



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of John Njoroge Kanyiri (Deceased) (Succession Cause 121 of 2021) [2024] KEHC 10080 (KLR) (9 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 121 OF 2021
RN NYAKUNDI, J
AUGUST 9, 2024
IN THE MATTER OF THE ESTATE OF JOHN NJOROGE KANYIRI (DECEASED)
IN THE MATTER OF
PRISCILLA KIRINGA NJOROGE PETITIONER**

RULING

1. Before me for determination is a Notice of Motion dated 14th May, 2024 expressed to be brought under the provisions of Rule 49 and 73 of the [Probate and Administration Rules](#). The applicant seeks orders to wit;
 - a. That this Honourable court be pleased to set aside orders dated 5th February, 2024 dismissing the Petitioner's suit and reinstate the succession suit herein.
 - b. That the Petitioner/Applicant be granted leave to file an application for confirmation of grant at the soonest time possible.
 - c. That the costs of the application be in the cause.
2. The application was supported by an affidavit sworn by the applicant and grounds as captured hereunder;
 - a. That the grant issued herein on 28th February, 2023 was revoked on 5th February, 2024 and this matter marked as closed.
 - b. That the failure to prosecute the matter was not intentional or deliberate.
 - c. That after the grant was issued, one of the beneficiaries (my daughter and a sister to the beneficiaries) suddenly died just before the beneficiaries could agree on the mode of distribution of the estate.



- d. That subsequently, the beneficiaries were unable to agree on the mode of distribution of the estate the deceased herein following the sudden death of their sister.
 - e. That the beneficiaries have now agreed on how the estate is going to be distributed amongst them.
 - f. That at the time I had not appointed an advocate in this matter and it was not within my knowledge that a delay in the decision-making would occasion the revocation of the grant.
 - g. That I recently learnt about the revocation from the judicial e-filing portal that I had been advised to open.
 - h. That we did not receive any notice to attend court and show cause why the grant should not be revoked.
 - i. That I am now eager to and anxious to having my matter herein be concluded and obtain the necessary orders from this honourable court.
 - j. That failing to prosecute the matter herein for lack of knowledge is forgivable and as such the failure was not deliberate.
3. The application has not been opposed.

Decision

4. Having read through the application together with the response, the sole issue I find for determination is whether the suit can be reinstated so as to confirm the grant issued on 28th February, 2023. The governing provisions of the law in which this court can exercise discretion to review an order for dismissal of a suit for want of prosecution falls within the spectrum of Section 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 12 Rule 7 of the *Civil Procedure Rules* as read with Rule 73 (1) of the *Probate and Administration Rules* and Art. 159 2(d) of *the Constitution*. It is trite that the discretion of the court to vary and set aside a dismissal order is unfettered for the same is to be looked at from the doctrine of the best interest of justice.
5. The factors taken into account or consideration for the purpose of reinstatement of suits are numerous, and were addressed in *Ivita vs. Kyumbu* [1984] KLR 441 (Chesoni J), where the court stated:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favor and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”



6. The dicta in *Ivita vs. Kyumbu* [1984] KLR 441 (Chesoni J) was followed in *Jim Rodgers Gitonga Njeru vs. Al-Husnain Motors Limited & 2 others* [2018] eKLR (Muchemi J), where the court said:

“It is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation.”

7. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilha Ngonyo Isaac vs. Kembu Farm Ltd & another & another* [2018] eKLR ((JN. Mulwa J), which echoed the decision of the court in *Shah vs. Mbogo & Another* (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

8. As noted above, the succession cause was dismissed for want of prosecution due to the applicant failure to take any steps to apply for confirmation of grant of letters of administration issued on 28th February, 2023. In other words, the law binds the administrator to file summons for confirmation of grant within 6 months from the above captioned date. However, this was never done as deduced from the record and this goes against the overriding principles in Section 1A of the *Civil Procedure Act*. In the premises, this court exercises discretion to set aside the dismissal order for the applicant has demonstrated sufficient cause why she failed to initiate or file summons for confirmation within the stipulated period as averred in her affidavit dated 14th May, 2024. I also take note of the annexed summons for confirmation of grant dated 16th April, 2024 with an annexed mode of distribution of the estate to herself and the beneficiaries. For emphasis sake, I have struggled with the wording in Paragraph 5 of the affidavit in support of the proposed summons for confirmation of grant which contains finer details on how the estate at an opportune time should be distributed. The underlying issues which go to the core of the proposed mode of distribution is that it goes against the provisions of sections 35, 36, 37, 38 as construed conjunctively with Section 41 of the *Law of Succession Act*. I regret that if this was a confirmation forum, despite the annexed consent I will not have accepted it for reasons that it will result in exercising jurisdiction vested with this court in a manner that contravenes the doctrine of identifying the beneficiaries and distributing the estate in equal shares to the heirs.

9. If there is any guidance this court can give, is to provide a legal framework which underpins the distribution in the matter of the estate of John Njoroge Kanyiri.

10. Section 35 of the *Law of Succession Act* provides:

35. Where intestate has left one surviving spouse and child or children (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and (b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by



way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.”

11. Section 38 further states:

“ 38. Where intestate has left a surviving child or children but no spouse Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

11. In addition, section 41 speaks to the property devolving to a child as follows:

“ 41. Property devolving upon child to be held in trust Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”

12. The instant proposed mode of distribution seems to misconstrue and misinterpret the provisions of section 82 of the *Law of Succession Act*. Generally speaking, there is no direct application of the doctrine of a trust deed in succession matters. The law envisages the following conceptual matrix of a continuing Trust. Thus;

“The concept of a continuing trust was not interpreted in section 3 of *Law of Succession Act*. In the context of the *Law of Succession Act* it arose in two situations;

with regard to the life interest enjoyed by surviving spouses, under Part V of the *Law of Succession Act* as stated in sections 35(1)(b)(2), 36(1)(c)(3) and 37. A continuing trust arose where a spouse survived the deceased, and, at distribution in intestacy, the property should devolve to the surviving spouse in the first instance, and, upon determination of the life interest, to the children or other persons beneficially entitled in intestacy. Such a surviving spouse held such property, during their lifetime, in trust for the eventual beneficiaries, be they children or others. It was a trust that continued during the lifetime of the surviving spouse;

with regard to the interests of minor survivors or beneficiaries, that was to say the interests of those beneficiaries or survivors who were below the age of majority, section 41 of the *Law of Succession Act* provided that the interests of such minors was held in trust, during their minority, until they attained the age of maturity, when it should be conveyed or transmitted or transferred to them. The trust, in such case, would be continuing during their minority. The term “continuing trust” was used expressly in sections 75A, 83(g)(i) and 84 of the *Law of Succession Act*, but it was the provision in section 84 which clearly brought out what “continuing trust” meant in the context of the *Law of Succession Act*, that was to say the life interest enjoyed by a surviving spouse and the trust held on behalf of a minor.”



13. Pursuant to the above provisions, the individualized intestate estate can not be wholly transferred to the spouse without first complying with the law concerning the individual beneficiaries to the estate and their applicable shares. This mode of distribution could be exercised by the administrator without the necessity of further empowering her as a Trustee to the estate in question. Specifically, on the face of it, if this court was to act in concurrence with the annexed proposed model of distribution as noted there should be a second succession cause to identify the assets and shares entitlement to the beneficiaries. The law of succession requires the immediate distribution of all the residuary assets to the beneficiaries with a contingent provision for a continuing trust permissible where an estate happened to have children who have not attained the age of majority. There is no evidence that this is the case here to justify the distribution of the estate first to the spouse and thereafter to the children at an opportune time which is not defined by the applicant. On wonders what will happen if the purported trustee, acted with reasonable promptness and committed breaches to that trust to dispose of the property without reference to the heirs. Therefore, to promote protection of Human rights on inheritance this court has broad discretion to decline adoption of a consent which is likely to occasion an injustice to the parties who have a common right to the subject.
14. For all these reasons, and all issues reconsidered pertaining to the application, the following order shall abide.
 - a. That the applicant has met the threshold under Order 12 Rule 7, Order 45 Rule (1) of the Civil Procedure Rules as construed with Rule 73(1) of the Probate and Administration Rules to set aside the dismissal order for want of prosecution of this succession cause
 - b. That the cause of action stands reinstated and the same shall be heard on a priority basis on confirmation of grant herein scheduled on 17th September, 2024.
 - c. That the applicant in filing the mode of distribution stays within the letter and spirit of Sections 36,37, 38 and 41 of the Law of Succession Act.
 - d. That the draft mode of distribution be in compliance with the law on intestate estate inheritance.
 - e. In the interim period a provisional certificate of confirmation of grant be issued for purposes of facilitating title registration from that of the deceased to the Petitioner as the sole administrator of the estate.
 - f. That the beneficiaries are at liberty to apply for its amendment to comply with Section 35, 36, 37 and 38 of the Law of Succession Act.
 - g. The status conference to be held on 2nd October, 2024
 - h. The costs of the application shall be in the cause.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 9TH DAY OF AUGUST 2024

In the Presence:

All the Beneficiaries & Petitioner

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R. NYAKUNDI

JUDGE

