



In re Estate of the Late Joab Odero alias Joab Odero Odero (Deceased) (Succession Cause 227 of 1993) [2022] KEHC 14167 (KLR) (24 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14167 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 227 OF 1993**

JN KAMAU, J

OCTOBER 24, 2022

**IN THE MATTER OF THE ESTATE OF THE LATE JOAB
ODERO ALIAS JOAB ODERO ODERO (DECEASED)**

AND

IN THE MATTER OF THE APPLICATION BY JANE ADHIAMBO ODERO

BETWEEN

ANNE OTIENO ODERO 1ST ADMINISTRATRIX

JANE ADHIAMBO ODERO 2ND ADMINISTRATRIX

AND

MARK OPIYO ODERO RESPONDENT

RULING

Introduction

1. In her Notice of Motion dated 29th September 2021 and filed on 1st October 2021, the 2nd Administratrix herein sought for orders that the court be pleased to order and direct that the Respondent, his agents, servants and/or representatives to vacate the property Kisumu/Pandpieri/833 (hereinafter referred to as “the subject property”).
2. She swore an affidavit in support of her application on 29th September 2021. She averred that the deceased died on 22nd September 1993 and that this case had been pending in court since then. She stated that vide a Ruling of B.K.Tonui J (as he then was) dated 28th May 2004, parties had agreed how to distribute the estate. She averred that the Certificate of Grant was amended in accordance with the Ruling. Her house was to get fifty (50%) per cent of the deceased’s assets including the subject property which was valued by Real Appraisal Limited at Kshs 27, 500,000/= as per the Valuation Report dated 28th February 2017.



3. She pointed out that the Respondent filed Grounds of Opposition to an application that was dated 24th July 2019 in which a consent was arrived at to the effect that Anne Atieno Odero be a Co-administrator to the deceased's estate.
4. It was her averment that the application was allowed in terms of Prayer (3) therein which dealt with the sale and distribution of the subject property as the Respondent failed to comply with orders that were issued on 11th November 2019. She added that the Objector filed an application dated 18th February 2020 for review of the aforesaid orders but the same was dismissed on 14th October 2020.
5. She contended that the Respondent was in occupation and/or management and control of the subject property and was collecting rent from tenants at the exclusion of the rest of the beneficiaries. She further stated that she had caused a ninety (90) days' Notice to Vacate to issue to the Respondent on 5th May 2021 but he had refused to vacate from the subject property without any lawful reason.
6. In opposition to the said application, the Respondent swore a Replying Affidavit on 6th November 2021. The same was filed on 8th November 2021. He admitted that it was agreed that the deceased's estate would be shared equally between the deceased's two (2) houses. He averred that he had no problem with the 2nd Administratrix, who was his step mother using her share of the property to collect rent and/or sell but that it was wrong for her to control or interfere with the share of the house of Hilda Achieng Odero, who was his deceased mother.
7. He believed that as a son and beneficiary of the estate, he was lawfully entitled to stay on the subject property and did not need the 2nd Administratrix's permission to be there. He pointed out that being aggrieved by the Ruling dismissing his application seeking to review the court orders, he had filed a Notice of Appeal and applied for typed proceedings to enable him file the Record of Appeal. He stated that he was not in any gainful employment and would wish to be given his share of the subject property.
8. He contended that the subject property had several unfinished flats/apartments and each family could give their beneficiaries their share which they could use as they pleased. He was emphatic that the 2nd Administratrix could not force him to sell his rightful inheritance.
9. He further stated that there was a judgment issued in Kisumu CMCC ELC No 296 of 2018 *Jackline Joyce Atieno vs Mark Odero* where adverse orders were made on the subject property which hived of nought decimal nought two (0.02ha) hectares which meant that the purchaser would own the entire driveway leaving no access to the property. He asserted that it was the 2nd Administratrix's intention to push the said issues under the carpet and get a quick sale deal.
10. He denied having received any eviction notice as alleged by the 2nd Administratrix and argued that it was not criminal to hold a contrary opinion over sale and/or distribution of the estate. He added that under Sectional Property Act No 21 of 2020, a suit property could be partitioned and those who wished to sell could do so but by virtue of Article 40 of *the Constitution* of Kenya, he had the right to protect his interest. He urged the court to stay the 2nd Administratrix application pending hearing and determination of his appeal.
11. The 2nd Administratrix swore a Further Affidavit on 7th March 2022. The same was filed on 21st March 2022. She denied ever having been served with any Notice of Appeal and letter requesting for Judgment, Ruling and proceedings in this matter by the Respondent. She added that the documents were filed and served out of time and hence the said Notice of Appeal was in contravention of Rules 75, 76, 77, 82 and 83 of the Court of Appeal Rules, 2010.



12. She stated that the issue of whether or not the whole property could be sold had been addressed by the court's Ruling dated 14th October 2020 which acknowledged that the Respondent herein would get his half (1/2) share that was distributed to his deceased mother once the subject property was sold and presently, there was no stay of proceedings or execution of the said Ruling. She asserted that she was a stranger to the issues in the case at the Environment and Land Court as she was not served with any papers therein.
13. The 2nd Administratrix's Written Submissions were dated 10th March 2022 and filed on 21st March 2022 while the Respondent's Written Submissions were dated 26th April 2022 and filed on 25th April 2022 (sic). Notably, the 1st Administratrix's was supporting the present application and thus did not file any affidavit herein. She, however, filed Written Submissions and List and Bundle of Authorities that were both dated 22nd April 2022 and filed on 25th April 2022
14. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

15. The 2nd Administratrix submitted that the Rectified Certificate of Confirmation of Grant dated 10th December 2019 indicated that the subject property was to be sold and the proceeds of the sale be distributed among the beneficiaries in line with the order that was issued on the same date.
16. She asserted that the Respondent admitted that he was in occupation and/or possession of the subject property and that he and his advocates were served with an eviction notice on 31st May 2021 but he declined to sign it to acknowledge the same. She urged the court to allow her application as prayed and the eviction be carried out by a Court Bailiff under the supervision of OCPD or OCS-Central Police Station Kisumu. Although she relied on the case of *Rosaita Mbithe Kyalo vs Jackson Kiilu Mutisya* [2017] eKLR to support her case, she did not set out what holdings in the said case she was relying upon.
17. The 1st Administratrix submitted that the issue of distribution of the estate was dealt with by the court on 28th May 2004 when all beneficiaries agreed and recorded a consent that the deceased's assets be shared equally between the two (2) houses but that in the course of distribution, it became apparent that the practical way of distributing the suit property was by selling the same and distributing the proceeds of sale among the beneficiaries.
18. She asserted that consequently by way of application dated 24th July 2018, the Grant was amended to reflect the consent recorded on 28th May 2004 and an order made to that effect. She was categorical that the Respondent's contention to remain on the subject property if entertained by court would open the matter to endless litigation yet the matter was twenty eight (28) years old. She pointed out that litigation must come to an end as justice delayed is justice denied.
19. She argued that the court had become functus officio in respect of the issue of sale and distribution of the subject property and could not re-open the issue again. In this regard, she relied on the case of *John Gilbert Ouma vs Kenya Ferry Services Limited* [2021] eKLR where the court cited with approval the case of *Telcom Kenya Limited vs John Ochanda (Suing on his own behalf and on behalf of 966 former employees of Telkom Kenya Limited)* [2014] eKLR where the court held that functus officio was an enduring principle of law that prevented the re-opening of a matter before a court that rendered the final decision thereon.
20. She further submitted that an appeal or intended appeal was not a ground for stay of execution and that the Respondent never filed an application for stay of execution pending appeal either to the High



Court under Order 42 Rule 6 of the Civil Procedure Rules, 2010 or Rule 5(2)(b) of the Court of Appeal Rules.

21. She added that the Notice of Appeal dated 27th October 2020 ought to have been lodged on 28th October 2020 and having been lodged on 30th October 2020, it was filed and served out of time. She averred that the Respondent had not taken any steps to regularise the same. She placed reliance on Rule 75 (2) of the Court of Appeal Rules that provides that a Notice of Appeal should be lodged within fourteen (14) days of the date of the decision to be appealed from and that the same should be served within seven (7) days of lodging the same in accordance with Rule 77 of the Court of Appeal Rules. It was her further submission that even if one was to assume that the said Notice of Appeal was properly filed, the same did not operate as a stay.
22. She further argued that Rule 82 of the Court of Appeal Rules provides that an Appeal ought to be filed within sixty (60) days from the date the Notice of Appeal was lodged and hence in this case, the Respondent ought to have filed his Appeal on or before 28th December 2020.
23. She asserted that the continued stay by the Respondent on the subject property was selfish as he had continued to plunder the deceased's estate which was intermeddling with the deceased's estate as envisioned in Section 45 of the Law of Succession and was thus hindering the administratrixes from discharging their duties as set out in Sections 82 and 83 of the Law of Succession as the deceased's property was vested in them subject to any limitations that were imposed by the grant. She was categorical that the Respondent would not suffer any prejudice as he would benefit once the subject property was sold and the proceeds shared equally amongst all the beneficiaries to the deceased's estate.
24. On his part, the Respondent reiterated the averments of his Replying Affidavit. He submitted that evicting him would render his appeal nugatory and that the application was premature as there was no consent on conditions before sale nor consent for him to give vacant possession before sale.
25. In her order of 9th December 2019, Cherere J directed that:-
 1. That property known as Kisumu/Pandpieri/833 be sold and the proceeds of the sale be distributed among the beneficiaries.
 2. Further the title to this cause is amended to read the estate of Joab Odero alias Joab Odero Odero that is the name appearing on the certificate of court.
26. To be able to complete administration and distribute the estate to the beneficiaries of a deceased, an administrator must take possession and get in all the assets of a deceased estate as provided in Section 83(b) of the Law of Succession Act Cap 160 (Laws of Kenya).
27. Section 83 of the Law of Succession Act sets out the duties of an administrator as follows:-
 - a. to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;
 - b. to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
 - c. to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
 - d. to ascertain and pay, out of the estate of the deceased, all his debts;



- e. within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
 - f. subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
 - g. within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;
 - h. to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
 - i. to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”
28. The *Law of Succession Act* is a complete legal regime with substantive and procedure rules for the governance of succession matters including their civil and criminal sanctions for dealings with the estate of deceased persons.
29. For instance, intermeddling with a deceased’s estate would attract both civil and criminal sanction under Section 45 of the *Law of Succession Act* which states that:-
- 1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - 2. Any person who contravenes the provisions of this section shall—
 - a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration”
30. In addition, Rule 49 of the Probate and Administration Rules, 1980 further provides that applications for which no provision has been made therein as may be necessary to give effect to the protection of the deceased’s estate may be made.



31. The said Rule 49 of the *Probate and Administration Rules* stipulates that:-
- “A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.”
32. This is without prejudice to the general provision on the inherent jurisdiction of the succession court to grant relief to avoid abuse of the process of the court under Rule 73 of the Probate and Administration Rules that states that:
- “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.”
33. As provided under Section 83(b) of the *Law of Succession Act*, the 1st and 2nd Administratrixes herein were under a duty and had a right to get in the subject property for purposes of administration and final distribution of the deceased’s estate. They were acting in accordance with the law when they sought to have the Respondent herein vacate the subject property to enable them proceed as per the Rectified Certificate of Confirmation of Grant that was made on 9th December 2019 by Cherere J.
34. The Respondent had no mandate to direct them how to proceed particularly when the order of 9th December 2019 was so clear that the subject property was to be sold and the proceeds distributed equally to all the deceased’s beneficiaries.
35. His actions amounted to intermeddling with the deceased’s estate as his continued occupation in the property hindered the 1st and 2nd Administratrixes from exercising the powers bestowed on them by Section 82(b)(ii) of the *Law of Succession Act* that stipulates that:-
- “Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers...to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best... provided that no immovable property shall be sold before confirmation of the grant.”
36. However, as the issue of intermeddling had not been placed before this court for consideration and determination, the court restrained itself on commenting further on the issue.
37. It was immaterial that the Respondent had filed a Notice of Appeal with intent to appeal the impugned orders of this court. He ought to have applied for stay of execution and/or proceedings in this matter either before this court or in the Court of Appeal to protect his interest but failed to do so. Indeed, Order 42 Rule 6 (1) of the Civil Procedure Rules that states that:-
- No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order (emphasis court) but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.



38. This court was therefore persuaded that the 2nd Administratrix had demonstrated that the Respondent was unlawfully in occupation of the subject property contrary to the Laws of Succession and was hindering the administration of the deceased's estate as was consented by the beneficiaries of the deceased's estate which was given the legal effect by the issuance of the Rectified Certificate of Confirmation of Grant.

Disposition

39. For the foregoing reasons, the upshot of this court's decision was that the 2nd Administratrix's Notice of Motion application dated 29th September 2021 and filed on 1st October 2021 was merited and the same be and is hereby allowed as prayed.

40. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF OCTOBER 2022

J. KAMAU

JUDGE

