



REPUBLIC OF KENYA



**In re Estate of Gakumo s/o Thuku alias Humphrey Gakumo Thuku (Deceased) (Succession Cause 2325 of 2011) [2023] KEHC 24369 (KLR) (Family) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24369 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 2325 OF 2011  
EKO OGOLA, J  
SEPTEMBER 26, 2023  
IN THE MATTER OF THE ESTATE OF GAKUMO S/O  
THUKU ALIAS HUMPHREY GAKUMO THUKU  
(DECEASED)**

**IN THE MATTER OF  
NJUGUNA JOHN KAMAU ..... APPLICANT**

**RULING**

1. The Summons before this Court is dated 26<sup>th</sup> January 2023. The Applicant prays for the following:-
  - a. That this Honorable Court be pleased to set aside the Orders issued on 16<sup>th</sup> January 2023 dismissing the Summons for rectification of grant.
  - b. That this honorable court be pleased to reinstate the Summons for Rectification of grant dated 22<sup>nd</sup> August 2022.
  - c. That this Honorable Court be pleased to grant a hearing fated for the Summons for Rectification of grant dated 22<sup>nd</sup> August 2022.
2. The Applicant is the advocate on record for the administrators. The administrators filed Summons for Rectification of grant dated 22<sup>nd</sup> August 2022. The said Summons was fixed for hearing on 28<sup>th</sup> November 2022. When the matter was before the Court, counsel for the Administrators was directed to file the schedule of distribution of the estate. The Summons were then to be heard on 16<sup>th</sup> January 2023. When the matter came before the Court on that date, neither the Administrator nor their counsel made an appearance. Consequently, the Summons were dismissed.



3. The Applicant deposed that his call dropped before he could be heard via the virtual platform. He further stated that he attempted to log in but he could not be admitted to the virtual platform. The Applicant has annexed to his supporting Affidavits evidence of his attempts to contact the Court Administrator. According to him, failure to attend Court for the hearing was not deliberate and/or fashioned as a way of delaying the hearing of the said Summons or even wasting the Court’s precious time. It is for this reason that the Applicant prays for the Summons to be reinstated.

### **Determination**

4. I have considered the Summons, the affidavit in support, and the entire record of the Court. The only issue for me to determine is whether this suit ought to be reinstated.
5. The constitutional underpinnings on the conclusion of matters in a timely manner are contained in Article 159 of the Constitution, which provides as follows:

“Judicial authority

- (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
  - (a) justice shall be done to all, irrespective of status;
  - (b) justice shall not be delayed;
  - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
  - (d) justice shall be administered without undue regard to procedural technicalities; and
  - (e) the purpose and principles of this Constitution shall be protected and promoted.
- (3) Traditional dispute resolution mechanisms shall not be used in a way that—
  - (a) contravenes the Bill of Rights;
  - (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
  - (c) is inconsistent with this Constitution or any written law.”

6. It is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay. Sections 1A and IB, of the Civil Procedure Act, are relevant, with regard to this and they state as follows:

“1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.



- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
  - (a) the just determination of the proceedings;
  - (b) the efficient disposal of the business of the Court;
  - (c) the efficient use of the available judicial and administrative resources;
  - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
  - (e) the use of suitable technology.”

7. Section 3A of the *Civil Procedure Act* gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute it. Section 3A reads:

“3A. Saving of inherent powers of court. Nothing in this Act 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.”

8. The factors taken into account or consideration for the purpose of reinstatement of suits are numerous, and were addressed in *Ivita v 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 favour 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.”



9. 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 *Bilba Ngonyo Isaac v Kembu Farm Ltd & another & another* [2018] eKLR (JN. Mulwa J), which echoed the decision of the court in *Shah v 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.”

10. It must be noted that the Courts are under a lot of pressure from backlogs and increased litigation. Therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. In this case, it is understandable the challenges that come with using the Court’s virtual platforms. The Applicant has satisfactorily shown that he attempted to remedy the challenges of his call dropping. In my view, the Applicant’s non-attendance was unintentional and the litigant should not be one to bear the price.

11. The upshot is that I allow the Summons dated 26<sup>th</sup> January 2023. The Court’s Orders dated 16<sup>th</sup> January 2023 are hereby set aside; the Summons dated 22<sup>nd</sup> August 2022 are hereby reinstated.

12. There will be no orders as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2023**

**E.K. OGOLA**

**JUDGE**

In the presence of:

N/A for the Applicant

