



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 342 OF 2001

IN THE MATTER OF THE ESTATE ERNEST KILONZO KILUU (DECEASED)

ESTHER KAVINDU KISAU 1ST APPLICANT

BEATRICE TABITHA KENZI 2ND APPLICANT

VERSUS

JOHN WAMBUA KILONZO RESPONDENT

R U L I N G

1. The application dated 14/11/2011 seeks orders that the orders made on 7/1/2011 be set aside and that the protest be reinstated.
2. The application is supported by the affidavit sworn on 14/11/11 by the former advocate for the Applicant, **D.M. Ndungi** and another affidavit sworn on 14/11/2011 by the 1st Applicant, **Esther Kavindu Kisau**. In a nutshell, the Applicant's case is that on 7/11/2011 when the matter came up before the court for the hearing of the protest by the Applicants, the protest was dismissed for non attendance by the protestor and their advocate. The 1st Applicant averred that she was in court but did not hear her matter being called out. The advocate has deponed that he had gone out to attend to another matter before another judge at the same station but on returning to deal with this case, he found the matter had been called out and the protest dismissed.
3. In opposition to the application, an affidavit in reply was sworn on 7/2/13 by the Respondent, **John Wambua Kilonzo**. The response to the matters raised by the application is that the matter was called out in court before the court proceeded to dismiss the same after the Applicants said they were not ready. That the confirmation was final and that the Applicants' remedy lies in the appeal process. It was further asserted that the Applicants' advocate who was then on record has not attached any proceedings to show that he was engaged in another court.
4. The Respondents have also filed a notice of Preliminary Objection stating that the Applicants have relied on a non-existent provision of the law and that the firms of **Kamanda & Company Advocates** are not properly on record as the Notice of Change and/or appointment is not executed by the Protestor.
5. On 14/2/13, the advocates for the parties agreed to canvass both the application and the Preliminary Objection simultaneously by way of written submissions. The submissions were subsequently filed and I have considered the same.
6. The application for reinstatement was filed within 7 days of the dismissal of the protest. There was therefore no delay. Contrary to what is stated in the replying affidavit, the court record reflects non-attendance by the Applicants and their advocates on 7/11/11. However, although Applicants' Advocate has annexed a cause list, the same does not reflect whether he was the advocate on record in the case highlighted therein. However, the mistake by the Applicant and her

advocate is excusable. I have perused the court record and seen their protest is not frivolous. A confirmation of grant is not final as a confirmed grant can be a subject of revocation/annulment. In the case at hand, it is in the interest of justice to set aside the orders made in the absence of the Applicant and hear the protest on merits.

7. Citing the wrong provision of the law is a matter of technicalities of procedure and does not go into the substance of this cause. Both the advocates for the Applicant and for the Respondent have no notice of change and/or appointment on record that complies with the **Probate & Administration Rules** and the position should be regularized.
8. With the foregoing, I dismiss the Preliminary Objection and allow the application. Costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 6th day of March 2014.

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B. THURANIRA JADEN

JUDGE