



In re Estate of Ali Said Basmer (Deceased) (Succession Cause E095 of 2021) [2025] KEHC 1460 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1460 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE E095 OF 2021**

G MUTAI, J

FEBRUARY 14, 2025

IN THE MATTER OF THE ESTATE OF ALI SAID BASMER (DECEASED)

BETWEEN

ALI AWADH SAID APPLICANT

AND

BARKA SAID BASMER PETITIONER

RULING

1. Vide a notice of motion dated 14th August 2022 (sic!) the applicant sought to have the Respondent compelled to render a comprehensive account of her administration of the estate, for an independent audit of the income generated or spent by the estate, reimbursement of any money found to have been misappropriated and for an order directing the Chief Kadhi to distribute the estate of the deceased amongst the beneficiaries in accordance with the Islamic Sharia law. He also sought to have the costs of the application to be met by the Respondent.
2. The grounds upon which the orders were sought were that the applicant is the administrator of the estate of Awadh Said Basmer, the brother of the deceased herein. Awadh Said Basmer is a beneficiary of this estate. Vide a ruling delivered by Onyiego J, on 12th May 2023 the respondent was appointed as the administrator of the instant estate. The applicant averred that the respondent failed to diligently administer the estate of the deceased and that she failed to account for the income and the expenses of the estate nor produce accounts. This, it was stated, was contrary to what section 83 of the Law of Succession Act provides.
3. The application was opposed. The respondent filed a replying affidavit sworn on 18th November 2024, in which she averred that being dissatisfied with the decision of Onyiego J, she lodged an appeal that was yet to be heard. That being the case, the ruling of this honourable Court was, in her words, yet to be perfected, and therefore, the issue of distribution as provided for in the will cannot be dismissed as the Court of Appeal had yet to pronounce itself on the same.



4. The respondent denied any properties had been placed in her hands. She further denied that she had failed in her duties as an administrative of the estate. Ms Barka deposed that it would be premature for the Kadhi's Court to have the estate distributed without the fate of the appeal being established by the Court of Appeal. She thus urged that the application be dismissed.
5. The parties filed written submissions. I shall refer to the submission below.
6. The submissions of the applicant is dated 9th December 2024. The learned Counsel for the applicant, Ms Nafula, identified the two issues, which in her view, were due for determination by this Court as being whether the administrator had discharged her duties and if the estate of the deceased should be distributed.
7. Counsel submitted that the administrator hadn't distributed the estate of the deceased. It was urged that as an administrator, the respondent had the duties under sections 83(e), (f), (g) and (h) of the Law of Succession Act to produce to the court a full and accurate inventory of the assets and liabilities of the estate and a full and accurate account of all her dealings therewith within 6 months. This hadn't been done. Ms Nafula submitted that the failure was a grave omission on the part of the respondent. In support of her contention, counsel relied on the case of re Estate of Daudi Owino Olak [2022]eKLR.
8. On the second issue, it was urged that the respondent had yet to distribute the estate of the deceased fully. Counsel for the applicant submitted that there was no order of stay barring the distribution of the estate of the deceased. The respondent, therefore, had no excuse for her inaction.
9. For the foregoing reasons, it was urged that the application be allowed with costs.
10. Those of the Respondent are dated 14th January 2025. In the said submissions, the learned counsel for the respondent, Mr Hassan, submitted that the appeal against the decision of this Court was still pending at the Court of Appeal. He urged that there was a possibility that the decision of this court could be overturned. That being the case, the court was urged not to allow the application at this point.
11. Mr Hassan urged that Probate Courts exercise a sui generis jurisdiction. He submitted that the Court ought to invoke its powers under Rule 73 of the Probate and Administration Rules and make orders that would aid the parties. In that regard, he urged that the matter may be referred to the Chief Kadhi at this point so that the shares of all the beneficiaries may be established. The beneficiaries would, however, get their shares at the tail end once the appeal was concluded.
12. On the provision of accounts, it was urged that the respondent was not in full control of the estate. Some of the assets belonged to third parties or were added to the list without sufficient explanations. For those reasons, it was urged that the order directing the production of accounts at this point was not appropriate at this point.
13. Counsel, therefore, submitted that the application lacked merit.
14. This court has considered the submissions of the parties and the applicable law.
15. As the administrator, the respondent has certain duties under section 83 (e), (f), (g), (h) and (i) of the Law of Succession Act. The said provisions state that: -
 - “(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.”

16. Among this obligation is the duty to produce to the Court a full and accurate inventory of the assets and liabilities of the deceased and accurate accounts of the dealing therewith up to the date of the account. This duty is supposed to be undertaken within six months of the date of the grant.
17. I note that no such account of inventory or accounts has been provided. The estate was yet to be distributed to the estate despite the effluxion of time.
18. The duty of the administrator was stated succinctly *In re Estate of Julius Mimano (Deceased)* [2019] eKLR, where Musyoka, J stated as follows:-

The personal representative of a deceased person holds a unique position in law. The property of the dead person is vested in them by virtue of section 79 of the *Law of Succession Act*. The effect of section 79, read together with section 82 of the Act, is that the same puts the personal representative on the same footing with an owner of the property, in the sense that he exercises the powers that the legal owner of the property would have exercised were they alive, and suffered the same burden of duties and obligations over the property as the legal owner would have been under were they to be alive. Yet, the property, although vested in them by law, would not be theirs. Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the will, in cases of testate succession, and those identified at confirmation of grant, in cases of intestacy. They would also be holding it for the benefit of creditors and any other persons who might have a valid claim against the estate. That would mean that they are trustees of the estate, and, indeed, the *Trustee Act*, Cap 167, Laws of Kenya, defines trustees to include executors and administrators. In the circumstances, therefore, the personal representative would stand in a fiduciary position so far as the property is concerned, and owes a duty to the beneficiaries to render an account to them of their handling of the property that they hold in trust for them. The duty to render accounts to beneficiaries arises from the trust created over estate property when the same vests in the personal representative to hold on behalf of the beneficiaries.



19. In *re Estate of David Kyuli Kaindi (Deceased)* [2015] eKLR Musyoka, J. had this to say on the obligation of personal representatives to render accounts:-

The obligation to account is tied up with the fact that personal representatives are also trustees. They are defined as such in the *Trustee Act*, Cap 167, Laws of Kenya, at Section 2. This is so as property belonging to another vests in them in their capacity as personal representatives, and they hold the same for the benefit of others – beneficiaries, heirs, dependants, survivors, creditors, among others. They stand in a fiduciary position in relation to the property and the beneficiaries. As they hold the property for the benefit of others or on behalf of others – they stand to account to the persons for whose benefit or on whose behalf they hold the property. It is an equitable duty and a statutory obligation.

20. I agree that the beneficiaries are entitled to know about the way the estate is being managed.
21. Although the respondent averred that there is an appeal, the appeal, as Order 42 of the Civil Procedure Rules states, does not operate as a stay. Without a stay order, the respondent is required to carry out her duties as such, failing which she may be removed after being given notice under Section 76(d) of the *Law of Succession Act*.
22. The upshot of the foregoing is that the instant application has merit. The same is allowed as prayed.
23. As this is a succession cause between close family members, it is my view that an award of costs would not promote family amity and reconciliation. I, therefore, make no orders as to costs.
24. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 14TH DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Hassan, for the Respondents;

Ms Nafula, for the Applicant; and

Arthur - Court Assistant.

