



REPUBLIC OF KENYA



KENYA LAW
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**In re the Estate of James Omondi JURE (Deceased) (Probate & Administration
889 of 2015) [2022] KEHC 13242 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
PROBATE & ADMINISTRATION 889 OF 2015**

KW KIARIE, J

SEPTEMBER 28, 2022

IN THE MATTER OF THE ESTATE OF: JAMES OMONDI JURE.....DECEASED

BETWEEN

JANE ATIENO NYAMUTHE.....PETITIONER

AND

PAMELA AKINYI OMONDI.....RESPONDENT

RULING

1. Jane Atieno Nyamuthe, the applicant/petitioner herein, moved the court by way of summons for confirmation of grant dated September 16, 2021. It was brought pursuant to section 71 of the [Law of Succession Act](#) & rule 40 (1) of the [Probate and Administration Rules](#). The applicant is seeking the following orders:
 - a. That the honourable court be pleased to vary the limb of the court order dated the October 30, 2019 referring the matter herein to the Public Trustee for distribution of the net intestate estate of the deceased and do take up the issue distribute the net-intestate estate of the deceased to the beneficiary in accordance with the scheme set out in the court ruling dated the October 30, 2019.
 - b. That in the alternative, the court be pleased to give such directions that would finalize the cause herein in respect of the distribution of the estate of the deceased.
 - c. The costs of this application be costs in the cause.
2. The application was premised on the following grounds:
 - a. That all the disputes relating to the estate of the deceased have been settled by this court save for the issue of distribution of the net-intestate estate of the deceased.
 - b. That there has been protracted legal tussle over the estate of the deceased, from the year 2004 when the succession cause herein was filed, which has transcended all the way to the Court of



Appeal, which have all now been resolved and the only outstanding issue is the distribution of the estate to the identified beneficiaries.

- c. That vide this court's judgment dated the January 16, 2015, the court settled the identities of the beneficiaries of the deceased.
 - d. That vide the court's ruling dated October 30, 2019 the court resolved and settled the contested issue of the identities of the net intestate estate of the deceased (assets/properties) and the applicable scheme or mode of distribution of the net intestate estate of the deceased.
 - e. That besides, the ruling dated the October 30, 2019, attracted an application for leave to appeal to the Court of Appeal vide Kisumu Court of Appeal, Civil Appeal No 132 Of 2020 which application has since been dismissed.
 - f. That all dispute touching on the estate of the deceased as pertains to identities of the beneficiaries of the deceased, the component net-intestate estate of the deceased and mode or applicable scheme of distribution have been conclusively been settled.
 - g. That what is outstanding is the distribution of the estate of the deceased in accordance with the scheme set out by court in the ruling dated the October 30, 2019.
 - h. That the court had granted the party the liberty of agreeing on how to share out the net intestate of the deceased or have the same distributed by the public trustee.
 - i. That the respondent has frustrated and refused all attempts at amicable resolution of the disputing setting stage for a battle which has lasted in this court for now 17 years.
 - j. That besides, the public trustee who was served with the court order commanding the same to distribute the estate of the deceased to the beneficiary in accordance with the resolve scheme has written a letter dated the July 23, 2021, expressing her inability to comply with the court order thus setting the stage for further delay in the matter.
 - k. That this matter is extremely old and the beneficiaries have been deprived of the benefits of the estate of the deceased and the same are living in destitute state thus the need to bring this long-standing dispute to an end.
 - l. That it is the dictate of law and justice that litigation must be brought o an end and every single issue having been disputed and litigated upon in this matter, it is time for this court to finalize the issue of distribution of the estate at once without further postponing or delay of the same.
 - m. That the public trustee having expressed the reluctance to take up the matter, it would not be in the interests of justice to burden her with the dispute herein and the identity of the beneficiary and the scheme of the distribution of the estate of the deceased having been settled, the court ought to implement the same at once.
3. The application was opposed by the respondent who filed an application dated April 6, 2021. It was brought by way of notice of motion under sections 1A, 1B, 3A, & 34 of the *Civil Procedure Act* and order 42 rule 6 (1) of the *Civil Procedure Rules*. She is seeking the following orders:
- a. This application be certified as urgent and service on the advocates for the petitioner/ respondent be dispensed with in the first instance.
 - b. Pending the hearing and determination of this application, this honourable court be pleased to order a stay of proceedings in this court pending hearing and determination of Civil Application KIS No 132 of 2020.



- c. This honourable court be pleased to order a stay of proceedings in this court pending hearing and final determination of the applicant's intended appeal at the Court of Appeal should such intended leave to appeal be granted.
 - d. Costs of this application be provided.
 - e. Further or any other relief that the honourable court might deem fit to grant.
4. The application was premised on the following grounds:
- a. There is pending before the Court of Appeal Civil Application No KIS No 132 of 2020.
 - b. There is pending before this honourable court an application by the petitioner/respondent herein dated September 16, 2021.
 - c. The objector/applicant's intended appeal stands to be rendered nugatory should this honourable court issue averse orders on the petitioner/respondent's application before this honourable court.
 - d. Further and other reasons to be adduced at the hearing thereof.
5. The application was opposed by the respondent on the following grounds:
- a. That the application is an abuse of the court process in so far as issues stay of the proceedings had been mounted by the applicant vide the application dated the November 11, 2019 and heard on merit and dismissed vide the ruling and order of this court dated the October 13, 2020 and thus the same is res judicata.
 - b. That prior to moving to the Court of Appeal, the applicant had unsuccessfully sought for leave to move the Court of Appeal which was rejected vide the court ruling dated the April 23rd, 2021.
 - c. That besides, the applicant had filed reference seeking to challenge the ruling of Justice Ouko vide an application dated the April 28, 2020 which application has since been withdrawn by the applicant.
 - d. That there has been legal scimmage over the estate of the deceased since 2004 and all the dispute touching on the estate of the deceased as pertains identities of the beneficiaries, components of the net-interstate and mode of distribution of the estate of the deceased have been conclusively been steeled vide court ruling dated October 30, 2019
 - e. That the court vide its ruling dated the October 30, 2019 granted the parties the liberty of agreeing on how to share out the net intestate of the deceased or have the same distributed by the public trustee.
 - f. That what is outstanding is the distribution of the estate of the deceased in accordance with the scheme set out by the court in the ruling dated October 30, 2019.
6. The application dated September 16, 2021 was erroneously titled. The applicant therein was not seeking confirmation but for variation of the court order dated the October 30, 2019. In essence what the applicant is asking the court to do is to review the impugned ruling. Order 45 rule 1 provides for review in the following terms:
- (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.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

Even if the petitioner/applicant had correctly approached the court for review, the same would not be available. This is because in the application by the respondent dated April 6, 2021 it was indicated that there is a pending application before the Court of Appeal this being Civil Application No KIS No 132 of 2020.

- 7. Secondly and very important is the fact that the impugned ruling was made by Karanjah J, a judge of concurrent jurisdiction. I cannot sit on appeal on an order issued by my colleague with concurrent jurisdiction. Whether the application in the Court of Appeal was withdrawn or not what the petitioner is asking cannot be granted for want of jurisdiction.
- 8. The respondent contends that Civil Application KIS No 132 of 2020 is pending in the Court of Appeal. This is not true. Judge Ouko dismissed the motion dated October 24, 2020 on April 23, 2021.
- 9. I therefore find that applications herein lack merits and I accordingly dismiss each of them with no orders as to costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF SEPTEMBER, 2022

KIARIE WAWERU KIARIE

JUDGE

