



**In re Estate of Hayati Saiffudin Anjarwalla alias Hayati Anjarwalla (Deceased)
(Succession Cause 112 of 2021) [2022] KEHC 11759 (KLR) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 11759 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 112 OF 2021**

JN ONYIEGO, J

APRIL 22, 2022

RULING

1. The deceased herein died testate on 22nd September 2021 while domiciled in Nairobi Kenya. She is survived by four children namely; Atiq, Karim, Huma and Najmus. Prior to her death, she had executed a written will dated 28th May 2013 thereby appointing her two sons Atiq and Karim as co-executors. Among the properties the deceased bequeathed was her residential property at Nyali Mombasa known as Sub-division 5864 Section I mainland North which she gave out to Atiq absolutely.
2. Subsequently, on 9th November 2021, the executors petitioned for a grant of probate of written will. Upon gazette, the said grant was made on 14th January 2022 and issued on 31st January 2022. However, before the expiry of six months for the grant to be confirmed, the petitioners moved this court vide a petition for a limited grant ad colligenda bona under section 67 of the Act seeking court's authority to sell property known as subdivision number 5864(Original number 523/3) section I mainland north (C.R. 19707) to Gabi and Ange oil & Gas limited (purchaser).
3. It was averred that the intended sale was geared towards securing a competitive sale price in the market and therefore preserve the property which was likely to diminish in value. After considering the application ex parte on 14th March 2022, the court dismissed the same on grounds that; a limited grant ad colligenda bona cannot issue while there is a full grant in place. Secondly, the grant sought could only issue for purposes of collecting and preserving the estate and not disposing the same.
4. Later, the petitioners vide a notice of motion application dated 4th April 2022, sought review of the orders made on 14th March 2022. They urged the court to issue a grant ad colligenda bona to facilitate sale of the subject property and that the sale proceeds be kept by the law firm of Anjarwalla and Khanna LLP advocates in an interest earning account pending confirmation of the grant. The application is anchored on the grounds that the property in question which is based in Mombasa is diminishing in value due to vagaries of harsh weather conditions hence high maintenance costs including payment of security expenses as the property is unoccupied. That the price offered is the best in the current market value hence an opportunity that should not be lost.



5. I have considered the application herein, affidavit in support and oral submissions by counsel for the applicant. This court has been moved for issuance of a limited grant ad colligenda bona pursuant to section 67 (1) of the law of succession. That section provides that;

“No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired”

6. To fortify Section 67 of the Act is rule 36(1) of the probate and administration rules which also provides as follows;

“Where, owing to special circumstances the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased”

7. A plain reading of the two provisions above quoted suggests that, a limited grant of administration ad colligenda bona is only applicable for collection and preservation of the estate in the absence of a grant of representation. The limited grant sought herein cannot issue in circumstances where a full grant issued on 31st January 2022 is still intact. There cannot be two grants in the circumstances of this case. The already issued full grant is capable of serving the purpose for which the ad colligenda bona is intended to achieve. If there was no grant of representation in place for whatever reason, the limited grant ad colligenda bona would be relevant. To the contrary, there is a grant of representation in place.

8. Having made a clarification on the legal position as to when a grant of administration ad colligenda bona can issue, I am left with the question whether in the circumstances of this case, the applicant has met the threshold for review of the orders made on 14th March 2022. For an order of review under Order 45 (1) of the CPRS pursuant to rule 63 of the probate and administration rules to issue, the applicant must prove that; there is 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 the decree was passed or order made; on account of mistake or apparent error on the face of the record or, for any other sufficient cause.

9. In the Civil Appeal No. 211 of 1996 National Bank of kenya vs Ndungu Njau(1997) the court of appeal had this to say;

“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 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 expression of the law”

10. Is there discovery of any new evidence or important matter that was not within the applicants’ knowledge? From the record, I do not see any. Is there proof of any mistake or error apparent on the face of the record? None at all. In fact, what the applicant is seeking is tantamount to telling this court to sit as an appellate court to set aside its own orders. In view of the above holding, the application



for review for purposes issuing a limited grant ad colligenda bona is disallowed and therefore the first limb of the application dismissed.

11. Having eliminated the main grounds for consideration before an order for review can issue, I am left with the omnibus ground as to whether there is any other sufficient cause given to warrant exercise of this court's discretion in directing for sale of the property in question and preservation of the sale proceeds in the law firm of Anjarwalla and Khanna advocates pending confirmation of the grant. The order sought is purely discretionary and therefore applicable under the current grant of representation.
12. The main ground advanced in support of the sale of the subject property is that the premises have remained unoccupied for some time thus attracting huge maintenance and security costs. Secondly, that the applicants have received the best offer in the market which if lost it will be difficult to get it again. The key factor for consideration is whether the sale is in the best interest of the estate. Indeed, the sole beneficiary of the property confirmed that the sale is in the best interest of the estate. This court is at all material times expected to make orders that promote the best interest of the estate. I do not find any prejudice in selling the property for purposes of attaining the best value in the market and have the sale proceeds preserved pending confirmation of the grant.
13. In exercise of this court's wide powers under section 47 of the *law of succession Act* and rule 73 of the *PE&A rules*, the application is allowed in respect of the second limb to the extent that the executors are hereby authorised to sell all that property known as subdivision Number 5864(original number 523/3) section I mainland north Mombasa(CR19707) and the proceeds realized therefrom be held by the law firm of Anjarwalla and Khanna Advocates in an interest earning deposit bank account pending confirmation of the grant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF APRIL 2022

J.N.ONYIEGO

JUDGE

