



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of the Late Rebecca Washuka Kinina (Deceased) (Succession Cause 478 of 2015) [2025] KEHC 14895 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14895 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 478 OF 2015  
RN NYAKUNDI, J  
OCTOBER 23, 2025**

**IN THE MATTER OF**

**RACHEL NJERI GITIHA ..... 1<sup>ST</sup> ADMINISTRATOR  
LEAH MUTHONI KININA ..... 2<sup>ND</sup> ADMINISTRATOR**

**RULING**

1. What is pending before this Court is Summons dated 17<sup>th</sup> January 2025 brought pursuant to Order 45 rule 1 of the Civil Procedure Rules 2010 and Rule 73 of the Probate and Administration Rules where the Applicants/Administrators sought for the following orders:
  - a. That the order dismissing the summons for confirmation of grant and closing the file made on the 22<sup>nd</sup> October 2024 be reviewed and set aside.
  - b. That the summons for confirmation of grant dated the 31<sup>st</sup> August 2018 be fixed for hearing.
  - c. That the costs of the summons be sourced from the estate.
2. Which application is supported by the affidavit sworn by Counsel for the Applicant Tobias Nyaberi Mogambi who depones as follows:
  - a. That I am an Advocate of the High Court practicing as such under the name and style of Wambua Kigamwa & Company Advocates hence competent to swear this affidavit.
  - b. That on 9<sup>th</sup> December 2024 we presented a request to have this matter fixed for summons for confirmation of grant.
  - c. That however, we could not secure a date immediately and made a follow up on the 13<sup>th</sup> January 2025 and it was dismissed for want of prosecution.
  - d. That we have moved the court to review the order dismissing and closing the file on the grounds:



- i. Notice was not given by the court listing the matter for notice to show cause why it ought not to dismiss the summons for confirmation of grant for want of prosecution.
  - ii. The order as made is prejudicial to the beneficiaries and personal representatives of the estate of the deceased as they had made efforts to prosecute the matter by filling consent on the mode of distribution.
  - iii. Notices were not served by the court in respect of the dates of the 27<sup>th</sup> February, 2023, 20<sup>th</sup> July 2023 and 22<sup>nd</sup> October 2024 despite express orders in place for service to be effected.
- e. That we pray that the order be set aside and the summons for confirmation of grant be reinstated to enable its prosecution to conclusion.

### **Analysis and Determination**

3. I have read and considered the summons and the affidavit in support of the same. There is one issue for determination by this Honourable Court;

**a. Whether the Summons seeking for the review and setting aside of the order dismissing the summons for confirmation of Grant dated 22<sup>nd</sup> October 2024 is merited?**

4. Section 80 of the *Civil Procedure Act* allows a party who is aggrieved by a judgement to apply to the court for review. Similarly, Order 45 Rules (1) and (2) of the Civil Procedure Rules sets out the grounds upon which an application for review will be founded. They are as follows: -

- a. A decree in which no appeal is allowed;
- b. There is discovery of new and important matter which after exercise of due diligence was not within the applicant's knowledge;
- c. There was a mistake or an apparent error on the face of the record;
- d. There are other sufficient reasons;
- e. The application must be made without unreasonable delay.

5. It is not in doubt that the Court possesses a wide discretion in deciding whether to allow an application for the setting aside the dismissal of an Application, or even a suit. This discretion must however be exercised judiciously as was well-stated in the case of *Shah v Mbogo (1979) EA 116* as follows: -

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

6. For the Court to exercise its discretion in favour of the Applicant, it must be satisfied that there is sufficient cause or reason to warrant reinstatement of an action dismissed. In the case of the Hon. Attorney General v the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (UR), Musinga, JA explained as follows the meaning of sufficient cause: -

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“28. Sufficient cause” or “good cause” in law means:“..... the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused”.

See Black’s Law Dictionary, 9<sup>th</sup> Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

7. The material before the Court shows that the Applicants took active steps to have the summons fixed for hearing including a request on December 09, 2024 and a follow-up on January 13, 2025. Counsel deposes that despite express orders for service for several dates being February 27, 2023, July 20, 2023 & October 22, 2024 notices were not served by the Court Registry. The Applicants further aver that they had filed material, including a consent on the mode of distribution and that dismissal without notice has prejudiced beneficiaries who have actively prosecuted the matter.
8. The Court must be cautious when considering applications to set aside dismissals for want of prosecution. Dismissal for want of prosecution is an important case-management tool that enables courts to remove dormant matters from the roll and to manage scarce judicial resources. However, the power to strike out or dismiss must be exercised only after giving parties a fair opportunity to show cause, unless the right to be heard has been unequivocally waived. In the present case the Applicants’ unchallenged affidavit establishes three salient factors that weigh strongly in favour of relief:
  - a. Active conduct to prosecute: Counsel’s affidavit describes concrete steps taken to have the matter fixed and followed up; this is inconsistent with willful neglect by the Applicants.
  - b. Alleged registry default / lack of notice: The Applicants assert that the Registry did not serve notices for several listed dates despite orders for service.
  - c. Prejudice to beneficiaries: The Applicants demonstrate that beneficiaries have acted in reliance on the pending summons notably by lodging a consent on mode of distribution and that dismissal will produce irreparable prejudice to those interests.
9. In the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, the Court of Appeal held that: -

“[22]. 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.”
10. Similarly, the Court of Appeal, in the case of *CMC Holdings Ltd v James Mumo Nzioka* (2004) KLR 173, guided as follows: -

“The discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”



11. On the evidence before me, I am satisfied that dismissal of the summons on 22<sup>nd</sup> October 2024 should be set aside for the reasons that: The Applicants made reasonable attempts to obtain a hearing date; they were not afforded a fair opportunity to be heard in the event that the registry erred in effecting service and that the interests of justice and the rights of beneficiaries require the matter be heard on its merits rather than being finally determined by procedural default.
12. In exercise of the Honourable Court's powers under Order 45 rule 1 of the Civil Procedure Rules 2010 and Rule 73 of the Probate & Administration Rules and in the interests of justice, the application is merited. Consequently, the following orders shall abide: -
  - a. That the order dated 22<sup>nd</sup> October 2024 dismissing the summons for confirmation of grant for want of prosecution and closing the file be and is hereby reviewed and set aside. The matter is hereby reinstated for hearing on merit.
  - b. That the Deputy Registrar is hereby directed to fix the summons for confirmation of grant dated 31<sup>st</sup> August 2018 for hearing on merit before this Court within 30 days from the date of this Ruling.
  - c. That without complying to the thirty (30) days granted above for prosecution of the Summons, this case docket shall be removed entirely from this Honourable Court.
  - d. That there shall be a Status Conference on 23<sup>rd</sup> November 2025 to confirm compliance with the aforementioned orders.
  - e. The Costs shall be in the cause.
  - f. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET VIA CTS THIS 23<sup>RD</sup> DAY OF OCTOBER 2025**

.....

**R. NYAKUNDI**

**JUDGE**

