



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Bernard Kilonzo Katiku (Deceased) (Succession Cause
391 of 2015) [2024] KEHC 9268 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 391 OF 2015**

MW MUIGAI, J

JULY 29, 2024

IN THE MATTER OF THE ESTATE OF BERNARD KILONZO KATIKU - DECEASED

BETWEEN

MUENI KILONZO PETITIONER

AND

JOYCE MUKULU KILONZO OBJECTOR

AND

RUEBEN KIMANI NJOROGE PROTESTOR

AND

VICTOR NZIOKI KILONZO BENEFICIARY

VICTORIA MUTETE KILONZO BENEFICIARY

CAROL KATHIO KARIUKI BENEFICIARY

ALEXANDER KATIKU KILONZO BENEFICIARY

RULING

1. This Court in its Judgment delivered on 28th April, 2023 ordered that the Summons for Confirmation and Protests be compromised as follows;
 - (1) The Deceased is survived by the following beneficiaries;
 - a. JMK
 - b. MK
 - c. VNK – Son



- d. VMK– Daughter
 - e. CKK- Daughter
 - f. AKK – son
- (2) The following shall be subjected to Sibling DNA testing and/or evidence of maintenance by the deceased prior to his death
- g. BMK
 - h. GKK
 - i. MKK
- (3) The assets that comprise of the deceased’s estate are as follows;
- a. Machakos/Kiandani/2XX2
 - b. Machakos/Kiandani/2XX8
 - c. Masii/Muthini/2XX
- (4) The estate of the deceased is distributed as follows;
- a. Machakos/Kiandani/2XX8- wholly to JMK and 4 children
 - b. Subject to 50’ by 100’ to RKN as Creditor of deceased’s estate or bonafide Purchaser in ELC Court and status quo shall be maintained
 - c. Machakos/Kiandani/2XX2 distributed to JMK and 4 children.
 - d. Masii/Muthini/2XX distributed to JMK and 4 children and portion to MK subject to Sibling DNA of 3 children
- (5) No order as to Costs each party to bear own costs.

Chamber Summons – Dated 17/07/2023

2. The Applicant herein filed a Chamber summons and sought the following orders;
- 1. Spent
 - 2. This Court direct the Deputy Registrar to sign all necessary and requisite transmissions document’s necessary for transmission of all those properties known as Machakos/ Kiandani/2XX8, Machakos/Kiandani/2XX2 and Masii/Muthini/2XX in place of MK (the 2nd Administrator) to JMK (the Applicant herein) as per the Certificate of Confirmation of grant dated 28/04/2023 and issued on 16/05/2023.
 - 3. Costs of this application be provided for.
3. The Application is supported by the affidavit of JMK who contends that the succession cause herein is in its completion stages, Judgment having been entered on 28th April, 2023 and a certificate of confirmation of grant issued by this court on 16/05/2023 and what remains is the distribution of the deceased’s estate among his lawful beneficiaries before the lapse of six months. She stated that the Co-administrator has refused and/or failed to deliver or execute the necessary documents to facilitate transmission of the deceased’s assets and ultimately distribution of the deceased estate. It was contended that in the interest of justice, the deputy Registrar executes the necessary documents for



transmission as she requested the 2nd Administrator to supply her with the necessary documents for transmission and ultimate distribution of the estate but had not received a response to date.

Notice of Motion dated 26/07/2023

4. The beneficiaries/interested parties filed their Application seeking the following orders;
 - (a) Spent
 - (b) Spent
 - (c) Spent
 - (d) Spent
 - (e) This Court review and set aside the judgment delivered on 28th April, 2023 and include the Applicants herein as heirs of the Estate and accordingly allocate to them a part of the Estate as provided by law.
 - (f) The costs of this application be provided for.
5. The application is supported by the Affidavit by BMK made on his behalf and on behalf of the other Interested parties sworn on even date stating inter alia that this Court judgment delivered on 28/04/2023 distributed the deceased's estate but failed to give a clear and definite share to the interested parties in its order for distribution and there is real danger that the interested parties shall be disinherited if the Estate is distributed and the properties change hands to the other beneficiaries and liabilities.
6. He contended that they are beneficiaries by virtue of their birth certificates. He It was stated that there are dependents and beneficiaries of the deceased by virtue of birth and have depended on the deceased for their education and shelter and the process of DNA may take a long hence this pose a great challenge to salvage the loss which may be occasioned to them.

Objector's Grounds of Opposition

7. The objector/applicant herein filed her grounds of Opposition to the Petitioner's Application dated 26/07/2023 as follows;
 - a. The application is bad in law, frivolous, vexatious and is otherwise an abuse of this Honourable Court's process.
 - b. The orders sought in the application are incapable of being granted as there is no justification and/or basis has been laid for the same by the applicants.
 - c. The proceedings herein are by and large concluded judgment having being entered on 28th April 2023 and a certificate of confirmation of grant having been issued by the Honourable court on 16th May 2023 and the Applicants/interested parties were not participants in the proceedings herein.
 - d. The validity of the purported birth certificates attached to the application is heavily contested and/or disputed;
 - e. There is no explanation, reasonable or otherwise has been supplied as to the difficulty in carrying out a DNA test as directed by the Court in its aforesaid judgment.



- f. The application has been made in bad faith as the blanket request for review of this courts aforesaid judgment is tantamount to pursuing an appeal through the back door.

Replying affidavit

8. The Objector filed her Replying Affidavit sworn 11.10.2023 and contended that the applicants entitlement to inheritance of the deceased's property was strictly contingent and/or predicted on their undertaking of a sibling DNA test to verify that they were children of the deceased herein; the sudden appearance/ production of birth certificates is highly suspicious and the authenticity thereof is highly challenged, contested and/or disputed as it has not been demonstrated hence as such it is merely an afterthought.

Petitioner's Grounds of Opposition

9. The Petitioner filed her grounds of opposition dated 25th August, 2023 based on the following grounds inter alia that;
- a. The application is incompetent, bad in faith and an abuse of courts process;
 - b. The present application is misconceived and an attempt to waste courts judicious time.
 - c. The application is premature as the beneficiaries herein have moved the court vide application dated 26.07.2023 seeking temporary stay of execution and review of the judgment of 28/04/2023 and which matter is still pending for hearing and determination.

Replying Affidavit by the interested parties

10. BM the 1st Interested party sworn on 4th December, 2023 stating inter alia that the interested parties are dependants of the deceased within section 29 of the *laws of Succession Act* and their stake in the estate ought to be addressed before distribution of the estate is done. He stated that the objector had not demonstrated by way of evidence if she has made any efforts to have her co-administrator execute the transmission documents and a mere statement of existence of bad blood between the co-administrators cannot be relied upon.

Written Submissions

11. It is only the Interested parties who filed their written submissions. They reiterated the contents of its replying affidavit and stated that they ought not have been subjected to DNA tests and the birth certificates indicating that the deceased was their father has not been challenged. Reliance was placed on the case of *S.W.M. vs G.M.K.* [2012] eKLR.

Determination

12. This Court has considered the Applications on record, dated 17.07.2023 and 26.07.2023, the affidavits thereto for and against, the grounds of opposition and the submissions on record and I find that the issues for determination are;
- a. Whether this court should review and set aside the judgment delivered on 28.04.2023 and include the applicants herein as heirs of the estate and accordingly allocate to them a part of the estate as provided by law.
 - b. Whether the Deputy Registrar should be directed to sign the transmission forms.



13. Order 45 rule 1 of the *Civil Procedure Rules* is a proviso that gives the conditions to be met by a court before granting an order for review; it states as follows:
- (1) Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
 - (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”
14. The Court of Appeal in *Mahinda vs. Kenya Power & Lighting Co. Ltd* [2005] 2 KLR 418 expressed itself as follows:
- “The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made.”
15. This same Court in the case of *Anthony Gachara Ayub vs. Francis Mahinda Thinwa* [2014] eKLR which quoted with approval the judgment of the High Court in *Draft and Develop Engineers Limited vs. National Water Conservation and Pipeline Corporation*, by stating:
- “An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible.”
16. The only grounds upon which a court can review its orders are;
- a. from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made,



- b. or on account of some mistake or error apparent on the face of the record,
 - c. or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
17. In this case, the interested parties are asking this court to list them as beneficiaries and have them inherit from the estate as beneficiaries. The Objector strongly contests the documentation that has been produced and contends that they are an afterthought.
18. As elucidated earlier, for this court to address such an issue, there must be demonstration and satisfaction of at least one limb of Order 45 of the *Civil procedure Rules*, 2010 the issue of the interested party being subjected to DNA was addressed by this court and the court rendered itself as follows;

“The Petitioner produced Identity Cards of the 3 children ideally Birth Certificates would help determine biological parents of the children. See; *In Re Estate of Peter Simel Muse Lengakah (Deceased)* [2019] eKLR. If they were assimilated into the family, evidence of dependency would help resolve the dispute on whether they are beneficiaries of deceased’s estate or not. At this stage, there is no sufficient evidence on record to determine this question one way or the other. The children may consider Sibling DNA testing to resolve the matter once and for all.”

Disposition

19. For now, the list of beneficiaries includes, the Objector and 4 children and the Petitioner awaiting DNA Sibling testing to include the children as the deceased’s biological children or evidence of dependency of the children as having lived with and/or that they were maintained by the deceased and are dependents of the deceased’s estate within the meaning of Section 29 of *LSA*.
1. The Summons for Confirmation and Protests are compromised as follows;
 2. The Deceased is survived by the following beneficiaries;
 - a) JMK
 - b) MK
 - c) VNK – Son
 - d) VMK – Daughter
 - e) CKK- Daughter
 - f) AKK – son
 3. The following shall be subjected to Sibling DNA testing and/or evidence of maintenance by the deceased prior to his death
 - a. BMK
 - b. GKK
 - c. MKK
 4. The assets that comprise of the deceased’s estate are as follows;
 - a) Machakos/Kiandani/2XX2



- b) Machakos/Kiandani/2XX8
 - c) Masii/Muthini/2XX
5. The estate of the deceased is distributed as follows;
- a) Machakos/Kiandani/2XX8- wholly to JMK and 4 children.
 - b) Subject to 50' by 100' to RKN as Creditor of deceased's estate or bonafide Purchaser in ELC Court and status quo shall be maintained.
 - c) Machakos/Kiandani/2XX2 distributed to JMK and 4 children.
 - d) Masii/Muthini/2XX distributed to JMK and 4 children and portion to MK subject to Sibling DNA of 3 children
6. No order as to Costs each party to bear own costs.
20. The Applicant has produced birth certificates dated 20.07.2014, 23.04,2010 and 3.02.2010 as well as various receipts and a chief's letter, documents that are dated between 2005 and 2015. The question is whether this is new of new and important evidence which has just been discovered. Nonetheless, it would only be fair for this court to consider the same once all the documents are presented to court and all parties are allowed to cross examine on the same. Only then can the court determine otherwise.
21. Looking at the court record, the deceased died on 15.01.2015 and the Applicant has not demonstrated to the court that the said documents were not within her knowledge or could not be produced by her at the time when the decree was passed or the order made.
22. The interested parties seek setting aside and / varying of the orders of 28th April 2023 through an application of 26th July 2023 and the reason presented for not complying with the orders, is that the DNA process is long and they are apprehensive that by the time the test is satisfied, the estate herein will be fully distributed. There is no indication that the subject interested parties even began the process over a year since the order was issued. I must caution parties that court orders are not suggestions and one does not choose which to comply with and when, they must be complied with immediately.
23. As regards the application seeking to have the Deputy Registrar sign the transmission forms, this court has seen the letter that was sent to the firm of Andrew Makundi & Company advocates requesting for certain documents towards the process of transmission and it appears none of the documents has been availed. There has been no response and the Petitioner has not responded to the same nor commented on the same.
24. I will give the interested parties one last chance, they will be a temporary stay of the orders of 28th April 2023 for 90 days within which time BMK, GKK and MKK will present themselves for DNA testing and proof of the same filed before this court within 14 days failure to which the orders of stay of the shall lapse and the Deputy Registrar is directed to sign the registration forms as per the confirmation of grant dated 28/4/2023.

Disposition

25.

- (1) I therefore direct as follows;
 - a. There is stay of execution of the orders of 28th April 2023 for 60 days



- b. BMK, GKK and MKK will present themselves for DNA testing and proof of the same filed before this court within 14 days.
- c. The DNA report will be filed before this court within 60 days through DR MHC.
- d. Failure to comply with order c and d above, the Deputy Registrar, Machakos is directed to sign the transmission forms thereafter.
- e. Mention to confirm compliance on 30/9/2024.

RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 29/7/2024 MACHAKOS HIGH COURT (VIRTUAL/ PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

In the presence of:

Objector/Applicant – present

Ms Nzilani for Mr. Makundi – Absent

Geoffrey/Patrick – Court Assistant(s)

