In re Estate of Sawe Maina (Succession Cause 350 of 2015)
[2023] KEHC 26928 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26928 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 350 OF 2015

RN NYAKUNDI, J

DECEMBER 18, 2023

IN THE MATTER OF THE ESTATE OF SAWE MAINA

BETWEEN

ESTHER JEPSONGOK MAINA & OTHERS .... APPLICANT

AND

GILBERT KIPLIMO MAINA & OTHERS .... RESPONDENT

RULING

1. Judgment on the mode distribution of this estate was delivered on 19th April, 2023. That distribution is now the subject of a review application dated 18th October, 2023 by the beneficiaries by way of Summons. The applicants seek the following orders:

    1. Spent.

    2. That the Honourable Court be pleased to review and/or vary the terms of the judgment given on the 19th April, 2023 on the mode of distribution of the estate of the deceased herein.

    3. That this Honourable Court be pleased to grant and issue partial distribution of the estate of the deceased in respect of the dependants of House 'A' who have amicably deliberated and agreed to review the mode of distribution of the estate of the deceased (as per paragraph '6' of the supporting affidavit).

    4. That the costs of this Application be in the cause.

3. The beneficiaries seek review of that judgment on the following grounds: -

    a. That the judgment was delivered on th 19th April, 2023 and the mode of distribution made to the beneficiaries of both house 'A' and 'B'

b. That the judgment was based on the gift made inter-vivos (written will) of the deceased where the estate was to be divided between House 'A' and House 'B' equally.

c. That the applicants albeit being aggrieved and dissatisfied with the ruling/judgment delivered on the 19th April, 2023 have now finally agreed on the equitable mode of distribution of the estate of the deceased.

d. That the agreement has prompted them to seek for review of the said judgment on the mode of distribution.

4. The respondents on the other hand argued that a review ought not to be made once an appeal has been preferred. They contend that the applicants filed a notice of appeal and even secured stay pending appeal. Counsel relied on the provisions of Order 45 rule 1 (b) and maintained that the jurisdiction of the court to review its own judgment is ousted once a notice of appeal has been preferred.

5. Additionally, the respondents' counsel submitted that the matter herein is {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res-judicata}} and the court cannot revisit issues that have been canvassed and determined. That the doctrine of {{term{refersTo | title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res-judicata}} is and intended to promote finality in so far as litigation is concerned.

Analysis & Determination

6. The application by the beneficiaries is brought under order 45 rule 1 (1) (a) and (b) of the *Civil Procedure Rules* 2010. The provision contains the following terms: -

" 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."

7. The Court of Appeal in the case *National Bank of Kenya Limited v Ndungu Njau Civil Appeal* No. 211 of 1996 (unreported) in respect of an application for review stated thus: -

> "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 the law. Misconstruing a statute or other provisions of law cannot be a ground for review."

8. Under rule 73 of the *Probate and Administration Rules*, it is provided:

> "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."

9. In the case of *re estate of Charles Kibe Karanja (deceased)* [2015] eKLR Justice Musyoka stated as follows:-

> "If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of Court orders is not directly provided for in the *Law of Succession Act* and the *Probate and Administration Rules*, but it is imported into probate practice by Rule 63 of *Probate and Administration Rules*, which has adopted a number of procedures from the *Civil Procedure Rules*...........
>
> Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the Court has confirmed the grant or a heir or survivor of the deceased who had previously been unheard of materializes after distribution, the Court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed...........
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> New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November, 2006 so as to include the discovered assets and to distribute them. It is only after review or revision of the said orders that an altered certificate of confirmation of grant can issue."

10. Having that in mind, and order 45 rule 1, I need to consider if the application meets the provisions of a review application. The court in its judgment and in consonance with the statutory provisions distributed the estate equally among the two houses save for machineries, accessories and livestock.

11. Further, this court in its judgment delivered on 19th April, 2019 discussed the provisions of section 40 and 42 of the *Law of Succession Act* cap 160. In that discussion, the court found that the estate of the deceased was to be divided equally among the two houses.

12. I have had the occasion to review the consent alluded to by the applicant, which in essence and in my humble view provides for all the parties equally. However, I have noted that the respondents who are

represented by the firm of M/s Bundotich Korir & Company advocates have not executed the said consent. I believe the respondents neglected to execute the said agreement for reasons that the court is functus officio and that a notice of appeal has been filed.

13. In an attempt to equally distribute the deceased's estate among the beneficiaries, many at times a party may not agree with the court's mode of distribution. In the case of *Anne Nyambura Ndungu v Beatrice Wangari Ndungu & 2 others* [2021] eKLR the court of appeal stated as follows:

> 'Having reconsidered the record and the circumstances surrounding this matter, we wish to point out first and foremost, that succession matters, though deceptively straightforward in some cases, are not the easiest to determine. This is so particularly where a person dies intestate leaving behind many properties and many beneficiaries, and sometimes different houses as is the case here. It will always be difficult to distribute the properties "equally" and with scientific precision because different properties will have different sizes and different economic values. Section 40 of the *Law of Succession Act* is not a magic pill which can be applied to resolve all issues pertaining to distribution of a deceased person's estate. In a as much as section 40 *LSA* talks of "Equal Shares" the distribution must also be equitable. Where the parties themselves are unable to agree on the mode of distribution, it is left to the court to do the distribution based purely on the documents presented to the court.
>
> It is highly unlikely that the court would arrive at a mode of distribution that will be acceptable to all the beneficiaries. In this case, we are persuaded by the fact that following the death of the deceased, the principal parties sat, discussed the way forward and arrived at some kind of agreement which they reduced into writing, appended their signatures and filed in court. We appreciate the fact that the third respondent appears to have withdrawn her consent and subsequently denounced the agreement, hence the trial court's reluctance to endorse or adopt the same. We have keenly pondered on this issue and come to the conclusion that there is no guarantee that any other mode of distribution dictated by this court will be better, or more equitable than that presented in that document.'

14. The Supreme Court in *Geoffrey M. Asanyo & 3 Others v Attorney General* Supreme Court Petition No. 7 of 2019 expressed itself thus:-

> We turn now to the standing of the consent filed by the parties before the Appellate Court. The pertinent question is: When does a consent by the parties transmute into an Order of the Court? What is the role of the Court in the adoption of the consent?
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> In this Court's Order of 20th November 2018, we directed that the Appellate Court do adopt the consent of the parties.
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> Adoption of a consent by a Court is a process, in the course of which a Court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful Order and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court. It is only from that stage, that the Court becomes functus officio. This Court having ruled that the Judgment of the Court of Appeal (dated 13th November 2015) was a nullity; and that Court having not formally adopted the consent by parties, was not yet *functus officio*."

15. As to whether the court is functus officio, the supreme court in the case of *Raila Odinga v Iebc & 3 Others* Petition No. 5 of 2013 considered the origin of the doctrine of '*functus officio*' and made

reference to the case of *Jersey Evening Post Limited v A. Thani* [2002] JLR 542 at pg. 550 where the Court stated: -

> A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available." [own emphasis]

16. I am of the view that the court is not functus officio and such a review only enables the parties to have a fair and just resolution of the dispute. Again, as the court noted in its judgment that is now being reviewed; where there is an agreement as to the distribution of the estate, the court does not go about creating disputes but to facilitated resolution. (Question: is the review contrary to the wishes of the deceased?) As I have stated, the consent in my humble view is all inclusive and provides for the parties herein fairly and should be adopted as a judgment of this court in so far as distribution of the estate is concerned.

17. In *Kisya Investments Ltd v Attorney General and Another* Civil Appeal No. 31 of 1995 the Court held that a party who has filed a notice of appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending. However, in *Yani Haryanto v E. D. & F. Man. (Sugar) Limited* Civil Appeal No. 122 of 1992 the Court of Appeal was of the following view:

> "The facility of review under Order 44 of the *Civil Procedure Rules* is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...What rule 4(1) of Order 41 of the *Civil Procedure Rules* prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the *Court of Appeal Rules*. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore, despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal".

18. I have observed that the applicants filed a notice of appeal on 2nd May, 2023 and on 31st July, 2023, with the intent of challenging the said judgment but in light of the consent, the notices of appeal have been substantially withdrawn save for one of the objector. I take note that there is no substantive appeal. A notice of appeal is no more than a formal intimation of an intention to appeal and may be withdrawn irrespective of whether the intended appeal has merits. In fact, under Rule 77(1) of the *Court of Appeal Rules* it is provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Clearly, a strict reading of this rule contemplates a situation where a Notice of Appeal may even be served before the same is

lodged. As such the mere fact that a party has given a Notice of intention to appeal does not amount to an appeal for the purposes of review.

19. This succession matter remains protracted since 2015 as between heirs to the intestate estate. There is no dispute as to who is entitled in equal measure the inheritance survived of the deceased within the spirit of Section 29 of the *Law of Succession Act*. The metrics of distribution of an intestate estate like the one before court is clearly spelt out under the cluster of provisions in Section 35, 36, 37, 38, & 40 of the *Act*. The rights under this approach function of distribution within a wider reality demands of the court to strike a balance between competing individual interest vis vi the general interest of other beneficiaries with a purpose of justifying whether the exercise of fundamental inheritance rights should be limited in favour of one beneficiary. The answer lies not in the complete negation of that individual right to limit the rights of others but rather in the manner in which that individual exercises his or her right likely to occasion prejudice or injustice, therefore, completely depriving the rest of the heirs of their rights to inheritance. That limitation of that right like in the instant case construed from the key provisions of the statute must be reasonable and justified founded on the principles of due process clauses in Art.50 of *the constitution* and equality before the law. Therefore, sometimes an action by an individual which strips the other heirs or beneficiaries of their rights to inherit the heritage of the deceased might not qualify as a justifiable cause of action. Notwithstanding the contextual approach taken by the objector it is for the court to determine whether any infringement of inheritance rights is consonant with the requirements of the provisions of *the constitution* and the *law of Succession Act*. The legitimacy of the justification of functus officio must not only be looked at from the perspective of the objector but the other individual rights of the beneficiaries at large and whether the means chosen is reasonable and demonstrably justified. The distribution of the intestate estate is through the preconditions that are encompassed and defined in Section 35, 36, 37, 38, 39, 40, 41 & 42 of the *Succession Act*. As already alluded to in the previous decisions, whatever the circumstances unique to every intestate estate the court must at all times balance the rights and interest of different individuals within that family tree but none of them comes to the distribution framework with superior rights overriding the provisions of the statute applicable in vindicating those rights. It is important to note that the interlocutory rights of appeal accorded to the objector are subject to such limitations as prescribed by law and deemed necessary to protect the rights of others to the intestate estate. It is also categorical a notice of appeal filed by an individual pursuing a legitimate aim must be buttressed as explained under Section 1(a) 1(b) 3(a) of the *Civil Procedure Act*, Order 42 of the *CPR* and Rule 73(1) of the *Probate and Administration Rules*. The focus on limitation of this court jurisdiction is not based on the formal existence of an order of the Superior Court nor the limits of the various forms of procedural law in both the High Court in Court of Appeal. The purported appeal for the wellbeing of the objector is yet to be served upon the greater majority of the beneficiaries for the court arguably to have a good reason to down tools in exercising jurisdiction over the subject matter of this case. Conceding justiciability as invited by the objector raises two important questions: First is on the deprivation of the social economic rights raised by the other beneficiaries who have also been litigating before this court since the petition was filed on 15.9.2015. Second, is whether the standard of review is appropriate for the court to enforce this right. It is instructive to look at whether when balancing the rights of the beneficiaries going by the concerns raised by the objector lack of the court to exercise discretion on review jurisdiction it can result in the denial of social economic rights. i.e shelter, basic food, and the rubric of rights which flow from Art. 26 of *the constitution*. The inquiry further is whether this court's decision would be favouring the applicants to the intestate estate against the right to access court by the objector. Debate was abound in this matter whether to preserve the estate property and ultimately wait for an appeal which is yet to be substantively brought within the jurisdiction of the court of appeal as stipulated in the law. Theoretically however the court is informed of a notice of appeal by the objector but in this instance really if proportionality is the measure of how

to strike the balance between competing individual constitutional rights of appeal, the role of the court in such cases where this two rights are in conflict is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case. The end result in this case seems clear, if the court gives in to the dichotomy being a pursued by the objector, then the estate remains undistributed even partially, so where there is no contestation until and when the objector moves the superior court substantively to be heard on his grievances. The degree of injustice and inequity which as of human necessity by the parties themselves to this estate ought to be minimised given the balancing approach proposed by the 99.9% of the beneficiaries. The court acknowledges that this decision does not deprive the objector of any rights to institute any such proceedings as he deems fit to enforce any such infringement, violation or threats to his rights on access to the property survived of the deceased. Fortunately for this court has not side stepped any question likely in the future to be determined by the superior court which may be characterised from the previous or this instant ruling as obligated by law to determine and fashion more effective remedies on distribution which are not *ultra-vires* the provision of the *Succession Act*. It must also be emphasised that Succession Law deals with how to distribute a deceased's individual property to the heirs and also as the case may be to other dependants or creditors. Therefor a proper succession determines which individuals or groups are the appropriate heirs and summons them to the succession proceedings. Once the succession has been processed through the court system the administrators and all heirs must decide how to best to distribute the inheritance and must manage the inheritance appropriately according to law. I have come to appreciate in probate proceedings that identifying who qualifies as a rightful heir is actually the easy part. The difficult comes in calculating each person's compulsory or equitable share of the estate. This forms the battleground in Succession disputes. Another grievance raised by the heirs or beneficiaries is on the principle of fairness which is expressed in a range of ways some which are context specific where fairness is understood as equality of treatment among the survivors to the intestacy. This is translated into a desire for equal entitlement between those with the same relationship with the deceased, e.g children, or between those with different relationship e,g child and a spouse. Running through the provisions of the *Succession Act* one gets the sense that intestacy law strives for fairness by ensuring that those closest in relationship to the deceased are considered equally, that none is made worse off by the loss of a loved one or that those in most need of the money like school fees and other basic rights should be given priority. Finally, passing the estate to the children by the administrators on behalf of the deceased is seen as a tradition giving effect to the African customary law which is not repugnant to morality and justice. It should not be forgotten that African culture /customs also have provisions on how assets are to be distributed in particular both movable and immovable estate. As empirical evidence suggests in a typical African set up the presence of children and length of relationship were considered as important although other factors were also identified. Longer relationships were seen as reflecting a committed relationship that could be treated equally to a marriage and the co-habitant should have a right to inherit automatically the estate of the deceased subject to meeting certain condition. There is a strong sense that where surviving children were to inherit the estate should be divided up equally amongst them. Even when meeting these criteria and a petition is properly filed before any constitutional forum on succession matters our legal system, there is seemingly a challenge for certain intestate estate to be distributed within a reasonable time. That is the case I suppose in this estate given the many applications and counter applications in search of justice. The result is that the entitlement by the beneficiaries dissipates as the inheritance is clogged within the court system in some cases not on any meritorious grounds or any competing interest to meet the wishes of the deceased in support of his or her children. The spirit of the death which normally returns to God who gave it watches from above in despair as the estate created overtime remains undistributed to his or her heirs. Again the answer is the surviving dependants of the deceased possess inalienable right to manage the heritage survived of the deceased,

it should be cherished, treasured and protected at all costs so that they can benefit generations within that family. Time has come for communities to adopt a ground and approach to strengthening a hybrid justice systems of both formal and alternative as defined in Art.159 2(C) of *the constitution* as a realistic strategy to reducing justice. Ensuring access to justice through negotiations and mediation may have influenced the applicants approach to this outstanding probate dispute towards coming up with the framework established by law under the review jurisdiction for this court to entertain the instant application. This linking approach finds favour with this court.

20. For those reasons the key thematic orders that abide the decision of this court to address the issues raised by the parties as far as permissible commands this court to declare as follows:

    a) The applications for review and rectification as filed by the applicants supported by the affidavits contextually dated on 18.10.2023 and on rectification dated 24.11.2023 be and are hereby allowed.

    b) That the corresponding annexed consents by the 99.9% of the beneficiaries forms the structural scheme of the model of distribution in view of the fact that it does not offend the provisions of Section 35, 36, 37, 38, 39, 40 &42 of the *Law of Succession Act*.

    c) That the objection by the objector on the canons of *functus officio* is denied as no appeal was demonstrated to have been filed as at the time of the review jurisdiction being exercised by this court. There is no real conflict to the question of this court entertaining the application on review of its primary judgement.

    d) That the right of appeal of the objector does not remain extinguished by this decision of the court.

    e) That the costs of this applications do remain the cause.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 18TH DECEMBER ,2023

In the Presence of

Mr. Omboto Advocate

Dr. Chebii Advocate.

……………………………………….

NYAKUNDI

JUDGE