



**Onguti v Okindo; Kenya Commercial Bank & 2 others (Interested Parties)  
(Succession Appeal 5 of 2018) [2025] KEHC 13716 (KLR) (3 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13716 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION APPEAL 5 OF 2018**

**S MBUNGI, J**

**OCTOBER 3, 2025**

**IN THE MATTER OF THE ESTATE OF NELSON ONGUTI  
OKINDO AND JOYCE BOSIBORI ONGUTI (DECEASED)**

**BETWEEN**

**EDWIN MOTARI ONGUTI ..... APPLICANT**

**AND**

**DANIEL MAYAKA OKINDO ..... PETITIONER**

**AND**

**KENYA COMMERCIAL BANK ..... INTERESTED PARTY**

**GISII MWALIMU SACCO CO-OPERATIVE SOCIETY ..... INTERESTED PARTY**

**MINISTRY OF FINANCE AND PLANNING ..... INTERESTED PARTY**

**RULING**

1. The application before this court is whether the orders for dismissal for want of prosecution dated 30<sup>th</sup> May 2025 ought to be vacated, and orders issued on 22/11/2021 be reinstated.
2. The application was canvassed by way of a written submission.
3. In their application dated 22<sup>nd</sup> September 2025, the applicant avers that he had been struggling to raise school fees for his law school, claiming that the respondent, who is his sister, had been channeling the proceeds of their deceased father's estate to sustain herself and her husband.
4. He prays that the appeal ought to be determined on merit to allow him a chance to be heard, notwithstanding the fact that he had filed a notice of motion rather than a summons for revocation.



5. He quoted Article 159(e) and opposed the dismissal of the appeal and held that the court had the discretion to set aside the dismissal of the application or a suit for non-attendance and quoted the case of *Shah v Mbogo* (1979) EA 116.
6. He further quoted the case of *Hon. Attorney General v the Law Society of Kenya & Another*, Civil Appeal (Application) No. 133 of 2011 (UR), Musinga, JA and *Philip Chemowolo & Another v Augustine Kubende*, [1982-88] KAR 103 at 1040 Apalo, JA (as he then was) in support of his case where a court should not shut its door to justice on account of a mistake.
7. The applicant prays that the order made on 30<sup>th</sup> May 2025 dismissing the summons for revocation for non-attendance be set aside and the said Summons for Revocation and/or Notice of Motion dated 15.08.2025 be reinstated for hearing on merit.
8. In their submissions, the respondent avers that the appellant had filed a myriad of applications and that on 30<sup>th</sup> May 2025, this court noted that the file had been inactive and marked it closed for want of prosecution.
9. They claimed that despite the file being marked closed, the appellant filed a notice of motion application seeking that the matter be reinstated. The respondent holds that the applicant's submission appealed to the court's emotions as opposed to supporting its claim with evidence and holds that the court has no jurisdiction to entertain the application without first reinstating the appeal, and hence the chamber summons and notice of motion dated 15<sup>th</sup> August 2025 have no anchor as the appeal had been dismissed and had not yet been reinstated.
10. They quoted the case of *Kenya Commercial Bank v Nyantika* (Civil Appeal 134 of 2002) [2003] eKLR, and *Stephen Onyango Achola & Another v Edward Hongo Sule* [2004], where the court held that once a matter was dismissed for want of prosecution, it cannot be reinstated through an interlocutory application unless the dismissal is set aside.
11. They hold that the applicant had not obtained the orders for reinstatement of the appeal and thus this court is *functus officio* in relation to dismissal of the appeal.
12. They submit that the application was purely an academic exercise and that it is a waste of judicial time.
13. The questioner questioned the applicant's motive by stating that they did not refer to the alleged application that had been dismissed and went further to file a new application dated 15<sup>th</sup> August 2025, and stated that although reinstatement is discretionary, it ought to be exercised judiciously and the applicant ought to demonstrate sufficient cause for the delay, which they failed to demonstrate.
14. According to the respondent, they will suffer undue prejudice as they were meant to believe that the matter was concluded for want of prosecution and that they have a legitimate expectation that litigation has to come to finality and that reviving the appeal after an inordinate and unexplained delay not only disrupts that expectation but also exposes the Respondent to unnecessary legal costs and prolonged uncertainty.
15. They pray that the appeal, which was filed in 2018, and they made no reason to delay it, and submit that the court should not reinstate the appeal nor the interlocutory applications.

### **Analysis and determination**

16. I have carefully considered the application, the supporting affidavit, the replying affidavit, and the rival submissions on record. The main issue for determination is whether the dismissal of the Summons for



Revocation of Grant for want of prosecution on 30th May 2025 should be set aside and the matter reinstated for hearing on its merits.

17. The law governing the reinstatement of suits dismissed for want of prosecution is settled. Courts are clothed with inherent jurisdiction to set aside such orders where sufficient cause is shown. In *Shah v Mbogo & Another* [1979] EA 116, the Court held that the discretion to set aside an *ex parte* judgment or order is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, but not to assist a party who deliberately seeks to obstruct or delay the course of justice. The principles governing such applications are well-settled
18. In *Rev. Dr. Timothy M. Njoya & 6 Others v Hon. Attorney General & 4 Others* [2014] eKLR, the Supreme Court affirmed that discretion must balance expedition (Article 159(2)(b)) with fairness (Article 50(1)), avoiding "justice denied by technicalities."
19. Similarly, in *CMC Holdings Ltd v Nzioki* [2004] 1 KLR 173, the court outlined a tripartite test:
  - a. was the delay inordinate
  - b. Was it inexcusable
  - c. Would reinstatement cause prejudice irreparable by costs.
20. Here, the delay from 2021 to May 2025 (approximately 3 and a half years) is inordinate, as litigation must not be perpetual. However, the Applicant provides a plausible excuse.
21. The Applicant explains that he was financially constrained due to school fees obligations and that his sister and the Respondent allegedly utilized the estate funds to her benefit. Although financial hardship is not always an absolute defence to delay, this Court takes judicial notice of the socio-economic realities in succession disputes and the importance of determining such matters on their merits. The explanation offered, though not robust, is plausible and not shown to be in bad faith.
22. The primary consideration is whether reinstating the matter would result in prejudice to the Petitioner that cannot be remedied through costs. The Petitioner invokes the principle of finality in litigation and the reasonable expectation that legal disputes reach a conclusion.
23. While this argument holds merit, the prejudice alleged primarily pertains to the inconvenience of defending the case anew, which can be adequately addressed through an award of costs. Conversely, refusing reinstatement would irrevocably bar the Applicant from pursuing legitimate claims to the estate.
24. The Court of Appeal in *Hon. Attorney General vs. Law Society of Kenya & Another*, Civil Appeal (Application) No. 133 of 2011 (UR) stated that courts should lean towards sustaining rather than striking out matters where possible, unless the conduct of a party is inexcusable. Similarly, in *Ivita v Kyumbu* [1984] KLR 441, Chesoni J (as he then was) held that the test for reinstatement is whether the delay is prolonged and inexcusable, and if so, whether justice can still be done despite the delay.
25. Applying the above principles, I find that although there has been a delay, it has been explained to a reasonable extent, and justice can still be done by reinstating the matter. The Respondent's concerns about prejudice can adequately be addressed by costs and directions for expeditious disposal.
26. Weighing the scales, the interests of justice favor reinstatement. The Applicant demonstrates intent to prosecute and a triable revocation claim on merits, vital in succession where estates must be equitably distributed. Denying a hearing would perpetuate alleged inequities, offending Article 50 on fair hearing



27. Accordingly, the application is allowed as prayed. The orders of 30th May 2025 are vacated, the orders of 22nd November 2021 are reinstated, and the Summons for Revocation and/or Notice of Motion dated 15th August 2025 are restored for hearing on merits.

Orders;

- i. The Applicant shall file and serve a formal application for directions within 14 days;
- ii. The matter shall be set down for hearing within 30 days and prosecuted to conclusion within 6 months, failing which it shall stand dismissed without further order;
- iii. Costs of this application shall be in the cause.

**DATED SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 3<sup>RD</sup> OF OCTOBER, 2025.**

**S.N. MBUNGI**

**JUDGE**

In The Presence of;

Ms Namange for the Appellant, present.

Ms Osoro for the ODPP present.

