



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gitina v Mwaniki (Probate & Administration Appeal  
13 of 2013) [2025] KEHC 3061 (KLR) (12 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3061 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
PROBATE & ADMINISTRATION APPEAL 13 OF 2013**

**CW GITHUA, J  
MARCH 12, 2025**

**BETWEEN**

**PAUL NDUATI GITINA ..... APPLICANT**

**AND**

**NAOMI WANJIRU MWANIKI ..... RESPONDENT**

**RULING**

1. In his Notice of Motion dated 13<sup>th</sup> June 2023, the applicant, Nduati Gitina, sought a total of five prayers two of which are already spent. The prayers which are pending this court's determination are as follows;
  - i. That the orders dated 20<sup>th</sup> June 2017 dismissing his appeal be vacated and the appeal be reinstated for hearing;
  - ii. That the respondent, her agents, or anyone claiming through or under her be restrained by an order of perpetual injunction from claiming benefits due from Athi water and Services Co. Limited in respect of land parcel no. LOC.2/Makomboki/180 which premises is the subject of this appeal pending the hearing of the application dated 25<sup>th</sup> May 2023 or until further orders of this court, whichever is the latest;
  - iii. That costs of the application be borne by the respondent
2. The application is premised on the grounds stated on its face which are replicated in the depositions made in the supporting affidavit sworn by the applicant on 13<sup>th</sup> June 2023. In support of his application, the applicant contended that the respondent, who is his biological mother, initiated succession proceedings at Kigumo Law courts and fraudulently obtained grant of letters of administration to a non-existent Estate since the land subject matter of the succession cause, namely LR No. LOC. Makomboki/180 (the suit land) belonged to him and he was very much alive; that the



grant was subsequently unlawfully confirmed with the result that he was fraudulently dispossessed of his property.

3. In addition, the applicant averred that in furtherance to the fraud perpetrated through the lower court, the respondent now wanted to rob a government agency which has compulsorily acquired the suit land hence his prayer for a permanent injunction to stop the applicant from claiming benefits from Athi water and Services Co. Limited in respect of the suit land.
4. The application was opposed vide a replying affidavit sworn by the respondent on 21<sup>st</sup> June 2023. The respondent, besides confirming that she was the applicant's biological mother averred that she lawfully obtained both the initial and confirmed grant to the Estate of her late father (the applicant's grandfather); that following confirmation of the grant in the ruling delivered by the lower court which is the subject of this appeal, she legally obtained title to the suit land which was registered in her name; that it is the applicant who had fraudulently obtained title to the suit land as held by the trial court in the aforesaid ruling.
5. The respondent further deposed that the instant application was frivolous and misconceived as after the appeal was dismissed, this court became functus official; that litigation must come to an end and the application ought to be dismissed with costs for being an abuse of the court process.
6. The application was canvassed by way of written submissions which both parties duly filed and which I have carefully considered. I find that the key issue for my determination is whether the applicant's prayer for setting aside the dismissal orders made by this court and for reinstatement of his appeal is merited. My finding is informed by the fact that the outcome of this prayer will determine the fate of the other prayer for grant of a permanent injunction on terms sought.
7. It is trite that the court has wide and unfettered discretion in deciding whether or not to set aside an order dismissing a suit or an appeal for want of prosecution. This discretion must however be exercised judiciously on defined principles of law and in the interest of justice. In the case of CMC Holdings Limited V Nzioki [204] eKLR 173 the court in addressing the factors which should guide the court in the exercise of its aforesaid discretion held thus;

“...The discretion must be exercised judiciously.....In law, the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.....”

In addition, the Court of Appeal in Cecilia Wanja Waweru V Jackson Wainaina Muiruri & Another [2014] eKLR cited with approval its earlier decision in Richard Nchapi Leiyagu V IEBC & 2 Others [2012] eKLR in which it held as follows;

“...We agree with the noble principles which go further to establish that the court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”

8. . In this case, a perusal of the court record shows that the applicant filed his appeal on 18<sup>th</sup> June 2013. He did not take any step towards prosecuting it until the respondent filed an application on 15<sup>th</sup> June 2015, about two years later, seeking to have it dismissed for want of prosecution. The parties compromised



the application following which the applicant filed and served the record of appeal within the timelines which were ordered by the court.

9. The record further shows that directions for disposal of the appeal were issued on 6<sup>th</sup> July 2016. The court directed the parties to exchange and file their written submissions before 24<sup>th</sup> October 2016 when the appeal was fixed for hearing. On this date, none of the parties had filed submissions. The court gave the parties a further 30 days to file their submissions and fixed 27<sup>th</sup> March 2017 as the date for highlighting of submissions.
10. On 27<sup>th</sup> March 2017, the applicant's learned counsel Mr. T. M. Njoroge had not filed his submissions and he was granted a further 30 days to comply. On 20<sup>th</sup> June 2017 when the appeal was next fixed for hearing, the applicant had still not filed his submissions and in the exercise of its discretion, the court gave the applicant a further 14 days to file and serve his submissions in default of which his appeal would stand dismissed for want of prosecution. The applicant failed to file his submissions within the timeline set by the court and consequently, his appeal stood dismissed on or about 8<sup>th</sup> July 2017.
11. It is pertinent to note that the instant application was filed on 13<sup>th</sup> June 2023, about six years after the appeal stood dismissed. It is also apparent from the record that the applicant was prompted to file the instant application by service of an application filed by the respondent dated 15<sup>th</sup> March 2023 which sought dismissal of the appeal for want of prosecution.
12. Surprisingly, in his supporting affidavit and in his written submissions, the applicant did not give any reason or explanation for the long delay in either prosecuting his appeal or in filing the instant application.
13. Although there's no set rule or standard of determining what constitutes inordinate delay and each case must be considered on its own merit, it is my finding that in this case, the applicants delay of about three years in prosecuting his appeal before the orders which resulted in dismissal of his appeal were issued and the further delay of about six years in filing the instant application without giving any reason or explanation for the long delay was without doubt inordinate and inexcusable. The applicant did not claim that the delay was a result of any error, inadvertence or mistake.
14. From the conduct of the applicant, it can safely be concluded that he lost interest in prosecuting his appeal as soon as he filed it given that he went to deep sleep thereafter. He did not bother to take any step to facilitate hearing of the appeal even after he was awoken by the respondent's initial application seeking its dismissal. The applicants conduct of expressing interest in prosecuting the appeal only when threatened with its dismissal shows clearly that his intention in filing the appeal was not to seek justice but to deliberately delay or obstruct the course of justice.
15. Having taken all relevant facts into account, I have come to the conclusion that the applicant has not demonstrated that he was deserving of exercise of the court's discretion in his favour. It is my finding that setting aside the orders issued by this court on 20<sup>th</sup> June 2017 and reinstating the appeal in the circumstances of this case would be tantamount to allowing the applicant to continue abusing the court process to the detriment of the respondent who has already executed the trial court's ruling by having the suit land registered in her name.
16. Under Section 47 of the [Law of Succession Act](#) and Rule 73 of the Probate and Administration Rules, this court is empowered to make any orders that are expedient and necessary to meet the ends of justice and to prevent abuse of its process. In my considered view, setting aside the orders made by this court and reinstating the applicant's appeal will not serve the ends of justice in this case. In the premises, I hereby decline to grant prayer 1 of the applicant's motion.



17. Having declined to reinstate the applicants appeal, his prayer for an order of a permanent injunction as sought in prayer 4 falls by the wayside as it no longer has any legs to stand on.
18. For all the foregoing reasons, It is my finding that the applicants Notice of Motion dated 13<sup>th</sup> June 2023 lacks merit and it is accordingly dismissed with costs to the respondent.
19. It is so ordered

**DATED, SIGNED AND DELIVERED AT MURANGA THIS 12<sup>TH</sup> DAY OF MARCH 2025.**

**HON. C.W. GITHUA**

**JUDGE**

In the presence of :

Mr. T. M. Njoroge for the Applicant

No Appearance for the respondent.

Ms. Susan Waiganjo, Court Assistant

