



REPUBLIC OF KENYA



**In re Estate of Joseph Kiptanui Kipkoech (Deceased) (Succession Cause  
151 of 2012) [2023] KEHC 18452 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18452 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 151 OF 2012**

**SM MOHOCHI, J**

**MAY 30, 2023**

**IN THE MATTER OF THE ESTATE JOSEPH KIPTANUI KIPKOECH (DECEASED)**

**IN THE MATTER OF**

**ESILENE KABON TALLAM ..... EXECUTOR**

**RULING**

**Introduction**

1. The deceased, the Late Joseph Kiptanui Kipkoech of Eldama Ravine- Baringo County, died testate at the War Memorial Hospital in Nakuru, on the 21<sup>st</sup> May 2010, at the age of 75 years old. In his Written Last Will and Testament dated 11<sup>th</sup> February 2009, the deceased appointed his wife, Esilene Kabon Tallam, the Applicant, as the executor to the Will.
2. It is now Thirteen (13) years since the demise of the deceased, and his probate is inconclusive, the advanced age of the Executor/Applicant is indicative of the “state of limbo”, to the estate of the deceased finds itself, from the Orders of revocation of grant of representation, dated 2<sup>nd</sup> October 2018, pursuant to Section 70, *Laws of Succession Act* by S. Chitembwe. J.
3. Executor/Applicant, filed the Petition for Grant of Probate of Written Will on the 9<sup>th</sup> March 2012, the gazette notice was prepared on the 22<sup>nd</sup> March 2012 by P. Maroya DR. This Court has noted that, the Gazette Notice No 13669 dated 22<sup>nd</sup> March 2012, published on 28<sup>th</sup> September 2012 made the succession of the deceased take the unfortunate path to the “state of limbo” status. The Court has its share of blame and seeks to redeem itself with this decision.
4. The Gazette Notice No 13669 dated 22<sup>nd</sup> March 2012, published on 28<sup>th</sup> September 2012, unlawfully and illegally converted a testate succession into an intestate succession.
5. The irregular and unlawful grant, was issued to the law firm of Arusei & Co. Advocates on the 28<sup>th</sup> November 2012 and at this juncture, the Advocates for the Executor/Applicant would have been expected to note the anomaly but this never happened.



6. On the 2<sup>nd</sup> October 2018, the grant of Letters of Administration Intestate, dated 19<sup>th</sup> November 2012 were revoked.
7. The Executor/Applicant, on the 14<sup>th</sup> November 2022, filed the instant Application, a Notice of Motion pursuant to Order 45 of the *Civil Procedure Rules*, Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules*, seeking the following reliefs; -
  - i. Orders of review and setting-aside the revocation;
  - ii. Orders of reinstatement of the grant of Letters of Administration Intestate, dated 19<sup>th</sup> November 2012; and
  - iii. Leave to file Summons for Confirmation.
8. The Notice of motion is anchored on the following seven (7) grounds:-
  - i. That the petitioner’s succession cause was revoked pursuant to Section 70 of the *Law of Succession Act*.
  - ii. That failure to take necessary action to prosecute the succession was occasioned by lack of knowledge on the part of the Executor/Applicant;
  - iii. That Executor/Applicant was not aware of any other steps to take after issuance of the grant of Letters of Administration Intestate, dated 19<sup>th</sup> November 2012, and commits to conclude the succession.
  - iv. That there was breakdown between the Executor/Applicant and her former Advocates in conduct of the matter.
  - v. That it is in the interests of justice, equity and consciousness for the court to grant the orders sought in the Application
9. This Application came up before this Court on the 6<sup>th</sup> March for directions and the Executor/Applicant was directed to file written Submissions which were confirmed as filed on the 21<sup>st</sup> March 2023.
10. The Executor/Applicant, submits and invokes Order 45 of the *Civil Procedure Code* as the panacea in instances such as this succession finds itself, she relied on the case of *Pancras T. Swai v Kenya Breweries Limited* (2014) eKLR where the Court unpackaged the limb “for any sufficient reason”, as a basis of allowing review.
11. Review of decisions of a probate Court, is governed by Rule 63 of the *Probate and Administration Rules*, which provides as follows: -
  - “63. Application of *Civil Procedure Rules and High Court (Practice and Procedure) Rules*
    - (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.”

12. In the case of *John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another* [2016] eKLR, the Court cited Rule 63 of the *Probate and Administration Rules*, and then stated as follows: -

“As stated above, the only provisions of the *Civil Procedure Rules* imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the *Civil Procedure Rules* imported into succession practice by rule 63 of the *Probate and Administration Rules*. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the *Civil Procedure Rules*.”

#### **Issues for determination**

13. After careful analysis, the Court has framed a single issue: -

Whether the Application(s) have satisfied the conditions for grant of Review Orders, Setting Aside Order?

#### **Whether the Application(s) have satisfied the conditions for grant of Review Orders?**

14. It, therefore, follows, that any party seeking review of orders, in a probate and succession matter, is bound by the provisions of Order 45 of the *Civil Procedure Rules*.

15. The substantive provisions of Order 45, state as follows:

“ 1.

- (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.

16. Order 45 provides for three circumstances under which an order for review can be made. To be successful, the applicant must demonstrate to the Court that; there has been 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. Secondly that, there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.

### **Determinations**

17. Indeed, Section 69 of the Law of *Succession Act* vests Court with power to issue a grant after statutory notice period, a grant may be made in accordance with the original application. In this instance, the Court erroneously issued. The grant of Letters of Administration Intestate, dated 19<sup>th</sup> November 2012 by R. Wendoh J. was irregular and unlawful to the extent, that the succession of the deceased was testate and the Court, ought to have issued a grant of probate of a written will.
18. Arusei & Co. Advocates and Executor/Applicant, went into a “slumber” and never filed summons for confirmation within the 6 -month statutory period. In the meantime, the Court issued four (4) Notices between 6<sup>th</sup> April 2015 to the 19<sup>th</sup> June 2018, for revocation under Sections 73 and 76 of the *Succession Act*.
19. Similarly, Rule 73 of the *Probate and Administration Rules* provides that: -
  - “73. 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.”
20. The reading of the above sections indicates that the High Court is clothed with wide powers to do what is necessary to ensure that the ends of justice are met.
21. The Deceased Person had his Last Will and Testament which probate cannot conclude unless a proper grant is made and that it is in the interest of justice that the last wishes and testament of the deceased are fulfilled.
22. The Court has “*suo motu*” found that there has been some grave mistake and error apparent on the face of the record, with the unexplained mutation of this probate following an error committed by the Court on the gazettelement of the petition.
23. The Court has “*suo motu*” upon review, found that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within Executor/Applicant’s knowledge and could not be produced by her at the time when the order of Revocation was passed.
24. There has been failure on the part of the Court that is regretted, ignorance on the part of the Executor and negligence on the part of the previous council representing the executor all contributing to the situation persisting.
25. This Court finds merit in this Notice of Motion, qualifying for the exercise of the jurisdiction of the Court provided for, in Order 45 of the *Civil Procedure Rules* and Rule(s) 7, 43, 63 and 73 of the *Probate and Administration* and makes the following Orders/Direction: -
  - i. The Court reviews and sets aside Orders of the 2<sup>nd</sup> October 2018;



- ii. The Court reviews and varies the grant of Letters of Administration *Intestate*, dated 19<sup>th</sup> November 2012 and issues a Grant of Probate of a Written Will to the Executor/Applicant;
- iii. The Executor/Applicant shall be expected to file summons for confirmation within the next sixty (60) days, from the date hereof as per the Last Will and Testament (with codicil) of the deceased; and
- iv. This probate shall be mentioned on the 19<sup>th</sup> September 2023 for further directions.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 30<sup>TH</sup> DAY OF MAY, 2023**

.....

**MOHOCHI S.M**

**JUDGE**

**In the presence of: -**

C.A. Schola

Ms. Kimura, N Ikua & Co. Advocates- Applicants

