction on 28th February, 2012.
 9. The applicant was not present in court and there is no explanation as to why he was not.
 10. The court is of the view that matter being fixed for directions, should have proceeded for directions or be adjourned but not be dismissed. It was incumbent upon the respondent advocate to alert court that the matter was for direction not hearing.
 11. The court ought to have borrowed on the case of **CREDIT BANK LTD** supra and adopted the mantra that, the overriding principle must be of necessity for the court to do justice between litigants. This was a perfect case for the same principle to apply. This is because the matter was not for hearing but for directions.
 12. Though the reasons for applicant advocate advanced for absence are not convincing and especially in absence of any medical report, the court is of the opinion that this being a family dispute, court should endeavor to hear parties on merits and not drive any party from seat of justice without according it a hearing.
 13. The mistake by the applicant advocate can be redressed by way of the costs.
 14. The court thus makes the following orders;
 - a. *The orders dated 28th February, 2012 are set aside and the application dated 24th November, 2010 is reinstated.*
 - b. *The applicant to pay respondent Kshs. 5,000/= within thirty (30) days and in default execution to issue.*
 - c. *The parties to expedite hearing of the reinstated application.*

Dated and Delivered at Machakos this 5th day of June, 2015

CHARLES KARIUKI

JUDGE