



REPUBLIC OF KENYA



**In re Estate of Alfred Kiplamai Bor (Deceased) (Probate & Administration
17 of 2018) [2023] KEHC 21205 (KLR) (7 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 17 OF 2018
RN NYAKUNDI, J
AUGUST 7, 2023**

BETWEEN

BERNADETTE CHERUBET BOR 1ST APPLICANT

IRENE ZIPPY KAPLAMAI 2ND APPLICANT

AND

EMMANUEL KIPTOO LAMAI 1ST RESPONDENT

BENJAMIN KIPTANUI LAMAI 2ND RESPONDENT

NAUMY JEBOR BOR 3RD RESPONDENT

FELIX LAMAI 4TH RESPONDENT

RULING

1. What is pending before this court is an application dated July 25, 2022 seeking the following orders;
 1. Spent
 2. Spent
 3. That this honourable court be pleased to review its decision issued on June 20, 2022 appointing Emmanuel Kiptoo Lamai as the administrator in the estate of Alfred Kiplamai Bor on behalf of the 1st house and appoint Irene Zippy C Kaplamai as the administrator on behalf of the 1st house.
 4. That the honourable court be pleased to make any further orders as the ends of justice may demand.
2. The application is premised on the grounds set out therein and the contents of the affidavit sworn by the applicant and Irene Z Kiplamai.



Applicant's case

3. The applicants' case is that she is a daughter to the deceased and her mother was the first wife of the deceased. Further, that the affidavit sworn by the 2nd petitioner contains averments that are untrue and misleading. She contends that the 2nd petitioner is disrespectful, vindictive and abrasive and is not trusted by the beneficiaries from the first house. Further, that he has unsuccessfully attempted to distribute the property of the estate to the sons and in exclusion of the daughters. She urged the court to review its orders and appoint Irene Zippy Kiplamai as an administrator as she is trusted and commands respect from all of the houses. She urged that the appointment of the 2nd petitioner as an administrator was an error. Pointing out that his appointment was contrary to the wishes and consent issued by the children of the first house. She stated that the application was bona fides and that no prejudice would be suffered if the orders sought were granted.
4. Learned counsel for the 2nd applicant filed submissions dated November 8, 2022. It is her case that the court made an inadvertent error which is apparent on the face of the record by failing to consider the consent dated February 21, 2018 from the first house where majority of the family appointed Irene Kaplamai as their preferred choice of administrator. The applicant cited the case of *Nyamogo & Nyamogo v Kogo* (2001) EA 170 in support of the submissions. Further, she stated that the court did not take into account the failure to attach an executed consent by the family members in favour of the proposed administrators in the replying affidavit dated July 27, 2021 sworn by Emmanuel Lamai. Counsel urged that the respondents have administered the estate based on Nandi Customs which are discriminatory towards the deceased's daughters and it is only the 1st, 2nd and 3rd respondents who benefit. Counsel submitted that there is sufficient reason to warrant review and urged the court to allow the application.

Respondent's case

5. Counsel for the respondents opposed the application, submitting that the court lacks the jurisdiction to allow the application by virtue of rule 63 of the probate and administration rules. Further, that succession proceedings are *sui generis* in nature and therefore the *civil procedure rules* and acts have no place in the succession court unless expressly provided for under rule 63. He relied on the cases of *In Re Estate of Njuguna (deceased)* (2002) KLR 292 and *In the matter of the estate of Gathua Nguru Muriithi (Deceased)* (2015) KLR in support of these submissions.

Analysis & Determination

6. Upon considering the application and attendant responses, the following issues arise for determination;
 1. Whether this court has jurisdiction to entertain the application
 2. Whether the application meets the threshold for an order for review

Whether the court has jurisdiction to entertain the application

The issue of jurisdiction has been addressed far and wide in various precedents over time in our courts. The locus classicus in this issue is *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989) where the court held :

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment



it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

7. The applicant has sought for review under Order 45 of the Civil Procedure Rules. Rule 63 of the Probate and Administration Rules provides as follows;

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 Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (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.

In 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.”

It therefore follows that this court has jurisdiction to entertain the present application. The next issue to be determined is the merit of the application.

Whether the application meets the threshold for an order of review

Order 45 of the Civil Procedure Rules provides 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.

The applicants have placed reliance on the ground that there is an error apparent on the face of the record, that error being the failure to consider a consent issued by the members of the 1st family wherein the 2nd applicant is the alleged preferred administrator for the first house. What constitutes an error apparent on the face of the record has been the subject of various decisions. In Paul Mwaniki vs. National Hospital Insurance Fund Board of Management [2020] eKLR, it was said:

“... a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-



evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

The court went on to say-

- “ 37. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.
38. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.”
8. I have considered what the applicant is purporting to be an error and it is my strong view that it is not a mere error. The contention is on the principles arrived in determining the appointment of Emmanuel Lamai as one of the administrators of the estate. The Honourable Justice E. Ogola, in appointing Emmanuel Lamai as one of the administrators had revoked the grant issued to the proposed administrator, the 2nd petitioner on the grounds that she had failed in her fiduciary duty and was not fit to hold that position. The present application is an abuse of the court process as the applicants are attempting to appeal the import of the decision under the guise of a review.
9. As the alleged error is not self-evident and requires an examination to be established, I find that the application is unmerited and is hereby dismissed.
10. This litigation has a chequered history since its initiation before this court on May 19, 2018 following the death of the deceased who was blessed of the lord to experience life abundantly for 99 years far beyond the purposed age of 70 years in the book of Psalms 90: 10 “ Seventy years is all we have, eighty years if we are strong yet all they bring us is trouble and sorrow. Life is soon over and we are gone”
11. I think it may be fairly be said that the estate has no dispute as to the free property of the deceased as expressly defined in Section 3 of the Succession Act. I would also go as far as to say that under Section 29 of the same Act there is no dispute as to who must be conferred the benefit of the shares in the estate. I find no objection in the record in the context of material filed that would require the interpretation as to the dependants or commonly referred to as beneficiaries. As far as the purported disposition of the estate survived of the deceased, it is more of sibling rivalry than on account of the administrators filing their respective mode of distribution in consonant with the provisions of the Act. As a reminder, to the administrators and the respective beneficiaries alike even in consents filed in court on the mode of distribution, there must be adherence to the *law of Succession Act* which is the Kenyan code governing both testate and intestate inheritance. The exact provisions which act as a yardstick for the court to exercise discretion expressly states as follows: The *law of Succession Act* grants certain rights to the



surviving spouse and her children upon the demise of the Patriarch of the family. The African family is primarily rooted in hierarchy where the husband is the head of the homestead and is expected to provide the vision and mission of the entire household during his lifetime. Therefore, upon his demise the devolution of his estate is governed by the provisions of the Succession Act. The text of the statute is concerned with preserving family inheritances within the same generation in accordance with what the Act refers to as intestate Succession and bequest. Virtually all kinds of property survived of the deceased are subject to transfer by inheritance or bequest. Although there is an impression that succession law origin is in the 1981 enactment by the legislature but in the book of Numbers 27 verse 1-11 does provide the foundation upon which common law promulgated the legal framework on inheritance. The verses simply provide as follows: “ Where the five daughters presented their claim to Mises, who brought it to Yahweh. Yahweh then not only ruled in their favour, but also set out the following law of intestate succession for all Israel: And you shall say to the people of Israel, “If a man dies and has no son then you shall cause his inheritance to pass to his daughters and if he has no daughter, then you shall give his inheritance to his brothers. And if he has no brothers, then you shall give his inheritance to his father’s brothers. And if his father has no brother then you shall give his inheritance to his kinsman that is next to him of his family, and he shall possess it. And it shall be to the people of Israel a statute and ordinance, as the Lord Commanded Moses (Num 27:8-11)

Perhaps the underlying consideration in Genesis 15 3&4 is of relevance as Blackstone Conjectured that the entire inheritance context had been derived as follows: “ A man’s children or nearest relations are usually about him on his death-bed, and are the earliest witness of his decease. They became therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And therefore also in the earliest ages, on failure of children, a man’s servants born under his roof were allowed to be his heirs, being immediately on the spot when he died.”

11. Likewise the *law of Succession Act* legitimises the book of Numbers on inheritance as set out in the following provisions: in Section 35 (1) , 36(1) and 37 of the *Law of Succession Act* Cases numbers 121, 122 and 246 deal with the of a surviving spouse.

Section 35(1) provides: “Subject to the provisions of section 40, where an intestate has left a surviving spouse and a child or children, the surviving spouse shall be entitled to:

- a. The personal and household effects f the deceased, absolutely and
- b. A life interest in the whole residue of the net intestate estate:

12. Provided that, if the surviving spouse is a widow, that interest shall determine upon marriage.

13. Section 36(1) provides: “ Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to:

- a. The personal and household effects of the deceased absolutely and
- b. The first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater and
- c. A life interest in the whole of the remainder

14. Provided that if a surviving spouse is a widow, the life interest shall be determined upon her marriage to any person.

15. Section 37 provides: “A surviving spouse entitled to a life interest under the provisions of section 35 or 36 with the consent of all co- trustees and all children of full age, or with the consent of the court, may during the period of the life interest, sell any of the property subject to that interest if it is necessary



for his own maintenance. Provided that in the case of immovable property, the exercise of that power shall always be subject to the consent of the court”. Further in Section 38 provides as follows: “ Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42 devolve upon the surviving child if there be only one, or be equally divided among the surviving children.

16. In the instant Succession cause the intestate estate is survived by more than one spouse bringing the mode of distribution within the scope of Section 40 of the Act which provides as follows: “ Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall in the first instance be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children”
17. No estate may be distributed without letters of administration. Any distribution executed without letters of administration or otherwise contrary to the provision of the Succession Act shall be null and void. It is also expressly stated in the law under Section 66 that where the deceased has died intestate letters of administration shall be granted in accordance with the guidelines set forth in the aforesaid section without any consent ousting the scheme as enacted by the legislature. A party contesting the courts grant of letters of administration must show by clear and convincing evidence that the recipient of the letters of administration is incompetent to administer the deceased estate. It is only in the event that objector meets the threshold of the burden of proof the court will grant letters of administration to another beneficiary with next higher priority as stated in Section 66 of the Act. This estate from the record has been in the court corridors for some years now without the property devolving to the beneficiaries in accordance to the law. There is no leadership for reasons of the infighting as who takes the lead to perform the duties of an administrator. With each class of heirs set on this kind of litigation, obviously, there would winners and losers for the likelihood of a risk of intermeddling, intimidation, deprivation of the property rights to the beneficiaries, takes centre stage as the law of succession is thrown out of the window.
18. In essence besides the above application on review, a further summons dated April 4, 2023, was filed seeking the following orders:
seeking the following orders;
 1. That this Application be certified urgent and be heard *ex-parte* the first instance.
 2. That the Honourable Court be pleased to order for the release of Kshs 3,000,000/= out of the deposited sum of Kshs 57,709,380/= held in a Joint Interest earning Account of(m/s Tororei & Co. Advocates)and (m/s Kalya & Co. Advocates)at KCB - Eldoret Branch Account No. 127889269 to meet/ foot the medical expenses for the Applicant herein (Lynnette Ngalo Rono).
 3. That in the alternative the 1st, 2nd and 3rd Respondent be ordered to release the amount received from rental income /proceeds collected from that property known as Eldoret Municipality Block 14/8500 located in Langas to meet her medical expenses.
 4. That the Honourable Court be pleased to make any other or further orders as the concerning the partial deposited on the amount deposited in the above referenced Bank Account
 5. That the costs be in the cause
19. The application is premised on the grounds set out therein and the contents of the affidavit sworn by Lynnette Ngalo Rono.



Applicant's case

20. The applicant contends that she is the daughter to the deceased and a beneficiary to the estate. Further, that she has developed a severe medical condition which requires urgent medical treatment and attention. She has been diagnosed with Lumbar sacral spinal (loss of lumbar lordosis.) She urged that she requires a sum of Kshs. 3,000,00 for treatment and if the same is released it will not prejudice the respondent.
21. The application was filed in April 2023 but there is no evidence that the same was served on any of the parties, specifically the respondents who are the administrators. The upshot of this is that the court is not aware if the respondents intend to oppose the application.
22. The orders the applicant seeks are tantamount to distribution of the estate. I note that since the appointment of the administrators there has been no grant of letters of administrators issued and in order for any distribution to occur the same is necessary.
23. In the absence of a response from the appointed administrators, the court is not able to determine whether the administrators have been approached by the applicant to fund her treatment. I say this as it was admitted by Emmanuel Lamai that he had been collecting rent from the estate for various purposes including payment of fees for the beneficiaries. It is my considered view that medical bills are also to be catered for from the estate as it is not in dispute that the applicant is a beneficiary of the estate. The 3rd respondent does not require the distribution of the estate for the release of the medical funds as he is in control of the rent collected from the estate. However, as he has not been afforded an opportunity to be heard, the court is not in a position to determine if the sum can be paid out of the collected rent.
24. In the premises it is my considered view that there is a need to expedite the cause in order to bring this matter to a closure. The persistent phenomenon of filing various interlocutory applications, would limit the court to exercise the primary jurisdiction to pass on inheritance to the beneficiaries. In addition, under Section 66 appointment of administrators does not accord them any preferential treatment on distribution of the estate but just recognised by the law as first among equals to administer the estate on behalf of the deceased. Furthermore, upon being issued with instruments of administration the probate court still retains the power related to the intestate estate and any breach of the duties of the administrator is to be dealt with in Section 83 of the *Law of Succession Act*. Finally, in the context of a subject that affect essentially everyone, it is remarkable that the contribution of each beneficiary to the estate can sometimes be called upon to file any associated facts characterizing mode of distribution in particular where there is no consensus surrounding the validly filed affidavit by the administrator. Given the primacy of the issues on distribution the law outlined the feature of consent by the beneficiaries to accompany the affidavit in support by the administrator. It is also critical to appreciate that no person or beneficiary before the distribution of the deceased estate, has a right to intermeddle with the assets survived of the deceased until it devolves to the specific dependants/ beneficiaries
25. For those reasons it is plausible to characterise the following orders:
 - a. The application of a review dated July 25, 2022 be dismissed for want of merit.
 - b. That the administrators arising out of the ruling by Justice Ogolla be issued with grant of letters of Administration forthwith.
 - c. That the Administrators be at liberty to generally take the next positive steps to file summons for confirmation of grant intestate.



- d. That the in reference to this intestate estate read in context be understood to refer the inheritance under Section 38 & 40 of the *Law of Succession Act*.
- e. That the model of distribution is expected to hinge in accordance to the express provisions of the law unless their exist compelling evidence that could read a departure from the legislative anchorage
- f. That it is clear that one of the beneficiaries is in need of urgent medical attention and by the operation of the law the amount of Kshs 3,000,000 be expended by the Administrators and within the distribution formula the said cash receivables be factored in the share of the applicant
- g. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 7TH DAY OF AUGUST 2023

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R. NYAKUNDI

JUDGE

