



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYANDARUA**

**PROBATE & ADMINISTRATION NO. E006 OF 2025**

**IN THE MATTER OF THE ESTATE OF:**

**JOHN ITEGI GITHINJI.....DECEASED**

**BETWEEN**

**ROSE NYAMBURA ITEGI.....1<sup>ST</sup> ADMINISTRATOR/RESPONDENT**

**ANN GATHONI KABUCHU.....2<sup>ND</sup> ADMINISTRATOR/RESPONDENT**

**AND**

**JOSEPH GICHUKI MUGO.....APPLICANT**

**RULING**

1. Joseph Gichuki Mugo, the applicant herein, has moved the court by way of Chamber Summons dated the 16<sup>th</sup> day of July 2025. The application is brought under Section 76 of the Law of Succession Act, Rule 44 of the Probate and Administration Rules, sections 1A, 1B and 3A of the Civil Procedure Act & Order 12 Rule 7 of the Civil Procedure Rules. He is seeking the following orders:
  - a) The application herein be certified as urgent and heard *ex parte* in the first instance. [Spent]
  - b) That pending the *inter partes* hearing of this application, the honourable court be pleased to stay the implementation of the certificate of confirmation of grant issued in this matter. [Spent]
  - c) That in the alternative to (2) above, pending *inter partes* hearing of this application, the honourable court be pleased to maintain the status quo existing. [spent]
  - d) That this honourable court be pleased to order that the application dated 30<sup>th</sup> May, 2023, be reinstated for determination on merit.

- e) The grant of letters of administration intestate issued to Rose Nyambura Itegi and Alice Gathoni Kabuchu and confirmed on 17<sup>th</sup> June, 2025, in respect of the estate of John Itegi Githinji, be revoked,
- f) That the costs of and incidental to this application be awarded.

2. The application was premised on the following grounds:

- a) The applicant is a biological child of the deceased and therefore a lawful beneficiary entitled to a share of the estate under the Succession Act (Cap 160, Laws of Kenya).
- b) A grant of letters of administration intestate was issued and has since been confirmed in this cause.
- c) That, however, the administrators deliberately failed to include the applicant, a biological son of the deceased, as a beneficiary of the estate.
- d) That the omission of the applicant, despite the administrators' full knowledge of his existence and rightful claim, amounts to concealment of a material fact from the Honourable court, which is a valid ground for revocation of the grant under section 76 of the Law of Succession Act.
- e) Upon learning of the proceedings herein, the applicant promptly filed an application dated 30<sup>th</sup> May, 2023, seeking to be recognized and joined as a beneficiary in this cause.
- f) The said application was, however, dismissed for want of prosecution on 20/3/2025.
- g) The applicant's advocate failed to take the necessary steps to prosecute the application despite being fully instructed, the applicant.
- h) The applicant should not be punished for the mistakes of his advocate.
- i) That applicant was condemned heard.
- j) It is imperative that the said application be reinstated for hearing and determination on merit, in order to avert a grave miscarriage of justice against the applicant.
- k) It is in the interests of justice, and in keeping with the principles of equity and fair administration of estates, that this application be allowed as prayed.
- l) The respondent do not stand to suffer any prejudice if the orders sought herein are granted.

m)The application is ready and willing to abide by any other order that this honourable court may give to ensure the fair and just disposal of this application.

3. The 2<sup>nd</sup> respondent opposed the application on the following grounds:

- a) On 24<sup>th</sup> February, 2025, this honourable court issued directions that the application dated 30<sup>th</sup> March, 2023, be heard by way of written submissions, and hereby the court gave timelines for filing such written submissions. The court also fixed this case for mention on 20<sup>th</sup> March, 2025, to confirm compliance and to fix a ruling date.
- b) On 20<sup>th</sup> March, 2025, when this cause came up before the court, the applicant's written submissions had not been filed. Neither the applicant's advocates nor the applicant was present before the court, and the application dated 30<sup>th</sup> May, 2023, was consequently dismissed for want of prosecution. In the circumstances, the applicant's submissions on the so-called preliminary issue are misleading.
- c) Secondly, and of most importance, the so-called preliminary issue is not raised in the applicant's pleadings, and the same is raised belatedly through submissions, which are not pleadings. The applicant, having not raised the so-called preliminary issue in his pleadings, is in law not permitted to raise it by way of submissions.
- d) The applicant has placed blame for his failure to prosecute the application dated 30<sup>th</sup> May, 2023, on his previous advocates on record, M/s Waichungo Martin & Co. Advocates. The applicant has not denied being aware that his application dated 28<sup>th</sup> September, 2024 (for orders for a DNA test) was coming up for ruling on 20<sup>th</sup> December, 2024. The application has not shed any light on whether he communicated with his previous advocates to ascertain the outcome of his said application dated 28<sup>th</sup> September, 2024, and the orders or directions made by the court in respect of his earlier application dated 30<sup>th</sup> May, 2023.
- e) Even as the applicant would like to wholly blame his previous advocates, the applicant has not informed this court what steps, if any, he took to follow up his pending applications in this suit with his previous advocates, more so bearing in mind that the case belongs to the litigant and to his/her advocate.
- f) The applicant was under a duty to make the necessary follow-ups on his pending applications, including the application dated 30<sup>th</sup> May, 2023, with a view to

confirming and ensuring that his application dated 30th May, 2023, was being attended to by his advocates on record.

- g) The applicant is thus equally to blame for the inaction and failure to prosecute the application dated 30<sup>th</sup> May, 2023.
- h) By reason of the foregoing and in view of the applicant's past inaction and indolence, the applicant is not deserving to be granted an order for reinstatement of the application dated 30<sup>th</sup> May, 2023.
- i) The Grant of Letters of Administration intestate issued to the 1<sup>st</sup> and 2<sup>nd</sup> administrators /respondents in this cause was issued on 29<sup>th</sup> September, 2022. In his application dated 30<sup>th</sup> May, 2023, which the applicant now seeks reinstated, the applicant did not apply for the revocation of the said grant at the earliest opportunity. This shows that the applicant's application for the revocation of the grant in this cause is clearly an afterthought.
- j) The issue whether or not the applicant is a child, dependent, or beneficiary of the deceased is yet to be determined by this honourable court, and the applicant cannot therefore rely on such undetermined issue to apply for revocation of the grant in this cause.
- k) The applicant has not placed any material or evidence before this honourable court to prove the statutory grounds for revocation of the grant under section 76 of the Law of Succession Act, and the applicant has indeed not made any submissions on the statutory grounds for revocation of the grant under the said section 76. Consequently, the applicant's prayer for revocation of the grant has no merit, and the same should be disallowed.
- l) The applicant has not sought for any orders for reviews and setting aside of the confirmation order made on 17<sup>th</sup> June, 2025. The applicant cannot seek review and/or setting aside of the said confirmation order by way of submissions. It bears repetition that submissions are not pleadings.
- m) Allowing the instant application will, without doubt, further delay the distribution of the deceased's estate for an unknown period of time and such delay with obviously cause prejudice to the 2<sup>nd</sup> Administrator/respondent. It is therefore not true that the 2<sup>nd</sup> administrator will not suffer any prejudice if the instant application is allowed, as alleged by the applicant.
- n) In the ultimate, we submit that the application dated 16<sup>th</sup> July 2025 has no merit, and we pray that the same be dismissed with costs.

4. The application that the applicant is seeking to reinstate is dated 30<sup>th</sup> May, 2023. This application was dismissed for want of prosecution on 20<sup>th</sup> March, 2025. This court has not been given sufficient reasons to reinstate an application that has been in court for almost 2 years without prosecution. Allowing the reinstatement of the application will promote an abuse of due process.

5. Section 76 of the Law of Succession Act provides:

***A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—***

***(a) that the proceedings to obtain the grant were defective in substance;***

***(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***

***(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, notwithstanding that the allegation was made in ignorance or inadvertently;***

***(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—***

***(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or***

***(ii) to proceed diligently with the administration of the estate; or***

***(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***

***(e) that the grant has become useless and inoperative through subsequent circumstances.***

6. For the applicant to succeed in applying for revocation, he must demonstrate his right in the estate. This issue has never been determined because he failed to prosecute his application, which was dismissed.

7. Rule 63 of the Probate and Administration Rules makes provision on which legal provision an application may be based as follows:

*(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.*

*(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.*

8. In the case of **Priscilla Vugutsa Kamaliki vs Mary Runyanyi Ochieng** [2016] eKLR Judge **Nekoye Sitati** said the following:

*The first issue for this Court to determine is whether the instant application is properly before the Court. The application is expressed to be brought under Section 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act Order 40 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules. It is worth noting that the Law of Succession Act is a self-contained Act and provisions of the Civil Procedure Act, unless specifically imported into it are not applicable. A look at Rule 63 of the Law of Succession Act reveals that the provisions under which the present application is brought are not some of the provisions imported into the Law of Succession Act. What this means, therefore, is that the instant application is incompetent for want of form and is therefore fit for striking out.*

9. In the present case, the applicant has premised his application on legal provisions not incorporated into the Law of Succession Act. This complicates his already inadequate application.

10. The application is dismissed with costs.

**Delivered and signed at Nyandarua, this 16<sup>th</sup> day of December 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**

