



**In re Estate of Amos Captain Lutubula (Deceased) (Miscellaneous Succession Application E003 of 2021) [2022] KEHC 12716 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12716 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA**

**MISCELLANEOUS SUCCESSION APPLICATION E003 OF 2021**

**PJO OTIENO, J**

**JULY 29, 2022**

**IN THE MATTER OF THE ESTATE OF AMOS CAPTAIN LUTUBULA (DECEASED)**

**BETWEEN**

**EMMANUEL M LUTUBULA ..... 1<sup>ST</sup> APPLICANT  
PETER MWOMBE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REUBEN AMOS DEMESI ..... 1<sup>ST</sup> RESPONDENT  
BARNABUS OMAE AMOS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application by the 2<sup>nd</sup> administrator dated July 13, 2022 seeks orders that the orders of July 30, 2020 transferring the Butali SPMCC Succession Cause No 285 of 2018 to this court be reviewed and set aside.
2. The reasons advanced to justify the review and or setting aside is that the application proceeded *ex parte* without the court being informed that the same had been opposed by a replying affidavit sworn on May 3, 2021 and filed on May 6, 2021. For that reason the applicant contends that he was condemned unheard and that the replying affidavit raised grave issues among them that the court had become *functus officio* hence there was nothing to be transferred as the said estate had been substantially transmitted and other portions disposed to 3<sup>rd</sup> parties. Those reason on the face of the notice of motion were reiterated in the affidavit Reuben Amos Demesi almost *verbatim* without addition or subtraction.
3. The application was opposed by Peter Mwombe Lutubula by an affidavit sworn on the January 29, 2022 and filed in court on January 31, 2022. In it, the deponent asserts that the application for transfer was duly served upon the applicants and that pursuant to an appearance in court the court directed that the estate be valued and a valuation report filed. That a valuation report was indeed filed in court



which put the estate's worth at more than the limits of the subordinate court's jurisdiction of Kshs 20,000,000/= and that the court at Butali had no jurisdiction in the matter and any orders issued by it were null and void and of no consequence from which reason the judge ordered the transfer to the High Court which has the requisite to dispose the same. It is contended that as the facts of value of the estate remain challenged, even if the application is allowed and orders set aside, no purpose would have been served because a reconsideration of the application would yield the same outcome and result.

4. Directions were then given that the application be canvassed by way of written submissions pursuant to which both parties filed submissions on the July 9, 2022.
5. In the submissions, the applicants take the view that the orders deserve being reversed because the grant issued in Butali has been substantially implemented and part of the estate alienated while underscoring the fact that the matter was initially in Kakamega High Court as Succession Cause No 794/2015 before it was transferred to Butali and that as at the date the application was made and granted, the grant had been confirmed and a distribution completed.
6. It is then conceded that even though the facts disclosed in the application cannot pass as an error apparent on the face of the record, the same suffice as any 'other sufficient reason' in that had the court been aware of the existence of the said facts it would arrived at a different decision. It was added that the duty and mandate of a probate court is to ascertain assets, liabilities and beneficiaries of the estate, and to distribute the net estate upon which mandate being executed the court becomes *funtus officio*. The applicant then cited to court the decisions in James Bosire Machogu v Brian Kipkemboi Kirua [2020] eKLR, Peter Muchiri Kamiri v David Kabugo Kamiri [2005] eKLR and Re Estate of John Maraga Gwako (Deceased) [2017] eKLR on when to issue orders of review of a court decision and that once confirmation is granted it becomes a decree absolute and a final order of the court thus this court becomes *funtus officio*.
7. For the respondents the submissions were offered to the effect that when the application was placed before the court with the valuation report the court was in no doubt that the lower court had no jurisdiction in the matter and ordered a transfer and the file has since been domiciled in Kakamega High Court and registered.
8. The respondents took issue with the application for seeking to review non-existent orders made on the July 30, 2020 but on the June 7, 2021, contending that no alternative valuation report has been availed to show that the estate value fall with the pecuniary jurisdiction of the court at butali and that even if the application was to be heard, again inter partes, the outcome would not be different hence no cause of justice would be served by setting aside. They urged that the application be dismissed.

#### **Analysis:**

9. Even though the application identifies the order for review to be one made on the July 30, 2021, the perusal of the record would reveal that no such order exists but there is an order to the same effect made on the July 6, 2022. I do not consider any prejudice to have been visited upon the respondents by being misled just as the court is not misled as to the target order hence I will focus on determining the application on the merits.
10. A court would set to review its orders for the two main grounds under order 45 rule 1 as well as for any sufficient reason deemed to meet the ends of justice and to avoid an injustice from being perpetuated. The expression any other sufficient reason need not be one that is *ejusdem generis* or analogous to the



two main grounds. In Wangechi Kimita v Wakibiru Mutahi [1985] eKLR, the Court of Appeal said, in reference to the expression for any other sufficient reason:-

“.....’for any other sufficient’ is not necessarily confined to the kind of reason stated in the two preceding heads in that sub-rule, which do not in themselves form a genus or class of things with which the third, general head, could be said to be analogous.”

11. For this matter, the applicants contention is that it ought to have been present or at least the court could have been notified of the presence of a replying affidavit on record which would have led it to a different conclusion.
12. This court views and takes the opinion that the purpose of review as a judicial remedy is to avail a revisit to an order occasioned by some mistake, error, an occurrence or event which if left to stand would present a denial or pervasion of the ends of justice. Just like the remedy of setting aside, it is intended to serve substantial justice so that an inadvertence or some error is not the only reason to drive a litigant away from the seat of justice.
13. The question a court of law must therefore ask is; what justice would be served by an order for review or setting aside. This court has posed that question to itself in this matter and finds that the critical issue is whether if the order is reviewed or set aside, and the application is reheard, there is a likelihood of a different conclusion being made.
14. In resolving that dispute, I have laid my hands on the valuation report dated June 4, 2021 placing the value of the estate at Kshs 62,740,000. The court has equally taken judicial notice that the Butali Magistrate’s Court is presided over currently by a principal magistrate whose pecuniary jurisdiction in terms of section 7 (1) of the Magistrate Courts Act capped at Kshs 10,000,000, well below the value of the estate.
15. Accordingly even if I was to set aside for purposes of giving the applicants the right to participate at the hearing of the application, my hands would still be tied to come to the conclusion that the matter is beyond the jurisdiction of the magistrate. I therefore find that no meaningful purpose, let alone, the interests of substantial justice would be served by disturbance of the order of transfer made on the July 6, 2022. For that reason, I find no merit in the application dated July 13, 2022 and direct that it be dismissed with no order as to costs.
16. Before I conclude, there is a contention by the applicants that the court has become *functus officio* upon the grant being confirmed. To that submission, the court’s learning is that in a succession matter, any application in the nature of revocation, rectification or any other that seeks to achieve the purpose of a succession cause, the just and fair inheritance of the estate by persons entitled, would be brought at any time. That the grant has been confirmed, estate distributed and transferred and parts thereof alienated to third parties is never a reason to declare the court *functus officio*. A court of law would interfere at any time so long as it appears that to let the matter rest would be to bless or countenance an injustice.
17. In order that the matter be progressed towards closure, it is directed that the administrators file a report and accounts to demonstrate that the administration has been concluded.
18. Mention on November 7, 2022. Let the file transferred from Butali now be properly registered as a succession cause and this miscellaneous be closed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29<sup>TH</sup> DAY OF JULY 2022.**

**PATRICK JO OTIENO**

**JUDGE**



**In the presence of:**

Mr Okali for Mr Ombwayo for the applicants

Mr Momanyi for the respondents

Court Assistant: Kulubi

