



In re Estate of Bonifas Okinda Olal (Deceased) (Succession Appeal E001 of 2024) [2025] KEHC 3296 (KLR) (14 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
SUCCESSION APPEAL E001 OF 2024**

DK KEMEL, J

MARCH 14, 2025

IN THE MATTER OF THE ESTATE OF BONIFAS OKINDA OLAL (DECEASED)

BETWEEN

JOHN OCHIENG OKELLO APPELLANT

AND

LUCAS ONYANGO OCHIENG RESPONDENT

RULING

1. The Appellant herein filed an application dated 18/11/2024 seeking principally for an order to review and set aside the dismissal orders dated 22/5/2024 and reinstate the Appellant’s application dated 13/12/2023 for hearing on merit.
2. The application is supported by the grounds set out thereunder and by the supporting affidavit of the Appellant’s Advocate sworn on even date. The Appellant’s gravamen is inter alia; that the Appellant’s advocate inadvertently failed to diarize the hearing date of the Appellant’s application dated 13/12/2023 and thus failed to attend court for its hearing on 22/5/2024; that the failure was occasioned by the Appellant’s Advocate’s inadvertent failure to diarize the hearing date which was not intentional but due to human error; that the Appellant should not be prejudiced due to the mistakes of his counsel; that upon realizing the mistake the Appellant’s counsel reached out to the Respondent’s counsel with a view to recording a consent for reinstatement of the dismissed application but the same was not accepted; that it is in the interest of justice to grant the application so that the Appellant’s application dated 13/12/2023 can be heard on merits.
3. The application was opposed by the Respondent who filed a replying affidavit sworn on 20/1/2025 wherein he averred inter alia; that the Appellant’s application dated 13/12/2023 was properly dismissed on 22/5/2024 for want of prosecution; that setting aside or reviewing of orders of 22/5/2024 is in the discretion of the court; that the Appellant has not satisfied the court that there is sufficient cause or reason to warrant reinstatement of the application dated 13/12/2023; that the Appellant has



failed to assist the court to adjudicate the matter expeditiously; that it is in the interest of justice that litigation must be conducted expeditiously so as to avoid injustice on grounds of delay; that litigation has to come to an end and that this court should not allow the Appellant to prolong the finalization of the case.

4. The application was canvassed by way of written submissions. It is noted that it is only the Appellant who has complied.
5. I have given due consideration to the application, the rival affidavits as well as the submissions filed. It is not in dispute that the Appellant's application dated 13/12/2023 was dismissed on 22/5/2024 for want of prosecution as the Appellant and his counsel did not attend court. I find the issue for determination is whether the application has merit.
6. It is trite that setting aside decrees or orders is at the discretion of the court and that the same being an equitable remedy must be exercised judiciously. It is a fact that human beings make mistakes or blunders in the course of daily life chores. Advocates are no exception. The Appellant's learned counsel has admitted that he had not diarized the matter. The proceedings of 6/11/2024 clearly showed that the Appellant's counsel was not aware that his application had already been dismissed for want of prosecution several months earlier. He appeared thoroughly shocked since, according to him, the matter was for purposes of confirming whether parties had filed and exchanged submissions regarding the application dated 13/12/2023. It was then that the said counsel embarked on filing the present application. The Appellant has earnestly beseeched this court to give him a chance to prosecute his application dated 13/12/2023. Indeed, parties are obligated to work towards the speedy finalization of matters as delay increases costs and inconvenience and eventually defeat equity. The courts have been kind to litigants by ensuring that the mistakes of advocates should not be visited upon a litigant. The rationale behind this is to ensure that justice is served to all parties by giving them a chance to ventilate their rival claims and thereafter the court can thrash out the issues in controversy with finality. The court must have a free hand so as not to fetter the wide discretion given to it by the Civil Procedure Rules and constitutional imperatives. In the case of Philip Keiptoo Chemwolo & Another vs. Augustine Kubende [1986] eKLR, it was held that:

“blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit.”

7. As noted from the contents of the supporting affidavit, the mistake was made by the Appellant's Advocate in failing to diarize the matter and attending court on 22/5/2024 to prosecute the application dated 13/12/2023. I find that it will be unfair and unjust to shut the door and lock out the Appellant from being given an opportunity to ventilate his case on the merits. Indeed, courts are bound by the Constitutional imperatives in Article 159 of *the Constitution* that justice shall be administered without undue regard to procedural technicalities. It is instructive that the matter emanates from a succession dispute in which the parties are emotionally attached and engaged and thus it is fair that none of the parties herein are locked out from ventilating their rival claims. I am persuaded to grant the Appellant an opportunity to prosecute his application dated 13/12/2023 on merits. As the Appellant has indicated his readiness to prosecute the said application, the request ought to be granted. The Respondent's concerns will be taken care of by an award of costs.
8. In the result, it is my finding that the Appellant's application dated November 18, 2024 has merit. The same is allowed in terms of prayer No.2 thereof. Parties are directed to set down the application dated December 13, 2023 for hearing on priority basis. The costs hereof are awarded to the Respondent.



DATED AND DELIVERED AT SIAYA THIS 14TH DAY OF MARCH, 2024

D. KEMEI

JUDGE

In the presence of:

Opiyo.....for Appellant/Applicant

M/s Kiprop.....for Respondent

Ogendo.....Court Assistant

