



In re Estate of Ahmedali Abdul Hussein Mamujee (Deceased) (Succession Cause 234 of 2013) [2023] KEHC 23293 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23293 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 234 OF 2013
G MUTAI, J
SEPTEMBER 29, 2023**

BETWEEN

MAZHER AHMEDALI MAMUJEE PETITIONER

AND

MURTAZA AHMEDALI ABDULHUSSEIN MAMUJEE RESPONDENT

RULING

Introduction

1. This Court (per Onyiego, J) delivered a ruling on 12th May 2023 vide which it issued a grant of probate of the written will of the deceased person jointly to the respondent and the applicant and ordered that the two “shall apply for confirmation of the grant within 30 days from the date of delivery of this ruling”.
2. The Petitioner/Applicant was aggrieved by the said decision. Vide a Notice of Motion dated 15th June 2023, the Petitioner/Applicant sought the following orders:-
 1. Spent;
 2. Spent;
 3. The ruling and /or orders of 12th May 2023 requiring the applicant and respondent to apply for confirmation of the grant within 30 days be reviewed, varied and/or set aside and be substituted with an order allowing the appellant’s petition for probate of the written will, filed on 4th January 2021 and dismissing the respondent’s cross-application for grant dated 15th April 2021;
 4. In the alternative to prayer 3, the court be pleased to extend time by 14days for the applicant to make an application seeking leave to appeal to the Court of Appeal against the ruling of 12th May 2023; and



5. The costs of this application be provided for.
3. The applicant contends that the respondent was found to have engaged in fraudulent conduct, having filed a previous petition for a grant of probate of the written will despite being aware that the said will had been revoked. That action, the applicant argued, disqualified the respondent from being appointed as a co-executor of the deceased's estate. The applicant further contends that the only reason the respondent was appointed as a co-executor was because the applicant is permanently resident in Canada.
4. The applicant averred that the Court, in reaching its decision, did not, however, consider the provision of section 24(1) of the Trustees Act, which provided as follows: -

“Trustees or personal representatives may instead or acting personally, employ and pay an agent, whether an advocate, banker, stockbroker or another person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator’s or intestate’s estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred and shall not be responsible for the default of any such agent if employed in good faith”.
5. The application was opposed by the respondent. The respondent filed a replying affidavit sworn on 18th July 2023. In the said affidavit, he deposed that delay in confirmation of the grant was highly prejudicial to the deceased's estate. He swore that he had never been found capable of improperly administering the estate during the pendency of the revoked grant of probate issued on the 25th of July 2013. Regarding fraud, the respondent deposed that the allegations against him were inadvertently undefended by his then advocates on record, Messrs. Koech & Company Advocates, and related to the questions of two wills, one of which he was unaware. He thus urged that the instant application be dismissed with costs.
6. The respondent also filed grounds of opposition which raised 4 grounds to wit:-
 1. The subject application is an abuse of the process of the Court for reasons that it indirectly seeks to appeal to the Court the ruling of the 12th May 2023 by way of review;
 2. The subject application does not satisfy any of the requirements of order 45 rule 1 of the Civil Procedure Rules for the grant of the prayers sought;
 3. The 4th prayer in the subject application has been introduced to create the effect of an omnibus application which is an abuse of the process of the Court;
 4. There has been no satisfactory explanation for the delay in seeking for enlargement of time to seek leave to appeal.
7. Parties filed their written submissions. The Submissions were highlighted on 2nd August 2023.

Submissions of the Petitioner/Applicant

8. The applicant submitted that the prayer for review was merited. Relying on Francis Njoroge v Stephen Maina Kamore[2018]eKLR it was urged that the instant application had been filed without delay on 15th June 2023, a month or thereabouts after the impugned decision was made. The said period, it was argued, could not be said to be inordinate.



9. The Court was referred to paragraph 24 of the ruling of the Court where it was held that:-

“However in the circumstances of the case, if the respondent is excluded from the administration of the estate, the applicant will remain. The applicant admittedly is a permanent resident of Canada. Will he efficiently administer the estate while domiciled in Canada? In my view, he will not manage the estate effectively while based in Canada. For that reason, and in the best interest of justice, I will find that the participation of the respondent in the administration of the estate is inevitable as he is resident in Kenya”.

The applicant urged that the Court made the above finding without considering section 24(1) of the *Trustees Act* which I have already adverted to above. I was also referred to what W. M. Musyoka, J wrote in his book “Law of Succession” at page 213. In the said text the learned judge, an authority in family law in Kenya, expounded on a personal representative’s power of appointment.

10. It was submitted that the respondent’s conduct disqualified him from being appointed as a co-executor. The Court was referred to the case of In re *Estate of Agwang Wasiro (deceased)* [2020]eKLR where it was held inter alia that

“a person who unlawfully deals with estate property prior to appointment cannot possibly be trusted to faithfully administer such property in accordance with the law. His conduct does not inspire faith, trust or confidence”.

It was urged that the respondent never challenged this finding that he had fraudulently acquired the grant, which was later revoked, and as such, he could not inspire faith, trust or confidence. Appointing him as a co-executor, it was argued, amounted to rewarding him for his fraudulent conduct.

11. The applicant, relying on a decision of the Court of Appeal in *Rboda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014]eKLR, submitted that although leave to appeal in probate and administration matters is not automatic, this Court should grant leave in this case in the event review was not granted.

12. On whether this Court could grant alternative prayers. I was referred to the decisions of Warsame J(as he then was) in *Analo Co. Ltd v Investment & Mortgages Bank Limited* [2005]eKLR and that of PS Brar, J in *Githunguri v Pan African Insurance Co Ltd* [1984]eKLR where it was held that alternative prayers could be pleaded.

Submissions of the Respondent

13. The respondent identified two issues as coming for determination by this Court:-

1. Whether the subject application satisfied the requirements under Order 45 Rule 1 of the *Civil Procedure Rules*; and
2. Whether the subject application is an omnibus application fit for dismissal.

14. Regarding the 1st issue the respondent submitted that the applicant had not met the required test. It was submitted that the court’s ruling was anchored on the contents of the cross-application which the applicant had not opposed. It was submitted that provision of section 24(1) of the *Trustees Act* could not amount to “any other sufficient reason”. In support of the said contention, I was referred to the



decisions of the Court in *Nasibwa Wakenya Moses v University of Nairobi & Another* [2019]eKLR where Mativo J (as he then was) held that:-

“the phrase “sufficient reason” within the meaning of the above rule means, analogous or ejusdem genesis to the other reasons stipulated in order 45 Rule 1. The position was illuminated in *Sodar Mohamed v Charan Singh & Another* [1963] EA 557 where the Court held that:- “any other sufficient reason for the purposes of review refers to grounds analogous to the other two (error on the face of the record and discovery of new matter.”

15. In further support of the said contention, I was referred to the decision in the case of *Republic v Public Procurement Administrative Review Board and 2 others* [2018]eKLR where Mativo J (as he then was) cited with approval the case of *National Bank of Kenya v Ndungu Njau* [2016]eKLR.
16. On the second issue the respondent submitted that the applicant’s application was an “all cure, omnibus application fit for striking out”. Relying on *Rajput v Barclays Bank of Kenya Ltd & 3 others* [KLR]393 it was urged that I should strike out the said application.
17. The respondent submitted that there had not been sufficient explanation for the delay on the part of the applicant. I was referred to the decisions of the Court in *Safaricom Ltd v Josenga Co. Ltd and 4 others* [2021]eKLR, *Church of God East Africa & Another v Dinah Buluma* [2019]eKLR and *Abdul Aziz Ngoma v Mungai Mathayo* [1976]KLR 61. In the latter case, the Court of Appeal stated that:-

“The Court’s discretion to extend time under Rule 4 only comes to existence after “sufficient reason” for extending time has been established, and it is only then that the other considerations, such as the absence of any prejudice and the prospects of the appeal, can be considered”
18. Regarding Section 24(1) of the *Trustees Act*, the respondent argued that the power to delegate to an agent available to the applicant is not a bar to nor prejudice to the executorship by the respondent, particularly in the face of unchallenged objection proceedings.
19. The respondent submitted that leave would only be granted where a prima facie case was shown, which merits serious judicial consideration. It was urged that in this case, no merits had been shown, firstly as the objection proceedings were unchallenged, secondly, as section 24 (1) of the *Trustees Act* cannot remedy the applicant’s non-participation in the objection proceedings and thirdly, as the applicant could still exercise his appointment powers under the said Act without intervention by the Court.
20. The respondent distinguished the cases referred to by the applicant in support of the alternative prayer. The Court was thus asked to find that the application dated 15th June 2023 is an abuse of the process of Court, without merit and fit for dismissal with costs to the respondent.

Analysis and Determination

21. I must, at the outset, set out what I consider to be the issues in this matter. In my view, they are:-
 1. Whether the applicant has met the requirements of Order 45 Rule 1 of the *Civil Procedure Rules*, 2010; and
 2. Whether the application dated 15th June 2023 is an omnibus application fit for dismissal.



Whether the applicant has met the requirements of Order 45 Rule 1 of the Civil Procedure Rules, 2010

22. To answer this question, I must set out the provision of the said Rule Order 45 Rule 1 of the Civil Procure Rules which provides 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.

(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.”

23. The applicant submits that the fact that the Court did not consider the provision of section 24(1) of the Trustees Act amounts to “sufficient reasons” that would justify the review of the orders of this Court.

24. Having read the ruling of my brother Judge, it would appear that his ruling was premised on the fact that the cross-petition for the grant had not been challenged. To my mind, the applicant had the duty of showing the Court how he could manage the estate while being domiciled in Canada. He failed to do so and may not do so now via a review application.

25. I agree with the decision of Mativo J (as he then was) in *Nasibwa Wakenya Moses case* (supra) in particular his finding that “any other sufficient reason” refers to grounds analogous to the other two (error on the face of the record and discovery of new matter).

26. I also agree with the Court in *National Bank of Kenya Ltd v Ndungu Njau* (supra) in its holding that: -

“In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law or that he exercised his discretion wrongly in the case... In my opinion, the proper way to correct a judge’s misapprehension of the procedure or



substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error is apparent on the face of the record and therefore requires no elaborate argument to expose”

27. For the foregoing reasons, I find no merit in the application for review and dismiss the same.

Whether the application dated 15th June 2023 is an Omnibus application, and if so, whether it should be struck out or be dismissed.

28. Prayer 4 of the said application is an alternative prayer. The respondent has submitted that I shouldn't allow the same as it is in the words of Ringera J (as he then was) “an all-cure, omnibus application”

29. In my view, parties to litigation are obliged to make decisions that would result in the best use of judicial time. That must also be balanced with the requirements of justice that pleading must be drawn so that parties know the cases they are defending. In this case, prayer No. 4 made by the petitioner/applicant cannot be said to be prejudicial to the respondent.

30. I agree with what Warsame J (as he then was) said in *Amalo Co Ltd* case (supra) to wit that:-

“it is true that the titles in issue are properties registered under cap 300, but by raising a defence in the alternative of an equitable right under the *Equitable Mortgages Act*, the defendant does not, in my view, depart from known rules of pleadings. The raising of equitable right is a fallback if the statutory right is defeated or destroyed by the Plaintiff. There is nothing wrong in raising an alternative defence, especially when it is the Plaintiff who started to displace the cardinal principle of the exercise of statutory power. By making an alternative defence or counterclaim by way of an equitable right, the defendant does not take refuge under the *Equitable Mortgage Act*. In any case, there is nothing wrong in taking refuge in another place when your shelter has been attacked or earmarked for attack.”

31. In view of the foregoing, I find and hold that the Petitioner/applicant is entitled to raise an alternative prayer. Having so found, I must now decide whether I should allow the application for leave. The Court rendered its decision on 12th May 2023. The Notice of Appeal was filed on 22nd May 2023. I have read the draft Memorandum of Appeal. In my view the proposed appeal is arguable.

32. In *Rhoda Wairimu Karanja and another v Mary Wangui Karanja & another* [2014]eKLR the Court of Appeal stated:-

“... leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration.”

The proposed appeal meets this test.

33. In the result, I allow prayer 4 of the said motion.

Disposition

34. The orders that therefore follow are thus:-

1. The prayer seeking review of the ruling of this Court is denied; and
2. This Court extends the time within which the petitioner/applicant may apply for leave to appeal to the Court of Appeal by 14 days.



35. Given the nature of the matter, this Court is not persuaded that costs are appropriate. Each party shall therefore bear own costs.

Orders accordingly.

DELIVERED AND DATED THIS 29TH DAY OF SEPTEMBER 2023 AT MOMBASA VIA MICROSOFT TEAMS.

.....
GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Wilson Mwihuri for the petitioner/applicant;

Mrs. Collete Akwana for the respondent;

