

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

SUCCESSION CAUSE NO. E008 OF 2024

(CORAM: CHARLES KARIUKI - J)

IN THE MATTER OF THE ESTATE OF LUCAS NTALAMEA OLE

KUDATE (DECEASED)

ZAHRA NOOR ISMAEL DUALE.....APPLICANT

-vs-

NANYIGAE KUDATE.....1ST RESPONDENT

SAMUEL KASAINI KUDATE.....2ND RESPONDENT

ROBERT KANYINGE KUDATE.....3RD RESPONDENT

RULING

1. The Applicant Lodged application dated 13/2/2025 seeking the Respondents to show cause why they should not be committed to civil jail for violating court orders and that the said Respondents be punished for violation of the court orders.
2. The application was fixed for hearing on 26/6/2025 but on that date the applicant and her advocate were not in court when the matter was called. Meanwhile the Respondent's Advocate moved court on non-attendance thus

prompted the Applicant to lodge motion dated 27/6/2025 seeking to reinstate the dismissed application.

3. The parties were directed to canvass motion via submissions which they filed and exchanged. The Applicant's Advocate explanation for lateness is that in that day he and Applicant arrived in court at 9.25a.m. The advocate addressed court and sought to recall the file but was advised to call his colleague for the Respondent to mention matter together.
4. It is averred that the Respondents Advocate failed to receive call. Later the Respondent called and stated that he was through with court work thus he was constrained to file the application. The matter dated 27/6/2025 for reinstatement of the application dated 13/2/2025. The parties agreed to canvass same via submissions.
5. **Applicant's submissions: -**
6. **Legal Analysis and the Law: -**
7. It is a trite that reinstatement of a suit as the discretion of the court, which discretion ought to be exercised in a just manner. In the case of ***Thathini Development Company Limited -vrs- Mombasa Water & Sewerage Co. Ltd Mombasa ELC 689/2022*** the court held as follows:

“A suit dismissed for want of prosecution, means that the parties therein failed to aise court in meeting its overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion.”

8. It's on record that the applicant's counsel attended the physical court after travelling all the way from Nairobi to Narok on 26th June, 2025 when he got into the court at around 9.30a.m. am the matter had already been called and directions issued online.
9. The applicants counsel explained this to your Lordship who recalled and directed the Respondents counsel be called so that the court would issue directions. Unfortunately, the respondent's counsel be design failed to attend to the same despite being notified by the court assistant.
10. That the courts do retain inherent or residual powers to render justice in every case before them under Section 3A of the Civil Procedure Code in the case of *Murtuza Hassan & Another -vrs- Ahmedslad Kulmiye* the court cited *Halburys Laws of England 4th Edition Vol 37* addressing the inherent residual powers of the court;

“Is virile doctrine and has been defined as being the reserve or found powers, a residual source powers which the court may draw upon as necessarily whenever, it is just or equitable to do so, in particular to ensure observance of due process of law, to do justice between the parties and secure a fair trial between them.”

11. The Respondents herein have disobeyed court orders and the application dated 13th February, 2025 which the court had issued orders that the

Respondents appear in court in person on 26th June, 2025 to show cause why they should not be held in contempt of this court's orders.

12. This is a very important application because the duty to obey the law by all individuals and institution is paramount in the maintenance of the rule of law, good order and the due administration of justice.

13. Respondents Submissions: -

14. The Applicant has not alleged fraud, nor has she pleaded mistake. What she seeks is a judicial miracle to undo a lawful dismissal Application by invoking sympathy cloaked in procedural jargon. The record is unambiguous the application dated 13th February 2025 was dismissed in open court. The applicant's attempt to recharacterize the dismissal as a mere procedural hiccup is a forensic sleight of hand that this Honorable Court ought to humbly reject.

15. Courts must not allow parties to reopen closed chapters merely because they regret their inaction, which in this case was the indolence of the Applicant. To allow reinstatement in such circumstances would be to shatter the sanctity of judicial orders, to reduce the solemnity of court proceedings to a revolving door of indecision. It would embolden litigants to treat court orders as tentative suggestions rather than binding pronouncements. *Interest*

reipublicae ut sit finis litium it is in the public interest that litigation comes to an end.

16. The court's directions on 26th June 2025 were issued in open court. The Applicant's counsel was admitted late and missed the call over. The court, in its magnanimity, even allowed him to address the bench post call over. That the court proceeded to dismiss the application thereafter is a judicial act presumed to be regular under the *doctrine of omnia praesumuntur rite esse acta*, all things are presumed to have been done rightly and regularly.

17. ISSUES ANALYSIS AND DETERMINATION:

18. After going through the record and parties submissions, I find issues are whether the application has merit and costs. The Applicant's Advocate explanation for lateness is that in that day he and Applicant arrived in court at 9.25a.m. The advocate addressed court and sought to recall the file but was advised to call his colleague for the Respondent to mention matter together. This is not controverted.

19. It is averred that the Respondents Advocate failed to receive call. Later the Respondent called and stated that he was through with court work. This averment also is not controverted. Thus, the applicant counsel was constrained to file the application. The matter dated 27/6/2025 for reinstatement of the application dated 13/2/2025.

20. The parties agreed to canvass same via submissions. An application to reinstate a suit dismissed due to an advocate's lateness is governed by Order 12 Rule 7 of the Civil Procedure Rules, which allows the court to set aside a dismissal order upon "*such terms as may be just*" if the applicant can show "sufficient cause" for the non-appearance.
21. The court's power to reinstate is discretionary, aimed at ensuring substantive justice rather than punishing litigants for procedural technicalities or their advocate's errors.
22. Here are the key grounds and principles for a reinstatement application based on advocate lateness: "*Sufficient Cause*" for Non-Appearance, the applicant must explain why the advocate was late or absent. Examples of "sufficient cause" accepted by Kenyan courts include: Excusable Mistake/Inadvertence: The advocate misunderstood the cause list, had a scheduling conflict in another court (if supported by evidence), or suffered an emergency.
23. Accident or Unforeseen Circumstances: E.g., sudden illness or traffic chaos that caused a short delay. Communication Breakdown: If the advocate did not receive timely notice of the hearing. Mistakes of Counsel Should Not Punish the Litigant. A primary principle in Kenyan law is that a litigant should not suffer for the mistakes or negligence of their advocate. Courts often hold that unless there is fraud or an intentional desire to obstruct

justice, the advocate's failure to attend should not mean the case is lost forever.

24. The "*Oxygen Principle*" (Article 159 & Civil Procedure Act) Courts are obligated under Article 159(2)(d) of the Constitution and Sections 1A, 1B, and 3A of the Civil Procedure Act to administer justice without undue regard to technicalities. Dismissal is considered a "draconian" step that should be avoided if the case can still be heard on its merits.

25. Lack of Intent to Delay (Contumelious Conduct). The applicant must prove that the lateness was not part of a deliberate pattern of behavior intended to sabotage the court process or harass the opposing party.

26. Merits of the Case: The applicant must show that their case has a reasonable chance of success and is not frivolous. No Irreparable Prejudice to the Defendant.

27. The applicant must show that if the case is reinstated, the defendant will not suffer prejudice that cannot be cured by paying "*throwaway costs*" (costs for the wasted day). Prompt Filing of Reinstatement Application. The application to reinstate must be made promptly after the dismissal. A long, unexplained delay in filing the reinstatement application can lead to its rejection, as the court might view the applicant as no longer interested in the suit.

28. In the instant case the applicant's candidness aids him in scoring highly on the positive side of persuading court to exercise discretion in his favour. The parameters stated above favour reinstatement and more, so the applicant advocates prompt appearance before court shortly after dismissal, seeking reinstatement and even calling the respondent's advocate who declined to indulge him.

29. Without much ado I reinstate the same application and advise parties/advocates to take hearing dates. The respondent will not get costs for being unkind to the applicant's advocate.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS
APPLICATION, THIS 13TH FEBRUARY 2026.**

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HON. CHARLES KARIUKI

JUDGE