Case Number:	Succession Cause 54 of 1985
Date Delivered:	01 Dec 2005
Case Class:	Civil
Court:	High Court at Kakamega
Case Action:	Ruling
Judge:	George Benedict Maina Kariuki
Citation:	AZIZ MUTANGE OPATI v BERIS AKOSA OPATI [2005] eKLR
Advocates:	-
Case Summary:	**[Ruing] Civil Procedure-review-**application for orders that the proceedings and orders made be reviewed, set aside, vacated and the applicant's application be reinstated and heard on merit-applicant claiming that he did not attend court because his advocate advised him it was not necessary for him to do so-court discretion-whether the applicant satisfied the court that the inordinate delay was not his fault-applicable principles-whether the applicant acted with expedition after learning that the said application had been dismissed-Law of Succession Act section 47 and 76; Civil Procedure Rules Order 9B rule 8 and Order 44 rules 1, 2 and 3; Probate and Administration Rules, rules 43 (1), 44and 73
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-

Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE 54 OF 1985

IN THE MATTER OF THE ESTATE OF WASHINGTON LUDIRE OPATI (DECEASED)

AZIZ MUTANGE OPATI……PETITIONER

V E R S U S

BERIS AKOSA OPATI……OBJECTOR

R U L I N G

The applicant, Beris Akosa Opati, applied by way of Notice of Motion under Orders IXB Rule 8 and XLIV Rules 1, 2 and 3 of the Civil Procedure Rules and section 76 of the Law of Succession Act, and Rules 43 (1) and 44 of the Probate and Administration Rules for orders that the proceedings and orders made on 26-9-2000 and all consequential proceedings and orders be reviewed, set aside, vacated and/or varied and the applicant's application dated 3-7-200 be reinstated and heard on merit or alternatively appropriate orders be made in lieu of the orders of 26.9.2000. The application was supported by two affidavits, the 1st being the supporting affidavit sworn on 16.6.04 and the other being the further supporting affidavit sworn on 27.10.04 by the applicant both of which I have perused. The application was opposed by the Respondent/Petitioner who also filed two affidavits, a replying affidavit sworn on 9.9.2004 and a further replying affidavit sworn on 21.9.04 both of which I have perused. It is not in dispute that the applicant and his advocate then on record knew that the application sought to be restored had been set down for hearing on 26.9.2000. The applicant did not attend court because his advocate advised him it was not necessary for him to do so. His advocate also advised him that he would alone attend court and thereafter advise him of the outcome of the application. The applicant did not therefore attend court on 26.9.00. He did not know what happened to the application. He averred that he waited to hear from his advocate but in vain. He averred further that he made numerous phone calls and wrote letters to his advocate and apparently got no response. But not a single copy of the letters was exhibited in the application. He stated that he got alarmed by the silence of his erstwhile advocate and decided to seek the services of his present advocates. He did not disclose in his application when he wrote to or telephoned his former advocate nor did he disclose when he instructed his new advocates now on record. Moreover, he did not reveal the date when his advocates now on record informed him that his application had been dismissed on 26.9.00 for non-attendance of his advocate.

Under Rule 73 of Probate and Administration Rules, this court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. under section 47 of the Law of Succession Act (Cap.160), this court has jurisdiction to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders as may be expedient.

The applicant is praying that his court do exercise its discretion to set aside the dismissal order of 26.09.2000 and restore the application dated 3-7-2000. For the court to grant the orders sought, the applicant must first satisfy it that there was no inordinate delay in applying for the orders. To do so, he must disclose the date on which he learned the application dated 3.07.00 had been dismissed on 26.09.00, the letters he wrote to his former advocates and the date on which he instructed his advocates now on record. Without these facts, it is not possible for the court to discern whether or not the applicant acted with expedition after learning that the said application had been dismissed on 26.09.00. It is not possible without such evidence to tell how long the applicant took to instruct his new advocates after learning of the dismissal of the application, or how long the latter took to file the application after receipt of instructions.

The applicant has not satisfied the court that in the circumstances of this case, the court ought to exercise its discretion in his favour. The application lacks merit. It is dismissed with costs.

Dated at Kakamega this 1st day of December, 2005

G. B. M. KARIUKI

J U D G E