



REPUBLIC OF KENYA



KENYA LAW
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**Macharia v Macharia (Succession Cause 355 of 2008)
[2025] KEHC 2657 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2657 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 355 OF 2008**

**M MUYA, J
MARCH 6, 2025**

BETWEEN

JOHN GICHUKI MACHARIA APPLICANT

AND

LUCY WARIMA MACHARIA RESPONDENT

RULING

1. The applicant in his Notice of Motion Application dated 5th July, 2022 seeks the following orders:-
 1. Spent
 2. That the honourable court be pleased to review, vary and or set aside the orders made on 26th November, 2020 dismissing the application dated 23rd November, 2017 filed herein and other consequential orders.
 3. That upon grant of prayer 2 above this honourable court be pleased to reinstate the applicant's application dated 23rd November, 2017 for hearing and final disposal.
2. The grounds for the application are:-
 - a. That the application dated 23rd November, 2017 was dismissed on 26th November, 2020 for want of prosecution.
 - b. That he had instructed the firm of C.M. Kingori & Company Advocates to represent him in the matter who in return failed and or neglected to update him on the position of the matter despite several visits to the advocates chambers and it was not until he made a visit at the court registry that he was informed that the matter was dismissed for want of prosecution.



- c. That it is only fair that just to set aside the orders made on 26th November, 2020 as the non-attendance by counsel was borne out of an inadvertent mistake which in no way goes to show, that he had lost interest in prosecuting the application dated 23rd November, 2017.
 - d. That an advocate's inadvertent mistake should not be visited on the applicant.
 - e. That the application, if allowed, the Respondent will not suffer any prejudice as the application was in any event to proceed for determination on merit.
 - f. That the said application raises substantive and weighty issues for determination by this honourable court touching on fraud.
 - g. That this honourable court be pleased to reinstate the matter that is still pending an unaddressed for final hearing and disposal on merit.
 - h. That no prejudice will be suffered by either party if the application dated 23rd November, 2017 is reinstated.
3. This application is opposed. The Respondent in her replying affidavit dated 8th November, 2022 deposes thus:-
- a. That distribution to the Estate was done on 17th August, 2012 which is ten years ago.
 - b. That the applicant has not informed the court where he was between 17th August, 2012 and July, 2017 when he first filed an application for review.
 - c. That consequently, he had failed to inform the court of his whereabouts between July, 2017 to 26th November, 2020 when his application was dismissed for want of Prosecution.
 - d. That the applicant has had a tendency of vanishing for three years to 5 years and re-appearing with applications before this Court.
 - e. That on 17th day of August, 2012 this Court distributed the assets of the deceased based on the number of children but not the spouses.
 - f. That it is not denied that the applicant's advocate was all along served with mention and hearing dates prior to the dismissal.
 - g. That the Respondents and other beneficiaries will suffer irreparable damage should they be dragged back 10 years ago.
 - h. That the applicant has not presented any evidence in the form of receipts for perusal of the court file to show that he became aware of the dismissal in 2022.
 - i. That the summons for confirmation of grant was filed on 14th July, 2009.

Applicants Submissions:

4. The applicant's submissions is that the main issue for determination is whether the court ought to exercise its discretion and grant the orders sought in the application.
5. It is common ground that neither the advocator nor the applicant attended court as required on the dates and times scheduled.
6. The submission by the applicant is that failure to attend court was an inadvertent error on the part of his advocate who failed to diarize the matter.



7. That an advocate's mistake should not be visited upon his client as held in the case of CMC Holdings Limited –Vs- Nzioki (2004) eKLR 173 where it was held:-

“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 litigant does not suffer injustice or hardship as a result of among other things an excusable misstate or error it would.....not be proper use of such discretion if the court turns its back to litigant who clearly demonstrates such as excusable mistake inadvertence, accident or error, such as exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned magistrate did here..... In doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate”

8. It is further submitted that reinstating this suit will not cause irreparable prejudice to any party. The Respondents have not filed a response to that effect.
9. The applicant places reliance in the case of Richard Ncharpi – Vs- IEBC & 2 others [CA 18 of 2013](#) where it was held:-

“The right to a hearing has always been a well protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end, of the day there should be proportionality”

Respondents Submissions:

10. It is the contention of the Respondent that the court distributed the Estate on 1st August, 2012 based on affidavit evidence and submissions fully filled in court. The applicant did not file a further affidavit before the distribution by the Court.
11. The Respondent places reliance on the doctrine and or principle of finality which found favour in the case of Kamau James Gitutho & others –Vs- Multiple IDC (K) Ltd & another (2019) eKLR where it was held:-

“The above position was informed by the principle of finality which is hinged on the public interest policy that litigation must come to an end, Bosire JA in Jasbir Singh Rai & 3 others –Vs- Tarlochan Singh Rai & 4 others (2007) eKLR succinctly described the principle as follows:-

“This is a doctrine which enables the courts to say litigation must end at a given point regardless of what the parties think of the decision which has been handed down”

12. Further the finality principle dealt with the all two human predilection to keep trying until something gives. See the court decision in William Koros –Vs- Hezekiah Kiptoo Komen & 4 others (2015) eKLR – “Looking at the trajectory taken by the applicants in this application, we are convinced that all they seek this court to do is to set aside the judgment simply because they disagree with the same. Clearly that would amount to us sitting on an appeal against our own judgment which is beyond our mandate.



In that regard, this court in the case of Daniel Lago Okomo –Vs- Safafri Park Hotel Ltd (2018) eKLR held:-

“We do not review judgments just because a losing litigant is unhappy and despondent. We have jurisdiction to do so”

13. It is the contention by the Respondent that the applicant’s best course would be to file an appeal on the distribution of the Estate as he was actively a participant in the proceedings that culminated in the ruling on distribution”

Analysis and Determination Issues:

Whether this application has met the threshold for reinstatement?

14. Summons for confirmation of grant of letters of administration in this suit were filed on 14th July, 2009, by the Respondent.
Subsequently, the applicant filed a protest.
15. Directions were given on the 19th day of November, 2011. The applicant was given 7 days to file a further affidavit to respond to the Replying Affidavit. The matter was to be dispensed by way of affidavit evidence and submissions.
16. The ruling on the distribution of the Estate was delivered on 17th August, 2012. This was after both parties had filed their submissions.
167. That subsequently the applicant appointed the firm of CM Kingori & Co. Advocates with instructions to file an application to review and or set aside the ruling of 17/8/2012. That application is the one dated 23rd November, 2017.
18. A perusal of the court file shows that the application dated 23/11/2017 was fixed for hearing on 2/7/2018. There was no appearance on the material dated though the dates were taken by Counsel, Mr. Kingori.
19. Application was further given a hearing date for 4th November, 2019 when directions were given for the matter to be heard by way of written submissions and a date fixed for 16/12/2019. No appearance and no submission had been filed. The matter was given hearing date for 31/3/2020. Further dates were given for 14/7/2020, 14/10/2020, 26/11/2020. On 26th November, 2020 the application for review and or setting aside was dismissed for want of Prosecution. After that dismissal the applicant filed the present application dated 5th July, 2022.
20. The application places blame on his counsel, Mr. CM. Kingori for the delay in prosecution the application and has cited a line of decided authorities on the principle that the mistakes of counsel should not be visited on the client.
21. In the case of Michael Muriuki Ngibuini –Vs- East African Building Society Ltd (2015) eKLR citing the case of Savings and loans Ltd –Vs- Susan Wanjiru Muritu Milimani HCCC no. 397 of (2002) eKLR where it was held:- “It is trite that a case belongs to a litigant and not her advocate. A litigant has a duty to pursue the prosecution of his or her case.....It is the duty of the litigant to constantly check with her Advocate the progress of her case”
22. I have deliberately shown the data as found on the record as to which dates the application subject matter of these proceedings was set down for hearing spanning a period of three years. The applicant does not explain why after the ruling was delivered on 17th day of August, 2012 it took him close to



five years to file the application in the year 2017. After filing the application to redistribute the Estate dated 23/11/2017, the applicant once again went into silence mood till the time his application was dismissed for want of Prosecution.

23. On 26/11/2020, even then he went silent again till the 5th day of July, 2022 when he filed the present application seeking for the reinstatement of his application dated 23rd November, 2017.
24. The main blame is placed on mistake by Counsel. The said counsel has not sworn an affidavit attributing blame or mistake on his part. There is no allegation on mistake as the misdiarizing the dates. In effect, no good reason has been given as to why the application was not prosecuted within the period of three years.
25. I am not persuaded that the application dated 5th July, 2022 has merit. It is hereby dismissed.

RULING READ AND DELIVERED IN OPEN COURT THIS 6TH DAY OF MARCH, 2025.

In the presence of:

Applicant in person

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M. MUYA

JUDGE

