



Rehal v Rehal (Civil Case E018 of 2023) [2024] KEHC 10103 (KLR) (13 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10103 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE E018 OF 2023
RE ABURILI, J
AUGUST 13, 2024**

BETWEEN

AMARDEEP SINGH REHAL PLAINTIFF

AND

KARMJIT KAUR REHAL DEFENDANT

RULING

1. On 26th January 2022, Hon. Mr. Justice F. A. Ochieng (as he then was) made the following orders, after observing that in his earlier Ruling of 20th September 2021, the Plaintiff in this case, had been paid remittances from 2015 until 2017:
 - “b. Accordingly, I now order the Respondent to pay to the Applicant the sum of Kshs.4,000,000 which is computed at the rate of Kshs.100,000 per month from August 2017 until January 2022.
 7. Thereafter, the Respondent shall continue to remit Kshs.100,000 monthly.
 8. And in order to avoid any disputes in future, the Respondent should make payments in a verifiable manner, such as by cheque, standing order or Mpesa....”
2. The above orders were made in HC Succession Cause No. 768 of 2009. The Respondent who is the Defendant herein and executor of the will of the deceased Harvinder Singh Rehal.
3. The Applicant who is the Plaintiff herein and beneficiary, whose benefit from the estate of the deceased who died testate was provision for upkeep of Kshs.100,000 per month, as per the certificate of confirmation of grant dated 2nd July 2014.
4. The above certificate of confirmation of grant and the orders of F. A Ochieng J have never been set aside.



5. The Executor of the will who is the defendant herein, Karmajit Kaur Rehal, has never complied with the above orders of F. A. Ochieng J and neither have the said orders been set aside. Efforts to have the orders implemented bore no fruits.
6. The Defendant is the beneficiary of All real and personal estate as per the will dated 18th March 1988 and it therefore follows that the Plaintiff who is her son is a subsidiary beneficiary in the sense that without the Defendant paying to him the monthly upkeep of Kshs.100,000 as ordered by F. A. Ochieng J, the Plaintiff is left without any provision.
7. On the other hand, the Defendant has refused to pay the monthly upkeep to the plaintiff and even when this court ordered that she complies with the orders in question or she be held to be in contempt of court orders, she could not appear in court physically and she appeared virtually, with obvious signs of immobility.
8. The Plaintiff was left helpless, despite his poor health status. He undergoes dialysis due to his failing kidney. Even if this court was to hold the Defendant to be in contempt of court orders issued by F. A. Ochieng, implementation of those orders would be meaningless.
9. The plaintiff has filed suit herein following the order of 19th June 2023 closing the Succession court file subject to the Executor filing into court an accurate and true account of the administration of the deceased's estate.
10. The court also directed that aggrieved beneficiaries to agree as a family on how to manage the stalemate or seek legal remedy in a civil court.
11. The Plaintiff then computed the amounts due to him until November 2023 and arrived at Kshs.7,743,755.92 and filed this suit seeking payment of the same by the Executor of his father's estate, on whom the obligation to pay the plaintiff Kshs.100,000 monthly upkeep lay.
12. The Plaintiff also sought for interim orders for the release of Kshs.4,000,000 being part of the ordered amount in the succession cause for his medical bills. This was vide application dated 18th December 2023 which according to the filed documents the Defendant was served but she never responded thereto and as a result, on 9th May 2024 this court issued an order for the Defendant to pay to the applicant a sum of Kshs.2,000,000 within 21 days to cover the Plaintiff/Applicant's medication.
13. The court directed that the other Kshs.2,000,000 would be paid within 30 days of 30th May 2024.
14. I then directed the matter to be mentioned on 27th May 2024 for pretrial directions.
15. It is the order of 9th May 2024 which prompted the Defendant to file her application dated 20th May 2024 under Certificate of Urgency seeking to set aside the orders of 9th May 2024 and among the reasons for the prayers are that the Defendant was never served with the application. Further, that the Plaintiff was paid his dues earlier on.
16. In the supporting affidavit sworn on 20th May 2024, the Defendant contends that she was only served with the order on 13th May 2024 in the evening, at her Milimani residence and that as she was never served with the subject Notice of Motion from which the orders emanated, she had the unqualified right to be heard and legitimately so.
17. She further filed a replying affidavit to the Notice of Motion dated 18th December 2023 subject of the orders made on 9th May 2024. In the said Replying affidavit, she annexed certificate of confirmation of grant; copy of the deceased's will and further deposed of how she sold one of the properties bequeathed to her – Kisumu Municipality Block 6/14 following the distribution and paid the Plaintiff



Kshs.7,500,000 in settlement of future payments. (I however observed that this allegation is unfounded as Ochieng J in the ruling referred to above was clear that the said payment covered the period 2015 -2017) hence the Defendant cannot now claim that she settled the benefits due to the Applicant for the future, noting that the monthly upkeep of Kshs.100,000 from 2017 to date has never been settled and that was the dispute that caused the plaintiff to lodge this suit).

18. In the Replying affidavit sworn on 14th June 2024, the Plaintiff's counsel maintains that the Defendant was served with all the documents. Mr. Jonyo deposes that he visited the Defendant's residence on 7th May 2024 as per his filed affidavit of service of 7th May 2024 and that he did send them to the defendant's advocate herein who had acted for her in the succession cause to the email shown to be bruceodenyadvocates@gmail.com.
19. The application was argued orally with Mr. Odeny reiterating the application, grounds and depositions by his client who denied being served with the documents, and the application before receiving the orders requiring her to pay up part of the claimed sum of money.
20. He submitted that the affidavit of service does not indicate who gave counsel for the Plaintiff the directions to find the defendant and that on 15th April 2024, the defence counsel wrote to the Plaintiff counsel asking for the documents, which letter was not responded to hence the filing of the application. That despite parties being the same in the succession cause, the advocate who acted in the succession cause for the Defendant herein had no instructions to appeal in this matter.
21. On behalf of the Plaintiff, it was argued by Mr. Jonyo advocate that the served the defendant with all documents, visited her residence on 7th May 2024 and served her previous advocate in the succession cause after she instructed him to serve her said advocate.
22. He submitted that the plaintiff was sick and hospitalized. That the orders sought by the Defendant interferes with his right.
23. The other submissions deny that the Plaintiff received payment for the period claimed as future payment. He submitted that the Defendant is wrongly sued as a beneficiary yet she is not an estate. That there is no estate left to be advanced to the plaintiff since he was paid Kshs.7.5 million for future payment.
24. Mr. Odeny further intimated that he was amenable to having a discussion with the Plaintiff's counsel on the dynamics of this matter as parties are a family and to possible take it to mediation.

Determination

25. I have considered the application dated 20th May 2024, the grounds, supporting affidavit and annexures. I have also considered the Replying affidavit and the oral submissions by both parties' counsel.
26. The only issue for determination is whether the defendant was served with the application dated 18th December 2023 before the orders of 9th May 2024 were issued.
27. The Defendant denies being served with the application and contends that she only received the orders of 9th May 2024. Her advocate has annexed copy of letter dated 15th May 2024 addressed to the Plaintiff's advocate and stating that she had only received the orders and not the Notice of Motion from which the order had emanated.
28. In the Replying affidavit, the plaintiff's counsel deposes that he served the defendant with the application on 7th May 2024. He refers to the affidavit of service sworn on the same date.



29. I have perused the affidavit of service in question. It states at paragraph 2
- “ 2. That having previously been furnished with the Respondent’s Advocate email address (bruceodenyadvocates@gmail.com) on 7th May 2024, I caused service of the Applicant’s Notice of Motion application, plaint dated 18th December 2023 and 15th December 2023 respectively, and the accompanying documents thereto upon the Respondent through the said email address.”
30. There is no doubt that there is an annexed print out of email of 7th May 2024 at 12.27pm send to bruceodenyadvocates@gmail.com annexing the pleadings following the directions given by Hon. Shariff J on 3rd May 2024.
31. In the said email, there is no mention that the Plaintiff’s counsel had visited the defendant at her residence and that she had instructed the advocate to serve Mr. Bruce Odeny Advocates.
32. Contrary to the submissions by Mr. Jonyo Advocates, the affidavit of service does not state the person who previously furnished him with the instructions if any, to serve the application upon the Defendant’s advocates email address.
33. As at the time of filing of this suit and the dispatch of the documents to Mr. Bruce Odeny Advocate, the latter advocate was not on record for the Defendant and there is no evidence that the Defendant was served but that she instructed the Plaintiff’s advocate to serve her advocate Mr. Bruce Odeny.
34. If that were to be the case, nothing prevented the advocate, Mr. Jonyo from deposing as such in his affidavit of service dated 7th May 2024, he was not on record and he had no instructions to act for the Defendant and it was not until he received instructions that he wrote the letter dated 15th May 2024 asking for copy of the application and affidavit of service for scrutiny and advise his client who had been served with the order of 9th May 2024 requiring her to pay Kshs.4,000,000 within the stipulated period.
35. This court issued the order of 9th May 2024 exparte in the belief that the Defendant had been served with the application but had not responded. I have now established that there is no evidence of such service. It follows that the Defendant was condemned unheard in an application which ought to have been considered interpartes in the first instance.
36. If the court was inclined to issue an exparte order pending interpartes hearing, it would have done so. It however did not do that. I do appreciate the gravity of this matter where the Plaintiff is in dire need of funds for medication and that the Defendant is his mother. I have previously implored the parties to settle the dispute amicably in vain.
37. However, there should be no short cuts to accessing justice. Due process is the whole mark of the rule of law and no party should be locked out of the hearing without being accorded an opportunity to be heard.
38. I am satisfied that the Defendant was not served with the application under certificate of urgency until the orders of 9th May 2024 were made against her.
39. I find the application dated May 20, 2024 to be merited. I allow the same. I set aside the orders of May 9, 2024 and direct that the application dated 1December 8, 2023 shall be set down to hearing interpartes on merit.
40. Each party to bear their own costs of the application.
41. I so order.



DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF AUGUST, 2024

R. E. ABURILI

JUDGE

