



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Mwanaisha Njeri (Deceased) (Succession Cause
2835 of 2011) [2025] KEHC 9868 (KLR) (Family) (4 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9868 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 2835 OF 2011

PM NYAUNDI, J

JULY 4, 2025

IN THE ESTATE OF MWANAISHA NJERI (DECEASED)

RULING

Introduction

1. By summons dated 30th January 2025 presented under Section 73, 49 and 67 of the Probate and Administration rules (sic), the applicant herein seeks for prayers that-
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to grant leave allowing the applicant to apply for reinstatement of the revocation application dismissed on 30th September 2015 and to extend and enlarge time accordingly.
 - d. this Honourable court be please to set aside its orders and proceedings made on 30th September 2015 dismissing the Revocation of Grant dated 9th January 2013 for want of prosecution and any other or further consequential orders of this Court pending the hearing and determination of this application.
2. Basically, the applicant seeks to set aside the orders of the Court dismissing her summons for revocation of grant on the basis that her advocate on record at the time did not keep her updated on the progress in the matter and therefore she was not aware of the application to dismiss the application dated 9th January 2013 for want to prosecution.
3. That this Honourable Court be pleased to reinstate the said application for Revocation of Grant dated 9th January 2013 for hearing and the same be determined on merit.



4. The respondent opposes the application and has sworn affidavit in opposition on 17th March 2025. It is his averment that the application is misconceived and incompetent and the delay in presenting the same is inordinate.
5. The application was canvassed via written submissions. The Applicants submissions are dated 26th March 2025, she identifies 2 issues for determination-
 - a. Whether the applicant was aware of an application for revocation of grant dated 9th January 2013?
 - b. Whether material facts were concealed from court during petitioning of this Cause?
6. In summary it is submitted that the mistake of the advocate should not be visited on the client and further the applicant failed to disclose to the Court material facts, for instance that there was a judgment on the ownership in the Kadhi's Court on ownership of Plot No. 15/B5 at Riruta Muslim Community, Kawangware. The applicant submits that unless the orders are set aside and the summons for revocation heard, she will suffer loss as the subject asset did not belong to the estate but to her deceased mother Asha Jambi who was a daughter to the deceased herein and a sister to the administrator/ respondent.
7. The applicant relies on the decision in Habo Agencies Limited v Wilfred Odhiambo Musingo [2020] KECA 486 (KLR) for the assertion that the application as presented has met the threshold for setting aside the order dismissing the summons for revocation for want of prosecution and therefore reinstating it for hearing.
8. The Respondents submissions are dated 14th April 2025 and has framed 6 issues for determination as follows-
 - a. Whether the applicant acted promptly and in good faith
 - b. Whether this honourable Court should entertain the Applicants numerous previous applications seeking to revoke the grant
 - c. Whether the Applicant can rely on alleged counsel's mistakes to excuse her failure to prosecute and justify reinstatement
 - d. Whether this Honourable Court should entertain the applicant's attempt to litigate substantive issues in an application for reinstatement
 - e. Whether reinstatement of the suit would unjustly prejudice the respondent
 - f. Whether the Application dated 30th January 2025 seeking to reinstate the application for revocation of grant dated 9th January 2013 is merited.
9. It is submitted that the delay in presenting the application for reinstatement is inordinate and inexcusable and reference made to the decision in Simion Waiti Kimani & Three Others vs Equity Building Society [2010] eKLR
10. It is submitted further that the applicant has filed numerous summons for revocation of grant an indicator that she is not keen to prosecute the matter, reference is made to the decision in Lelei & 2 Others v Kimetto & 30 Others [2024] KEELC 1220 (KLR)
11. On whether or not the error by counsel should be visited on the client it is submitted that the notwithstanding the failure of the advocate to attend court the applicant still has not explained the delay of 12 years; reference is made to the decision in Julius Kibiwott Tuwei vs Reuben Argut & 7others



[2022] eKLR; Utalii Transport Co. Ltd and 3 Others vs N.I.C Bank and Anor [2014] eKLR; Gideon Sitelu Konchella vs Daima Bank Limited [2013] eKLR; Ruga Distributors Limited vs Nairobi Bottlers Limited [2015] eKLR; It is submitted that the mistakes of Counsel will not absolve the applicant from accountability and responsibility to pursue their case diligently.

12. It is further submitted that if the application is allowed, will prejudice the respondent, as he has expended and adjusted himself in accordance with the grant as confirmed. It is submitted in conclusion that the application is unmerited and that it should be dismissed.

Analysis and Determination

13. Having considered the pleading, rival submissions and relevant law, I surmise the following as the issues for determination-
 - a. Whether the Application dated 30th January 2025 is merited and the Court should reinstate the application dated 9th January 2013.
 - b. Who should pay costs?
14. Parties are agreed that the application dated 9th June 2013 was dismissed on 30th September 2015 for want of prosecution. On that date the record shows that the Court considered the application for dismissal for want of prosecution and having been satisfied of proper service and confirming from the record that the applicant had not attended court on previous occasions when the matter was slated for hearing, proceeded to dismiss the application.
15. The point is whether the applicant is deserving of the exercise of the Court's discretion in her favour. The principles that a Court will consider when considering an application for reinstatement of a cause are well enunciated in the decision of Ivita versus Kyumbu [1984] KLR441 as follows-

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 favor 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

16. In summary the facts to be considered are the period and reason for the delay, prejudice to the parties, abuse of process and impact on fair trial.
17. The applicant herein contends that it is the former counsel who dropped the ball. The inaction in the period from 30th September 2015 to 2023 when the first summons for revocation was filed has not been explained. In Habo Agencies Limited v Wilfred Odhiambo Musingo [2020] KECA 486 (KLR) the Court in dismissing an application for reinstatement of an appeal expressed itself in these terms-

From the above, which is not disputed, the applicant's advocates had notice of the scheduled hearing of the appeal but elected not to attend court. At any rate, there is no explanation of the nature of mistake that the appellant alleges on the part of its advocate. If this Court is to exercise its discretion in favour of a party, the party is obliged to place before it some material



to justify exercise of discretion, otherwise the exercise of discretion will be perceived as capricious or whimsical. Clearly what the applicant seeks to rely on is not mistake, but plain indolence and dilatoriness, which is not excusable. It has been accepted by this Court that sheer inaction by counsel does not constitute an excusable mistake. (See *Rajesh Rughani v. Fifty Investment Ltd. & Another* (2005) eKLR).

We are alive to the imperatives of Article 159 of *the Constitution* and the overriding objective which decry undue regard to technicalities. However, it is equally an important principle of *the Constitution* that justice must be dispensed without undue delay. As the Supreme Court emphasised in *Raila Odinga and 5 Others v. IEBC & 3 Others* [2013] eKLR and in *Nicholas Kiptoo arap Korir Salat v. IEBC & 7 Others* [2014] eKLR, Article 159 is not a panacea in each and every instance of breach of procedure. It avails only in deserving cases. Before us is a matter that has been in court for the last 20 years for what the applicant readily admits has been a litany of omissions by its legal advisers. The “sufficient cause” presented in this application is mistake of counsel. But the evidence on record shows that counsel were served and in fact endorsed the hearing notice with the words “without prejudice” whatever that was intended to mean. They however never bothered to attend court or to send a representative to seek adjournment of the appeal.

18. In dismissing this application, I associate myself fully with the sentiments of the Court of Appeal in the *Habo Agencies Limited* case (*Supra*). The Applicant has not discharged their responsibility to demonstrate that they have been diligent in prosecuting their application. No reason was given for the 8-year gap between 2015 and 2023 when no action was taken.
19. It is intended to reinstate the summons for revocation in which the applicant challenges the inclusion of the asset in the Estate of the deceased. That challenge as framed is beyond the mandate of the probate court, the issue of the ownership of the parcel of land will be best settled in the Environment and Land Court.
20. The parties have ongoing litigation in Nairobi CMC ELC No.1937 of 2018. If the issue of ownership is resolved in the applicant’s favour she can move this Court for the appropriate orders.
21. Section 27(1) of the *Civil Procedure Act*, provides that costs follow the event. In *Hussein Muhumed Sirat versus Attorney General & Another* [2017] eKLR, the Court held that it is now a well-established legal principle that costs follow event and that the successful party is entitled to costs unless there are other exceptional circumstances. In this case the respondent is entitled to costs for the application which I assess at Kshs 25000 payable within 45 days.
22. Each party granted leave to appeal within 30 days from the date hereof.

It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 4th DAY OF JULY, 2025.

P. M. NYAUNDI

HIGH COURT JUDGE

In the presence of:

Mr. Kinuthia for Applicant

Fardosa Court Assistant

