



**In re Estate of Nzuki Kilonzo Kiti (Deceased) (Succession Cause 182 of 2004) [2023] KEHC 17343 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17343 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 182 OF 2004**

**G MUTAI, J**

**MAY 12, 2023**

**BETWEEN**

**HENRIETTE BENGER KILONZO ..... PETITIONER**

**AND**

**CHRISTINE WANJIRU WOTHIRU ..... OBJECTOR**

**AND**

**MITTERLEHNER HIRT ULRICH ..... PROTESTOR**

**AND**

**SIRAJ WAWIRE T/A MUSIKOMA AUCTIONEERS .... PROPOSED  
INTERESTED PARTY**

**EDINOTO OWAKA ..... PROPOSED INTERESTED PARTY**

**MARUMA IKUMI LIMITED ..... PROPOSED INTERESTED PARTY**

**RULING**

**Introduction**

1. This matter has been pending in Court since 2004. The same came up on 23<sup>rd</sup> January 2023 before the Hon. Mr. Justice Onyiego for the hearing of the application dated 10<sup>th</sup> November 2022 filed by the Objector/Applicant. When the cause was called out the advocate for the Objector/Applicant was not present to prosecute it. The Court therefore dismissed the application for want of prosecution. It is worth noting at the outset that the said date was fixed in the presence of both parties on 1<sup>st</sup> December, 2022.



## The Objector/Applicant Application

2. The application that was dismissed his Lordship on 23<sup>rd</sup> January, 2023 was a Summons for Revocation/ Annulment of Grant dated 10<sup>th</sup> November, 2022. The said summons sought 12 orders, among which was that the Grant of Letters of Administration Intestate issued to Henriette Benger Kilonzo on 31<sup>st</sup> March 2022 and confirmed on 18<sup>th</sup> October, 2022 be revoked and or annulled. The Objector/Applicant also sought various conservatory and or injunctive reliefs.
3. The Objector/Applicant in her affidavit in support of the Summons dated 10<sup>th</sup> November 2022 averred that she filed an Objection and a Petition by way of Cross Application dated 23<sup>rd</sup> April, 2008. She stated that she was diagnosed with cancer in the year 2011 and could not, therefore, prosecute her application and that it was only in October 2022 that she learned that her goods had been proclaimed. Upon doing a quick check she established that her Objection and Petition by way of Cross Application had been struck out by the Court in the result that the Petitioner/Respondent obtained a Grant of Letters of Administration Intestate, which Grant was subsequently confirmed.
4. The application dated 10<sup>th</sup> November, 2022 was opposed by the Petitioner/Respondent. In her Replying Affidavit sworn on 21<sup>st</sup> November, 2022 Henriette Benger Kilonzo deponed that the Objector/Applicant filed objection proceedings in 2008 which she did not prosecute for a period exceeding 14 years and 8 months. Regarding knowledge of the proceedings before Court Ms. Kilonzo stated that hearing and mention notices had been served on her previous advocates, who, up to that point were on record for. She was therefore, she deposed, estopped by the doctrine of agency from denying service as it is presumed that the advocates had full instructions to receive and act for her.
5. In a nutshell the application before me seeks to reinstate an application which was dismissed for want of prosecution that sought, in effect to reinstate objection application that was dismissed on 30<sup>th</sup> March, 2022 after a 14 years and 8 months period of dormancy.
6. The application was first placed before me on 23<sup>rd</sup> February, 2023. I certified the same urgent and directed that it be placed before me on 2<sup>nd</sup> March, 2023. On 2<sup>nd</sup> March 2023 I ordered that the same be disposed by way of Written Submissions. I confirmed that the parties had filed and served Written Submissions on 29<sup>th</sup> March, 2023 and reserved my judgment for 12<sup>th</sup> May, 2023.

## Submissions by the Parties

7. In his Written Submissions counsel for the Objector/Applicant avers that his failure to attend Court on 23<sup>rd</sup> January, 2023 was caused by an inadvertent mistake, error or confusion on his part, which failure he argued was excusable and ought not to be visited on his client. It was submitted that the application dated 1<sup>st</sup> December, 2022 raised serious and important issues which ought to be heard and determined on merits.
8. The Objector/Applicant submits that the application was wrongly dismissed for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules, 2010. It is submitted that the test under the said rule hadn't been met as there had not been a delay for a period in excess of 1 year in prosecuting the matter. It is further submitted that no notice was issued to the Objector/Applicant as required by the Rules. Lastly, it was argued that nothing was placed before the court showing that the Objector/Applicant through inexcusable conduct had intentionally sought to abuse the court process or obstruct administration of justice. Reliance was placed on *Mwangi S. Kimenyi v the Attorney General & Another*, HC Misc Application No. 720 of 2009 and [\*George Gatere Kibata v George Kuria Mwaura & Another\* \[2017\] eKLR](#).



9. In support of her application for reinstatement of the application dated 10<sup>th</sup> November, 2023 the Objector/Applicant relied on *Harrison Wanjohi Wambugu v Felista Wairimu Chege & Another* [2013]eKLR, *Belinda Murai & Others v Amos Wainaina* (1978) LLR 278 (CALL), *Philip Chemwolo & Another v Augustine Kubede* (1982-88) KAR 103 and *Markson Karani Muchunku v Joseph Ngari Gituku* [2021]eKLR for the proposition that a mistake on the part of counsel, which is shown to be inadvertent, and in respect of which a remedial application has been filed promptly, ought to be allowed.
10. The Objector/Applicant submitted that she, together with her son Mark Kilonzo, would suffer extreme prejudice if her application was denied and that it would be fair and just in the circumstances of this case to hear and determine this matter on merits. In respect of costs it was submitted that costs could be in the cause.
11. In her submissions in opposition to the application before the Court the Petitioner/Respondent avers that no reasonable explanation has been given for the tardiness with which the Objector/Applicant has prosecuted her case. The court is asked to consider the fact that the succession proceedings herein have been in Court for over 19years and 3 months due largely, it is submitted, to the conduct of the Objector/Applicant.
12. The Petitioner/Respondent gave a chronology of the events in this cause. She submitted that the Objector/Applicant was not keen on prosecuting her case and that the decision of the court dismissing the application dated 10<sup>th</sup> November, 2023 on 23<sup>rd</sup> January, 2023 was lawful, fair and justice and shouldn't be disturbed. The Petitioner/Respondent submitted that the only issue whose determination by this court is required is whether the application dated 10<sup>th</sup> November, 2022 should be reinstated.
13. The Petitioner/Respondent referred the Court to Article 159 of *the Constitution* of Kenya, 2010 and section 1A of the *Civil Procedure Act*. The Letter provides in part that justice shall be done to all without delay and undue regard to procedural technicalities. Section 1A of the *Civil Procedure Act* directs courts to take deliberate steps to ensure that cases pending determination are disposed of expeditiously. It was urged that in this cause the Objector/Applicant had actively sought to prevent expeditious disposal of the case and that her conduct was such that it would not be in the interest of justice to allow her application.
14. The Petitioner/Respondent particularized the defaults on the part of the Objector/Applicant. She submitted that Objector/Applicant could not be heard to say that she had been ousted from the seat of justice. Justice, it was submitted, cuts both ways. It was further submitted that the Objector/Applicant seeks a discretionary remedy. That being the case she ought to have come to court with clean hands. Further, it was urged, courts aid the vigilant litigants and not those who are indolent.
15. The Petitioner/Respondent relied on the case of *Standard Chartered Bank (K) Ltd v Ondieki Ayuki* [2018] eKLR and *W. Muchange & E. Olunga t/a Womi Associates v the Attorney General* [2017] eKLR for the proposition that where the delay in prosecuting a case is inordinate, unreasonable and totally unjustified a court ought to exercise its discretion in favour of an applicant seeking to dismiss the suit. I was also referred to the holding of the Court of Appeal in *Cecilia Wanja Waweru v Jackson Wainanina Muiruri & Another* [2014] eKLR where the said court expressed itself thus: -

“The delay was inordinate and reasonable explanation would be that the appellant had been indolent and slept on her rights. She was only awakened from her slumber by the dismissal of the appeal”.



16. The Petitioner/Respondent impugned the application dated 10<sup>th</sup> November, 2022 which in her mind was frivolous as no explanation had been given for the delay of 14 years and 8 months to prosecute the objection proceedings. Court was urged to look at the prejudice that would be caused to the Petitioner/ Respondent who is said to be 82 years old and has been waiting for justice since she was 62.

#### **Issues for determination by the court**

17. I have carefully considered the application filed on 23<sup>rd</sup> February, 2023. In my view only 1 issue falls for determination; whether or not the application dated 10<sup>th</sup> November 2022 should be reinstated.

#### **Should the application dated 10<sup>th</sup> November 2022 be reinstated?**

18. Before I make a determination in respect of this question I must at the outset out what I consider to be the guiding constitutional and legal provisions.
19. Article 159 (2) of *the Constitution* of Kenya 2010 sets out the principles which guide the courts and tribunals when exercising judicial authority. These are: -
- a. Justice shall 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 mechanism shall be promoted, subject to clause (3);
  - d. Justice shall be administered without undue regard to procedural technicalities;
  - e. The purpose and principles of this constitution shall be protected and promoted”.
20. Section 1A of the *Civil Procedure Act* provides that: -
- “(1) The overriding objective of this Act and rules made thereunder 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 process of the court and to comply with the directions and orders of the court”
21. I understand these constitutional and legal provisions as ordering courts not only to do justice but to do so without undue delay. Where a party has through craft sought to prolong a matter in court and has subsequently had his matter dismissed the court in the exercise of its discretion should do so unless there are good grounds.



22. In the case of *Mbogo v Shah* [1966] EA 96 at page 195 the court said as follows: when discussing the exercise of discretion by courts: -

“the discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or error, but is not designed to assist the person who had deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice “

23. In *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48 Briggs JA (as he then was) said at page 51: -

“I consider that under order 9 Rule 20 the discretion of the court is perfectly free and the only question is whether upon the facts of any particular case it should be exercised. In particular mistake or misunderstanding of the Appellant’s legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised”.

24. I must now make my determination. Has a case for exercise by me of my unfettered discretion been made? To answer this question, I must take into consideration the conduct of the Objector/Applicant.

25. The Objector/Applicant filed her objection in 2008. She avers that she fell ill in 2011. I have not seen an explanation for the failure on her part to prosecute her case for the 3 year period between 2008 and 2011. Although she says she was diagnosed with cancer in 2011 no documentary evidence has been adduced in support of this contention. The Objector/Applicant has cast aspersions against the firm of Gikandi & Co. Advocates, by averring that they attempted to have her sign a consent against her will and that subsequently the said firm failed to keep her informed about the case as a result of which the case was dismissed for want of prosecution on 1<sup>st</sup> March, 2022 and the Grant was issued and subsequently confirmed. That may be so. The question that begs to be answered is why for the 11 year period her relationship with her advocates was in the rocks she did not instruct another advocate or firm of advocates to act for her. If the firm of Gikandi & Co. Advocates were negligent as she seems to be saying what action did she take against them?

26. I would have dismissed the application as lacking merit. The delay in the prosecution of the objection proceedings has been inordinate. I haven’t seen a reasonable explanation for the failure on the part of the Objector/Applicant to prosecute her case. It might be that reasonable explanation exists. That has not been provided. Having said I am persuaded to give the Objector/Applicant one more chance to ventilate her claim.

27. I do so very reluctantly as the counsel for the Objector/Applicant has given a cogent explanation for his failure to attend court on 23<sup>rd</sup> January, 2023. I have taken note of the printout of the text messages he exchanged with the Objector/Applicant and extracts of his diary entries for the 23<sup>rd</sup> and 24<sup>th</sup> January 2023 and 22<sup>nd</sup> and 23<sup>rd</sup> February 2023. I am persuaded that the counsel made an error which ought not to be visited on his client.

28. I am guided by the decisions of the Court of Appeal in *Harrison Wanjohi Wambugu v Wairimu Chege & Another* [2013] eKLR where it was stated that

“Therefore we have to ask ourselves whether the failure to attend court by the Appellant on the 5<sup>th</sup> of May, 2008 constituted an excusable mistake or was it meant to deliberately delay the cause of justice. The Appellant contended that he failed to attend the hearing of the appeal because he erroneously confused the date of the hearing as 6<sup>th</sup> May, 2008 as opposed to 5<sup>th</sup>



May, 2008; and that upon realizing that the appeal had been dismissed when he attended court on 6<sup>th</sup> May, 2008 he filed an application on 7<sup>th</sup> May, 2008 seeking reinstatement of the appeal”.

29. The advocate in this matter appears to have made the same mistake as the one who represented the appellant in the above cause.
30. By allowing the application dated 23<sup>rd</sup> February, 2023 the Objector/Applicant now has a chance to prosecute her application dated 10<sup>th</sup> November, 2022 on merits and to do so with diligence.
31. The upshot of the foregoing is that I allow the application dated 23<sup>rd</sup> February, 2023 in part by: -
  1. Setting aside the orders made by this court on 23<sup>rd</sup> January, 2023 vide which the Notice of Motion application dated 10<sup>th</sup> November, 2023 was dismissed;
  2. I fix the application dated 10<sup>th</sup> November, 2022 for hearing interparties on 25<sup>th</sup> May, 2023; and
  3. I award the Petitioner/Respondent costs of the application to be agreed or taxed.
32. Orders accordingly.

**DELIVERED, DATED, and SIGNED this 12<sup>TH</sup> day of MAY, 2023 at MOMBASA via Microsoft Teams**

.....  
**GREGORY MUTAI**

**JUDGE**

In the presence: -

Mr. Hamisi for the Objector/Applicant

Mr. Idi holding brief for Mr. Odindiko for the Petitioner/Respondent

Mr. Yusto holding brief for Mr. Gakuo for the proposed 3<sup>rd</sup> Interested Party

Ms. Winnie Migot – Court Assistant

Page 5 of 5

