



**In re Estate of Dancan M'Ngatunyi Thaboro alias Ngatunyi Thaboro - Deceased
(Succession Cause 358 of 2014) [2023] KEHC 25191 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 25191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 358 OF 2014**

LW GITARI, J

OCTOBER 27, 2023

**IN THE MATTER OF THE ESTATE OF DANCAN M'NGATUNYI THABORO
ALIAS NGATUNYI THABORO – DECEASED**

**IN THE MATTER OF
JOSEPH M'MUJURI M'NGATUNYI PETITIONER**

RULING

1. The summons pending before this court is the one dated 3rd March 2023 filed by the petitioner Joseph M'Munjuri M'Ngatunyi. It seeks the following orders
 1. Spent
 2. That this Honourable court be pleased to reinstate the succession cause herein.
 3. That this court be pleased to review its orders dismissing the matter herein and the same be reinstated and proceed for confirmation in terms of the annexed summons for confirmation of grant.
 4. That costs be in the cause.
2. The summon is based on the grounds that the suit herein was erroneously dismissed and it is in the interest of justice that this application is allowed. The summons is supported by the affidavit of Hosea Mutembei Peter sworn on 3rd April 2023. He contends that he has never been served with any notice to show cause and the petitioner has been following up this file to “an avail” (sic) little did he know the same was dismissed without his knowledge. I have considered the summons. The record shows that a grant of letters of administration was issued to the applicant on 23rd October, 2014. Section 71(1) of the *Law of Succession Act* provides that –:

“After the expiry of a period of six months, or such shorter period, as the court may direct under sub-section (3) from the date of any grant of representation the holder thereof shall



apply to the court for confirmation of the grant in order to empower distribution of any capital assets.”

The petitioner did not move the court to have the grant confirmed.

3. The record shows that on 26th June 2018 the court ordered that the grant issued on 23rd October, 2014 be revoked. The applicant contend that he was not served with the notice to show cause why the grant should not be revoked.

The issue for determination is whether the cause should be reinstated.

4. The constitution of Kenya provides for the expeditious disposal of suits. This is as stated under article 159 of the constitution which provides-;

159. 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 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 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 mechanism 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.

5. The constitution which vests the exercise of the Judicial Authority on the courts and tribunals places a duty on the courts as well as the advocates and litigants to ensure that matters are concluded expeditious. This is buttressed under section 1A or 1B of the Civil Procedure Act which provides for objective of the Act. In this regard Section 1A and 1B of the Civil Procedure Act provides 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.”

6. The overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes and places a mandatory duty on the court to seek to give effect to the overriding objectives while exercising its powers under the Act. The Act further gives the court wide discretion to make such orders as may be necessary for the ends of justice or to prevent abuse of court process. In this regard section 3A of the *Civil Procedure Act* provides-;

“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.

The powers given under this section are wide and may be exercised while determining whether to reinstate a suit which has been dismissed.

7. The courts have considered the factors to be considered to determine whether to reinstate a suit or not. In *Iota v Kyumbu* (1984) KLR the court stated that the test is whether the delay is prolonged and excusable and if it is, can justice be done despite the delay. It further stated that the court has to consider both parties.
8. This is a succession matter. There was in-ordinate delay on the part of the applicant, although he is stating that the court did not serve him with the notice to dismiss the petition, it was his duty as the administrator of the estate to apply for confirmation of the grant issued to him after the expiry of six months. He did not have to wait for the court to prompt him. This notwithstanding, I find that no prejudice will be occasioned on any party by reinstating the grant. It is in the interest of justice that this matter be finalized instead of asking the applicant to start the process all over again. In my view this would be a fair exercise of judicial discretion conferred on this court. I am also minded that the probate and administration rules gives this court discretion to make orders as would be expedient and in the interest of justice. Rule 73 of the *Probate and Administration Rules* provides as follows-;

“Nothing in these Rules 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.



9. In *Shah v Mbogo & another* (1967) EA the court state with regard to exercise of discretion-

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting in advertence 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. The law has emphasized the need for expeditious disposal of cases. The court should therefore aim at doing substantive justice when dealing with matters before it but not on technicalities which will see multiplicity of suits and applications. The court should therefore in its wide discretion and power lean on reinstating suits where no prejudice will be occasioned.

11. In this matter it is in the interest of justice that this matter which has been pending in court for the last nine years be reinstated and be concluded within a given time frame.

Conclusion

For the reasons stated in this ruling, I will allow the application. I order as follows:-

1. The summons dated 3rd March 2023 is allowed as prayed.
2. The orders dismissing the succession cause is reviewed and set aside together with all the consequential orders.
3. The petitioner to move the court for the grant issued to him to be confirmed within 14 days.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF OCTOBER 2023.

L. W. GITARI

JUDGE

27/10/2023

The ruling has been read out in open court.

L.W. GITARI

JUDGE

27/10/2023

