



REPUBLIC OF KENYA



In re Estate of Samwel Amanaka Ngoze (Deceased) (Succession Cause E099 of 2021) [2024] KEHC 14871 (KLR) (25 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14871 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE E099 OF 2021**

JN KAMAU, J

NOVEMBER 25, 2024

IN THE MATTER OF THE ESTATE OF SAMWEL AMANAKA NGOZE (DECEASED)

IN THE MATTER OF

JOYCE OPISA AMANAKA 1ST PETITIONER

CHRISTINE NAFULA AMANAKA 2ND PETITIONER

RULING

Introduction

1. In her Notice of Motion dated 2nd March 2024 and filed on 4th March 2023, the 1st Petitioner herein sought for orders that this court be pleased to strike out the 2nd Petitioner's applications dated 17th March 2021 and 25th October 2023 (sic) and grant her prayers in Application dated and filed on 8th May 2019.
2. She also prayed that this court be pleased to order a discovery herein so that the 2nd Petitioner herein produces in court and gives her the Account numbers of all the Bank Accounts of the deceased which she listed in the schedule of assets herein.
3. She further asked this court to adopt and operationalise the report of Makos Survey Services dated 9th September 2020 which was a result of the joint survey conducted on 15th August 2020 on the orders of Musyoka J.
4. She swore an Affidavit in support of the said application on 4th March 2024. She also swore a Further Affidavit on 8th June 2024. The same was filed on 24th June 2024. She averred that she got married to the deceased in 1968 and had lived with him until his death on 15th October 2015.
5. The deceased later married the 2nd Petitioner in 1972 and he lived with her on an on and off basis until the year 2006 when she deserted him. The 2nd Petitioner returned shortly after his death and stayed with her children on the premises at Kasarani.



6. At the time of his death, the deceased had two (2) residential premises in Nairobi being on L/R Umagara Wiyonere Estate Plot No 40 and 41 at Kasarani where the children of the 2nd Petitioner resided. The other residential premises were on L/R No 5625 at Dandora Phase IV where the deceased stayed with her and her children. It was here where he died.
7. She further stated that the deceased had a wall unit on the premises at L/R No 5625 at Dandora Phase IV in which he kept his important documents but the 2nd Petitioner invaded the said premises and took away the wall unit and the documents therein. She then used those documents to file Succession Cause No 913 of 2016 at Nairobi. The matter was transferred to Kakamega in the same year and renamed Kakamega High Court Succession Cause No 534 of 2016.
8. She contended that Musyoka J entered Judgment in this cause on 10th April 2019 and directed that any party aggrieved lodge an Appeal within thirty (30) days. She averred that the orders of the Learned Judge pertaining to the division of the land properties were ambiguous and could not be implemented.
9. She pointed out that on 8th May 2019, she filed an application for review of the said Judgment. She asserted that the 2nd Petitioner did not file a response in the matter until 17th March 2021. She stated that there were disputes between parties about the shares of L/R West Bunyore/Essaba/613 and that Musyoka J ordered the Registrar, Kakamega Court, the Land Surveyor and Land Registrar, Vihiga County to visit the site and oversee the survey exercise by M/S Makos Survey Services and Regional Surveyor's Office who both she and the 2nd Petitioner respectively appointed. The said survey was carried on 15th August 2020 and a Report dated 9th September 2020 was filed. She contended that the said Surveyors' Report had not been implemented.
10. She further stated that she had opposed the 2nd Petitioner's application dated 17th March 2021 and that she had never served her with application dated 25th October 2023 (sic). She objected to the hearing of the two (2) aforesaid applications as she described them as an abuse of the court's process. It was her contention that the matter herein ended when she challenged the credentials of the 2nd Petitioner's Advocate.
11. The 2nd Petitioner swore a Replying Affidavit on 2nd May 2024 in opposition to the present application. The same was filed on 24th June 2024. She averred that the application was full of half-truths with misleading averments that were meant to misrepresent facts and mislead the court in making its orders. She termed the application as incompetent, scandalous, frivolous and asserted that it contravened the provisions of law and equity. She added that the prayers sought therein were unlawful and would amount to injustice on her part.
12. She asserted that the 1st Petitioner was seeking the court to revisit her application dated 8th May 2019 which was already heard and determined. She pointed out that she responded to the 1st Petitioner's application dated 8th May 2019 and served the same upon her on 2nd December 2020. She pointed out that the Makos Survey report had never been implemented as she had filed an application seeking review of the Judgment which was yet to be heard.
13. She was categorical that her application for review dated 17th March 2021 sought to bring to the attention of court that there were properties of the deceased which had not been brought to the attention of the court prior to the Judgment of 10th April 2019.
14. She pointed out that Musyoka J delivered a Ruling on 23rd September 2022 where he dismissed the application dated 29th September 2021 questioning her Advocate's, Victor Shivega's credentials as he found the allegations frivolous and without merit. She was categorical that the 1st Petitioner's averments had no evidence backing them thus ought to be dismissed by this court.



15. It was her contention that if the 1st Petitioner was aggrieved with any determination made by this court, she was at liberty to appeal and review the said decision. She added that the 1st Petitioner's numerous applications had hindered the quick and just determination of issues in this matter. She urged the court to dismiss the 1st Petitioner's application herein with costs.
16. The 1st Petitioner's Written Submissions were dated 8th June 2024 and filed on 24th June 2024. Although, the 2nd Petitioner indicated that she had filed submissions in respect to the application herein, the same was missing in the court file as at the time of writing this decision. This court checked the e-filing portal but did not find the same among the documents that had been filed by parties herein. This Ruling is therefore based on parties' affidavit evidence and the 1st Petitioner's Written Submissions.

Legal Analysis

17. The 1st Petitioner urged this court to resolve this cause timeously as it was filed in 2016. In this regard, she relied on Article 25 and 50 of *the Constitution* of Kenya, 2010. She further cited Article 22 and 23 of *the Constitution* and submitted that she was a layman and could not afford an advocate and thus urged the court to allow her appear in person in this cause.
18. She further urged the court to strike out the 2nd Petitioner's Replying Affidavit filed on 2nd December 2020 and dismiss her application dated 17th March 2021 for being filed late. She reiterated that her prayers in application dated 8th May 2019 be granted as prayed. She pointed out that an order of discovery was a normal practice in civil cases and as it was the 2nd Petitioner who first filed the Succession Cause in Nairobi, she must have relied on documents which still remained in her possession. In the premises, she urged this court to grant her prayer for discovery.
19. She further submitted that a team of two (2) surveyors, one appointed by each party were sent to establish the actual acreage of L/R West Bunyore/Essaba/613 where she stayed and partition it into two (2) portions measuring 60% for her house and 40% for the 2nd Petitioner's house. She urged the court to direct that the same be operationalised as court orders were not made in vain.
20. Right from the onset, this court noted that 1st Petitioner was seeking this court to allow the prayers in her application dated 8th May 2019. A perusal of the proceedings showed that before the court could give directions on how her application could be canvassed, parties raised issues about the shares of the deceased landed properties and that necessitated the court to give directions on how the survey would be carried out and the filing of the Report thereof.
21. Seemingly, it appeared that parties were lost along the said line of survey and forgot to move the court as to the hearing and determination of Application dated 18th May 2019. This court checked the Kenya Law Reports to be sure that this court did not determine the said application at any one point in time as argued by the 2nd Petitioner.
22. Having said so, the court was alive to the fact that the 1st Petitioner herein was a lay person and she may have not known that one was not required to file an application to seek the prayers of a previous application to be granted. The best she ought to have done was to apply orally in court that her application dated 8th May 2019 be set down for hearing and/or directions.
23. Going further, as this court had allowed the 2nd Petitioner's application dated 23rd September 2023 in its Ruling of 25th November 2024, which in turn would lead to the setting down of the hearing of her application dated 17th March 2021, the 1st Petitioner's prayers herein that the said applications be dismissed therefore fell on the wayside.



24. This court noted that the 1st Petitioner was seeking to re-open issues which ought to have been handled during the hearing. It was the view of this court that she had not demonstrated why the 2nd Petitioner ought to give her the account numbers of all the bank accounts of the deceased.
25. The Learned Judge did not allude to the Report by M/S Makos Survey Services dated 9th September 2020. The same appeared to have been prepared after he delivered his decision on 10th April 2019. If the said Report had been ordered for and not considered in the judgment, that was an issue that only the Court of Appeal could hear and determine.
26. This court was of equal and competent jurisdiction as the Learned Judge and could not therefore direct the adoption and/or operationalisation of the said Surveyor's Report unless of course the issue was being considered under review of the said Judgment and it had genuinely been omitted in his decision.
27. This court recognised that there had been inordinate delay in resolving the issues in dispute herein. However, it also acknowledged that every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of *the Constitution* of Kenya, 2010. Even where a party delayed in doing an act, there was always a provision that would give it reprieve to seek justice.
28. Notably, the High Court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process under Rule 73 of the Probate and Administration Rules, 1990.
29. The said Rule 73 of the Probate and Administration Rules provides that:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
30. This was a matter involving family members of the deceased. Indeed, family matters were extremely emotive and had the potential of becoming very convoluted and causing unimaginable rifts amongst family members if disputes affecting them were not heard and determined decisively and conclusively.
31. This court could not grant the 1st Petitioner's application dated 8th May 2019 seeking review of the Judgment of the Learned Judge as it could not be considered during the hearing and determination of the present application and had to be given its own directions.
32. It was not necessary for parties to file applications to ask the court to determine applications that had already been filed. They were required to fix those applications they wanted heard for hearing and not seek the granting of orders they had sought in subsequent applications. The innumerable applications that had been filed herein may have been the reason why some applications may not have been heard before the Learned Judge delivered his decision on 10th April 2019.

Disposition

33. For the foregoing reasons, the upshot of this court's decision was that the 1st Petitioner's Notice of Motion application dated 2nd March 2023 and filed on 4th March 2023 was not merited and the same be and is hereby dismissed. As this was a family cause, this court deviated from the general rule that costs follow the event so as not to strain the family ties further.



34. To progress this matter further, it is hereby directed that the 1st Petitioner files a Supplementary Affidavit and Written Submissions in respect of her Notice of Motion application dated and filed on 8th May 2019 by 20th December 2024.
35. The 2nd Petitioner to file and serve Written Submissions by 14th December 2025.
36. It is hereby further directed that the matter to be mentioned on 28th April 2025 to confirm compliance and/or for further orders and/or directions.
37. The parties are also hereby directed not to file any other applications to avoid causing confusion and delays in determining the dispute herein.
38. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF NOVEMBER 2024

J. KAMAU

JUDGE

