



In re Estate of Ruth Wairimu Thairu Linsley (Deceased) (Succession Cause 2688 of 2015) [2023] KEHC 24839 (KLR) (Family) (27 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2688 OF 2015
PM NYAUNDI, J
OCTOBER 27, 2023**

BETWEEN

HILDA WANJIKU WAIRIMU RESPONDENT

AND

PATRICK THAIRU MOSES KOOMU 1ST APPLICANT

BENSON KAMOTHO THAIRU 2ND APPLICANT

RULING

1. The Application for determination is the Notice of Motion dated 22nd June 2023 presented under Section 1A and 3A of the *Civil Procedure Act*, Order 10 rule 11, Order 51 rule 1 of the *Civil Procedure Rules*, and all other enabling provisions of the law.
2. The Application is supported by the Affidavit of Patrick Thairu Moses Koomu sworn on the 22nd June 2023. The Respondent opposes the Application and has filed Replying Affidavit sworn on 14th July 2023 and Preliminary Objection dated 14th July 2023.
3. The Court directed that it would hear both the Preliminary objection and the Notice of Motion concurrently and that parties canvass both by way of written submissions. Accordingly, the Applicants filed submissions dated 22nd August 2023 while the Respondents submissions are dated 20th July 2023.
4. The preliminary Objection is couched as follows;

Notice Of Preliminary Objection

Take Notice that the Respondent shall oppose the Application dated 22nd June 2023 and raise a Notice of Preliminary Objection on the following grounds:



1. The Application offends rule 49 of the *Probate and Administration Rules* providing parties who desire to make applications relating to the estate of a deceased person for which no provisions is made in the *probate and administration Rules* to approach the Court through summons supported by an Affidavit.
 2. The Applicant has erred in relying on provisions of the *Civil Procedure Act* and failing to quote section 73 of the *probate and administration Rules* which gives the court inherent power to make orders in succession proceedings.
5. On the first limb of the Preliminary objection, the Respondent sets out the provisions of Rule 49 of the *probate and administration rules* in support. It is submitted that the Application having been presented by way of a Notice of Motion instead of Chamber Summons as stipulated by rule 49 is defective.
 6. On the Second limb the Respondent contends that the Application is defective having been presented under provisions of the *Civil Procedure Act* and *Civil Procedure Rules* which ‘do not give the Court powers to review or set aside an order of the Court in succession matters.
 7. The Respondent relies on the decision of Makhandia J (as he then was) in *In the Matter of the Estate of Mumenya Njogu (deceased)* [2008] eKLR in which the Court stated;

“Rule 49 aforesaid does not provide for the setting aside of any order made in a succession cause. Neither does it provide for the setting aside of a judgment. As correctly pointed out by Mr. Kamwenji, that rule provides a procedural remedy. It tells a litigant by what means he/she can move the court. It does not provide the substantive remedy. The only rule that deals with exercise of discretion is rule 73 of the *probate and Administration rules*. That rule was not cited in the application. Nor did the applicant quote in the body of the application the common rubric “..... And all other enabling provisions of the law” Had he done so perhaps I would have ventured to invoke the said rule and consider the application in a different light. He did not. Unlike the *Civil Procedure rules* which have order L rule 12 that deals with situation where there is failure to cite a proper order, rule or other statutory provisions under or by virtue of which the application had been brought, which failure is not fatal, the *law of succession Act* has no such equivalent provision and nothing can come to the aid of the applicant in the circumstances. The application is thus incompetent.”
 8. In response, on the first limb, the Applicants submit that the manner in which an application is presented is a matter of form not substance and relies on Article 159 of the *Constitution* to urge the Court to administer substantive justice without undue regard to technicalities. For this stance, the Applicants rely on the decision in *Re Estate of Muriungi Ngaruthi* [2015] eKLR. The Applicants therefore contend that filing a Notice of Motion instead of a summon does not render the application fatally defective.
 10. The Applicant has not addressed the second limb of the preliminary objection.
 11. I consider it prudent to dispose of the Preliminary objection before I consider the merits of the Application.



12. The principles that guide Courts in determining the merits of a preliminary objection are well articulated in the celebrated decision of *Mukisa Biscuit Manufacturing Co. Ltd vs Westend Distributors Ltd* [1969] EA 696 where at page 700 paragraphs D-F Law JA (as he then was) had this to say:

.... A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

13. And at page 701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion

14. In the instant case the Respondent argues that the Notice of Motion is fatally defective as it is presented in the wrong format and secondly it is presented under provisions of the *Civil Procedure Rules* and therefore offends the edict of rule 63 of the *Probate and Administration Rules*. I find therefore that the Preliminary Objection as framed meets the criteria set out in the *Mukisa Biscuit case* cited above.

15. On the first limb, I concur with the decision of *Emukule J in Susan K. Baur V Shashikant Shamji Shah & Another* [2011] eKLR where he observed-

The difference between a Summons in Chambers and a Notice of Motion is today very much blurred. In the olden days, summons in chambers was heard in chambers unless the court adjourned it for good reason to be heard in open court. Similarly, Motions were heard in open court unless the court as sated in Order L, rule 1 directed that it be heard in chambers. Today, both Chamber Summons and Motions may and are heard in chambers, and in open court. So that christening an application a Chamber Summons or a Notice of Motion when the rules provide otherwise does not go to the root or basis of the claim, and is merely a matter of form not substance. It does not render the application fatally defective. In any event under this application there is correct reference to Order XXXIX rules 1(a), 2 & 3(a) and rule 9 (which says the application for temporary injunction may be brought by way of Chamber Summons. The contention otherwise is, I think, misconceived and mischievous.

16. On the Second limb, the Application is presented under Section 1A, Section 3A Order 10 rule 11, Order 51 rule 1 of the *Civil Procedure Rules*. The Court of Appeal in *Josephine Wambui Wanyoike v Margaret Wanjira Kamau & Anor* [2013] eKLR pronounced as follows;

We hasten to add that the *Law of Succession Act* is a self-sufficient Act of Parliament with its own substantive law and rules of procedure. In the few instances where need to supplement the same has been identified, some specific rules have been directly imported into the Act through It's Rule 63(1).

17. The rules that have been imported into *Act* by Rule 63 (1) of the *Probate and Administration Rules* are Order 5, rule 2 to 34 and Order 11,16,19,26,49,45and 50, this list is exhaustive.



18. In the Josephine Wambui Wanyoike case cited above the Court of Appeal observed that in that case, in addition to presenting the Application under provisions that are not imported under the probate and administration rules, the Appeal was for dismissal as the Magistrate Court did not have jurisdiction to revoke the grant. I also observe that in the Court of Appeal case, the Court did not consider the import of Article 159 of the Constitution.
19. The matter before me is a dispute between a grandfather and granddaughter. It is clear from the Application the orders that the Applicants/ Administrators seek.
- The Respondent has not indicated that they have suffered any prejudice on account of this error which we must place at the doorstep of the Advocate and not the party. I will therefore proceed to consider the Application on its merits
20. The Applicants identify the following as the issue for determination;
- a. Whether the Applicants are entitled to an order for the Review and/ or setting aside of the order dated 9th May 2023.
21. The Applicants contend that the property was sold for the benefit of the Respondent and that further the property has already been transferred to the purchaser. It is submitted that the good faith intention of the Applicant should override the provisions of Section 82 (b) of the Law of Succession Act. It is submitted that it would be inequitable for the respondent to get back the suit property from the purchaser, whereas she benefitted from the proceeds of the sale. The Applicants rely on the decision in Erick Mundia Wanene V Ann Wanjiku Ndungu [2017] eKLR.
22. The Respondent identifies the following as the issues for determination;
- a. Whether the Applicant's Application raises any bona fide triable issues.
- b. Whether the defendant/ Applicant has given sufficient reason to warrant the Court to set aside the ruling together with consequential orders.
23. It is contended that the Applicants have not laid a basis for grant of the orders they seek. The failure to respond to the Application dated 28th April 2023 is not explained.
- Notwithstanding that it was served upon them. It is submitted that the Application is merely intended to delay the Applicant enjoying the fruits of the ruling and orders granted in her favour.
24. It is the submission of the Applicant that the Respondent cannot explain away the failure to secure the Court's consent to sale the land as required under Section 82(b) of the law of succession Act.
25. I have considered the pleadings filed herein, the rival submissions authorities cited and the relevant law and frame the issues for determination as follows;
- a. Whether the Orders of 28th April 2023 should be reviewed
- b. Who should pay costs
26. The Applicant argues that the orders of 28th April 2023 should be reviewed because they are unenforceable against a 3rd party and in any event the Respondent was the beneficiary of the proceeds of sale.
27. The provisions of Section 82 (b) of the Law of Succession Act are mandatory in nature. The Applicant has made selective reference to the decision Erick Mundia Wanene V Ann Wanjiku Ndungu [2017] eKLR.



28. The facts in that case were similar to those in the current case, the Court considered Section 82 (b) of the *Law of Succession Act* and Section 56 of the *Trustee Act* and stated categorically that-

There is no dispute that the trustee did not obtain consent of the court to sell the suit properties. The sale of the suit properties were in the circumstances carried out in breach of trust. Since neither the beneficiaries nor the court has subsequently approved the sale, the same is unlawful. It is my finding therefore that the sale of the suit properties to the Plaintiff was unlawful.

29. In that case there was a clear paper trail showing that the money that was obtained from the sale was utilized to purchase other properties for the minor beneficiaries.
30. I would distinguish that scenario from the instant case where the Applicant opted not to present to court accounts as ordered but instead has presented broad statements. It is evident that the fiduciary duty imposed by Section 83 (g) and (h) require that the accounts presented by the Administrator must be able to withstand microscopic scrutiny. The account presented by the Applicant in their response do not pass the test.
31. It is well established by judicial precedent that the only actions of the Administrator that are protected are those that are in alignment with the law. Where the Administrator acts contrary to their mandate the Court has powers *vide* Section 47 of the *Law of Succession Act* and rule 73 to take measures to safeguard the estate.
32. The Court has the power to cancel title, this was well articulated in the case of *Santuzza Bilioti alias Mei Santuzza (Deceased) vs Giancarlo Falasconi* (2014) eKLR where the court held that: -

“...the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased’s property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before a grant is confirmed.”

33. In view of the foregoing I must come to the inevitable conclusion that the Notice of Motion as presented is without merit and fit for dismissal.
34. I will add whereas the Applicant seeks a review of the Ruling of the Court delivered on 28th April 2023, it is not clear what the error or the mistake on the face of the record is. Gikonyo J in Narok Civil Appeal No. E005 of 2021 *Evans Onera Omote & Anor Versus David Oginga Ogotu* had this to say-

[20] From the submissions made by the applicant, he believes he was the successful party and ought to have been awarded costs of the appeal. This is akin to asking the court to sit on appeal of its decision and reverse it. The fact that a party believes that the court should have reached a different conclusion or that the decision was erroneous are matters fit for appeal rather than review which is limited in scope. Notably also, courts have held that; “the process of reasoning cannot be treated as an error apparent on the face of the record justifying the exercise of the power of review.” And that; “an erroneous order/decision cannot be corrected in the guise of exercise of the power of review.” (*Republic vs Advocates Disciplinary Tribunal Ex Parte Apollo Mboya* [2019])

(21) Similarly, the request herein entails a re-appraisal of the evidence and re-analyzing its decision to establish whether or not the applicant is entitled to costs- something which is beyond the scope of review jurisdiction.



35. The current Application must suffer the same fate.
36. Having dismissed the Application, I reassert the orders granted on 28th April 2023 and direct that the same be served upon the Registrar of Lands for implementation of Order 2 thereof, that is the Registrar of Lands do cancel any transfer of ownership with respect to Plot No. 237; being a subdivision of LR 8469/4 (Nairobi/ Block 152) with Mutirithia Wa Andu Co. Ltd and property to revert to the deceased
37. The Administrators having failed to comply with the order 4, the grant issued on 24th February 2016 hereby revoked and Certificate of Confirmation of Grant issued on 14th December 2016 is cancelled.
38. Fresh grant of letters of Administration to issue to the Respondent.
39. The matter will be mentioned on 6th December 2023 to confirm compliance.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

**P. NYAUNDI
JUDGE**

