



REPUBLIC OF KENYA



**In re Estate of Darius Msagha Mbela (Deceased) (Succession Cause
3309 of 2007) [2023] KEHC 24503 (KLR) (Family) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24503 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 3309 OF 2007

MA ODERO, J

OCTOBER 27, 2023

**IN THE MATTER OF THE ESTATE OF DARIUS MSAGHA
MBELA (DECEASED)**

BETWEEN

JOSEPHINE EGWA MBELA APPLICANT

AND

BEATRICE MGOI MBELA RESPONDENT

RULING

1. Before this Court for determination is the Application dated 28th November 2022 filed by Josephine Egwa Mbela (the applicant). It seeks the following orders:-
 - “ 1. That the Court be pleased to set aside the order made on 19th September 2022 directing parties to dispose the application dated 17th July 2017 by way of written submissions and direct that the same be disposed by way of *viva voce* evidence.
 2. That costs of this application be in the cause.
2. The Application is premised on Article 50 (1) of the *Constitution* of Kenya 2010, Rule 47 and 73 of the *Probate & Administration Rules* and all other enabling provisions of the Law and is affidavit in support sworn by Ms. Ng’etich C. Sharon an advocate of the High Court practicing in the firm of Mitey & Associates who represent the Applicant in this matter.
3. The Respondent opposed the application vide a Replying Affidavit dated 7th December 2022.



4. The application was canvassed by way of written submissions. The Applicant relied on written submission dated 31st January 2023 while the Respondent relied on submissions dated 13th February 2023.

Background

5. The succession cause related to the estate of Darius Msagha Mbela (hereinafter ‘the Deceased’) who died intestate on 6th October 2007. Grant of letters of Administration were made to the Administrator, Beatrice Mgoi Mbela on 16th April 2008. The Grant was subsequently confirmed on 8th March 2010.
6. Eric William Mbela, one of the sons of the Deceased died on 31st December 2010. The Applicant who is the wife of Eric filed an application dated 10th August 2016 seeking to be substituted as beneficiary of the estate of her late husband. The said application was allowed.
7. The Applicant then filed an application dated 17th July 2017 seeking an order that the Respondent/Administrator do render an account on the estate and in particular properties vested to her. She also sought an order that the Respondent be compelled to render account for proceeds of the sale of Title Number 4752/2 Diani, South Coast Mombasa.
8. On 19th September 2022, this court directed the parties to file and exchange written submissions. When the matter came up for mention on 24th October 2022 to confirm compliance, the Applicant’s Advocates indicated that they had not filed written submissions. Ms. Ng’etich told the court that they wish to have the application heard by way of *viva voce* evidence.
9. The Applicant argues that there is need to summon the Land Registrar to shed light on all the dealings on two parcels of land which were sold by the Administrator who has refused to transfer proceeds of the sale to her. That the Registrar had been summoned but was stood down when the Respondent filed a Preliminary Objection. It was argued that the evidence to be adduced by the Registrar raises weighty issues which can only be canvassed by way of oral evidence. That the order sought is not prejudicial to the Respondent as the same is for the benefit of both parties.
10. The Respondent faulted the Applicant for filing the application under the wrong provisions of law. She argued that the application was incompetent as the supporting affidavit was sworn by the Applicant’s Advocate which is against Rule 8 of the *Advocates Act* as it is a contentious matter.
11. The Respondent further argues that in response to the application dated 17th July 2021, she and other beneficiaries filed replying affidavits which state how the deceased’s property has been distributed. That the issues raised in the application can be canvassed by the affidavits and submissions filed in court.
12. Finally, the Respondent urged the court to dismiss the Applicant’s application and order her to file written submissions within 14 days.

Analysis and Determination

13. I have looked at the Application, the affidavit in support and against the Application and the written submissions of the parties herein. The issues for determination are:-
 - i) Whether the supporting affidavit sworn by the advocate is defective.
 - ii) Whether sufficient cause has been shown for the setting aside of the orders made herein on 19th September 2022 in favour of *viva voce* evidence;



i) Whether The Supporting Affidavit Sworn By The Advocate Is Defective.

14. The Respondent has taken issue with the Applicant's Advocate Ms. Ng'etich C. Sharon swearing the Supporting Affidavit on behalf of the Applicant and argue that the affidavit offends the provisions of Rule 8 of the Advocates Act and that the same ought to be struck out.
15. I have considered the objection and I do not find any merit in the same. The Advocate is deponing to facts that are within her knowledge. She depones that the issues raised by the Applicant cannot be conclusively dealt it by way of written submissions as there is need to summon the Land Registrar, Mombasa to ascertain some things. That she has experienced difficulties in writing and filing submissions because of the above reason I do not consider that the Supporting Affidavit contains any matters that could be regarded as hearsay or contentious. I therefore rule the Supporting affidavit admissible.

ii) Whether Sufficient Cause Has Been Shown For The Setting Aside Of The Orders Made Herein On 19th September 2022 In Favour Of Viva Voce Evidence

16. For purposes of the Law of Succession Act, Section 47 is explicit that:
- “The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient...”
17. Consequently, the discretion of the Court to grant the orders sought in the instant application is unfettered; the primary consideration being the interest of justice. Indeed, in Rule 73 of the Probate and Administration Rules it is provided 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.”
18. Therefore the Applicant did not need to prove the existence of a mistake or error on the face of the record or discovery of new evidence. The order that the application was to be disposed of by written submissions did not compromise the application but were merely directions given to facilitate the expeditious disposal of the substantive application dated 17th July 2017.
19. The Application dated 17th July 2017 seeks the following orders:-
- “1.) That the Honourable Court be pleased to issue an order compelling the Respondent to render an account of the estate and in particular properties vested to Josephine Mbela, the Applicant herein and her co-administrators as per the amended grant.
 - 2) That in the interest of justice, the Honourable Court be pleased to render the immediate transfer of the listed properties to the Applicant by the Respondent.
 - 3) That the Honourable Court be pleased to issue an order that the Respondent do account for the proceeds from the sale of Title Number 4752/2 Diani, South Coast, Mombasa and how proceeds were disbursed.



- 4) That the costs of this application be provided for. “
20. The Applicant submitted that the Land Registrar should be summoned to testify regarding the land that was sold by the Respondent. It was argued that the Land Registrar had been summoned earlier but was stood down to determine a Preliminary Objection filed by the Respondent. The affidavits filed by the Respondent and other beneficiaries are not conclusive.
21. In *Gerald Macharia Njogu v Samuel Macharia Murimi* [2016] eKLR, Hon. Mativo, J. observed thus:-
- “The law of evidence encompasses the rules and legal principles that govern proof of facts in a legal proceeding. These rules determine what evidence must or must not be considered by the court in reaching its decision, and sometimes, the weight that may be given to that evidence. The law of evidence is also concerned with the quantum, quality and type of proof needed to prevail in litigation...When a dispute reaches court, there will always be a number of issues which one party will have to prove in order to persuade the court to find in his or her favour. The law must ensure certain guidelines are set out in order to ensure that evidence presented to the court can be regarded as trustworthy. I am fully aware that affidavits are an alternative to oral evidence and are often used particularly in applications. However, the law provides that a deponent in an affidavit can be cross-examined on oath. Further, if credibility is at issue, or if crucial information is not obtainable through the affidavit evidence, then oral evidence will be required as may be necessary...The advantage of oral evidence is that the witness is available for cross-examination and thus the strength of evidence may be tested. That is why reliable viva voce evidence is sometimes given more weight.” (see also *Re Estate of George Nderi Nguu (Deceased)* [2011] eKLR and *Re Estate of M’Ringera M’Kingania (Deceased)* [2017] eKLR. [own emphasis]
22. The Applicant seeks to summon the Land Registrar to give the true position of the property in dispute. This is not an unreasonable demand as the Registrar is the legal custodian of all documents/ transactions relating to any parcel of land. In the premises it is the view of this Court that justice shall be served if the parties are allowed to proceed viva voce. I therefore see no prejudice that can be visited on the Respondent as they will be granted an opportunity to cross – examine the Registrar. In that way each party shall have their day in Court.
23. Accordingly, I do allow this application and make the following orders:
- i) That the directions and/or orders granted herein on 19th September 2022 to the effect that the application dated 17th July 2017 shall be determined by way of written submissions be and are hereby set aside.
 - ii) That the application dated 17th July 2017 shall be heard by way of viva voce evidence. A hearing date shall to be allocated on priority basis.
 - iii) That the costs of the application be met by the Applicant.

DATED IN NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

MAUREEN A. ODERO

JUDGE

