In re Estate of Ezekiel Barngetuny (Deceased) (Probate & Administration 22 of 2021) [2025] KEHC 2860 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2860 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

PROBATE & ADMINISTRATION 22 OF 2021

JR KARANJA, J

MARCH 13, 2025

[FORMERLY ELDORET HIGH COURT SUCCESSION CAUSE NO. 299 OF 2014]

IN THE MATTER OF THE ESTATE OF THELATE EZEKIEL BARNGETUNY (DECEASED)

RULING

1. The Notice of Motion dated 22nd November 2024 is brought under Rules 63 and 73 of the Probate & Administration Rules and Order 45 Rule 1 of the Civil Procedure Rules.

   The Applicants, Erick Kipkemboi Barngetuny and Leo Kipkeny Barngetuny, seek the following basic orders against the three Respondents, Aisha, Ogla and Edna to wit: -

   (a) That, this court be pleased to review and/or vary its orders/ directions issued on 23rd October 2024 on the protestor's application dated 22nd February 2024 allowing the protest and directing that the protestor be included a beneficiary to the deceased's estate prior to confirmation of the grant to allow the parties undertake a waterproof test on the protestor's relationship with the deceased.

   (b) That, this court be pleased to order that a Deoxybunocleic Acid Test ([DNA] be conducted on Aisha Muthoni Kirigo in order to correctly ascertain whether she is a beneficiary of the estate of the Late Ezekiel Kiplelei Barngetuny.

   There are the two crucial orders sought by the Applicants on the basis of the grounds contained in the Notice of Motion and which are argumented by the Applicant's averments in their respective supporting affidavits dated 22nd November 2024, and supplementary affidavits dated 23rd January 2025, as well as their submissions filed on their behalf by Messrs. Kibii & Company Advocates.

2. The application was opposed on the basis of the grounds and averments contained in the replying affidavit of the First Respondent [Aisha] dated 16th December 2024 and that of the Second Respondent [Ogla] dated 13th December 2024.

   These were argumented by the respective submissions of the two Respondents filed herein by Mbiyu Kamau & Company Advocates and Mogeni & Company Advocates, respectively.

Indeed, the application was canvassed by way of written submissions.

The Third Respondent [Edna] did not file any replying affidavit nor written submissions in opposition to the application.

3. Interestingly, a beneficiary of the estate but not party to the present application, Joyce Jelagat Chumba, did file a replying affidavit dated 24th January 2025 and written submissions through Messrs. Mburu Maina & Company Advocates in support of the application which in essence is an application for review of this court's ruling delivered on 23rd October 2024, whose import was to allow the protest by the first Respondent against confirmation of the gran dated 7th December 2023 in the manner proposed by the Second Respondent and her [First Respondent] as a beneficiary of the estate.

4. The impugned grant of letter of administration respecting the estate of the Late Ezekiel Kiplelei Barngetuny [deceased] was made and issued by this court on the 7th December 2023 in favour of the First Applicant [Erick] as the First Administrator, the Third Respondent [Edna] as the Second Administrator, the Second Applicant [Leo] as the Third Administrator and the Second Respondent [Ogla] as the Fourth Administrator.

   Thereafter, the four administrators were ordered to take out necessary summons for confirmation of the grant within six [6] months from the date of grant or any shorter period that the parties may deem fit.

5. This was in accordance with Section 71[1] of the *Law of Succession Act*. Which provides that: -

   > " After the expiration of a period of six months, or such shorter period as the court may direct under subsection [3], from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets."

   An Administrator, being the holder of the grant is deemed to be the personal representative of the deceased for all purposes of the grant, but subject to any limitations imposed by the grant, all the property belonging to the deceased vests in him/ her as personal representative [See, Section 79 of the Succession Act].

6. The duties of a personal representative or administrator are spelt out in Section 83 of the Succession Act and include the following:-

   > " (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."

   The proviso to Section 71 of the Succession Act states that: -

   > " in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares."

7. After the impugned ruling of this court it was expected that the four administrators would in the exercise of their lawful mandate come to an agreement on the distribution of the estate after which they would take out necessary summons for confirmation of the grant to facilitate distribution of the estate amongst the rightful beneficiaries and eventually complete the process of administration. It was obviously towards that end that the Fourth Administrator [Ogla] applied for confirmation of the grant

vide the summons for confirmation of grant dated 24th January 2024 and filed herein on 30th January 2024.

A similar application was subsequently filed by the First Applicant [Erick] vide the summons dated 11th May 2024.

8. However, prior to the Second Application for confirmation of grant the First Respondent [Aisha] filed an affidavit of protest dated 22nd February 2024 against the first application for confirmation of grant dated 24th January 2024. Her complaint was essentially that she was also a daughter of the deceased, but was kept in the dark with regard to these succession proceedings such that she was not included as one of the beneficiaries entitled to a share of the deceased's estate. She was therefore opposed to the application by the Second Respondent/ Fourth Administrator for confirmation of the grant and indeed, the proposed mode of distribution of the estate.

9. The court directed that the protest be canvassed by written submissions even as the parties were encouraged to explore possibility of settlement through the alternative justice system process. It would however, appear that the parties gave AJS a wide path and filed respective submissions for and against the protest. The impugned ruling of the 23rd October 2024, was therefore the end product of the protest and indeed, the two applications for confirmation of the grant. It provoked the present application by the two applicants and this court, after due consideration of the application on the basis of the supporting grounds and those in opposition thereto as well as the rival submissions holds the view that the issue arising for determination is whether the application is proper and competent before this court and if so, whether the applicants have demonstrated sufficient grounds for exercise of this court's discretion in their favour.

10. Section 80 of the *Civil Procedure Act* provides for review as follows; -

> " any person who considers himself aggrieved -
>
> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is allowed by this Act,
>
> May apply for a review of judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit."

11. On the other hand, Order 45 Rule 1 of the Civil Procedure Rules, gives specific grounds upon which a review application can be made. These are: -

(a) Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an Applicant at the time the decree was passed;

(b) where there is a mistake or error apparent on the face of the record and

(c) for any other sufficient reason.

[See, Ndungu Njau Vs. National Bank of Kenya Limited, Nairobi Civil Appeal No. 257 of 2002]

12. A party aggrieved by an order or decree of the court may under the aforementioned provision of the civil procedure Rules apply to the same court for review so long as they demonstrate that there is discovery of new and important evidence, a mistake or error apparent on the face of the record or any other sufficient reason [See, Republic Vs. Public Procurement Administrative Review Board and

Others [2018] eKLR]. It is exactly for this reason that the applicants have moved this court praying for review of its ruling made on 23rd October 2024. It may therefore be said "prima facie" that the application is proper and competent before this court.

13. The question is whether the Applicants have satisfied any of the grounds specified in Order 45 Rule 1 of the Civil Procedure Rules to warrant exercise of discretion in their favour.

On the authority of the decision of the Court of Appeal in Shah Vs. Mbogo & Another [1967] EA 116, this court would have unfettered discretion to review, vary or set aside its decision to avoid injustice or hardship resulting from an accident, inadvertence or excisable mistake or error.

14. In this application, the Applicant allude to there being an error on the face of the record to the effect that in the impugned ruling the court did not ascertain the paternity of the protestor when it stated in paragraph *15* as follows: -

> "..... the most eeffective and water proof evidence of paternity would be the legally and scientifically accepted Deoxybunocleic Acit Test [DNA] test and that the 1st and 2nd Administrators ought therefore to commission a DNA test so as to leave no doubt in their mind that the protestor is indeed a known or unknown daughter of their late father, hence their sibling.
>
> Indeed, the 2nd Administrator in her replying affidavit to the protest alludes to a DNA test being carried out to establish and/or proof and/or determine the protestors disputed paternity."

15. The Applicants' supporting affidavits suggest that the court contradicted itself when it allowed the protestor to be included as a beneficiary of the deceased's estate despite its aforementioned observation. There is also a suggestion that the court was not satisfied as to the respective identities of the persons who are beneficiaries to the deceased's estate. That, it was unclear as to whether the protestor was to be included as beneficiary of the estate.

16. It is mainly for the foregoing reasons that the Applicants pray for review of the impugned ruling and direction that DNA test be carried out to determine the true paternity of the First Respondent/ Protestor.

This position receives support from the beneficiary Joyce Jelagat Chumba, who in her submissions cited the decision of the Court of Appeal in Nairobi City Council Vs. Thabit Enterprises Limited [1997] eKLR, where the definition of a mistake or error apparent on the fact of the record was given as follows: -

> "..... error on the face of the record is not what can be described as any incorrect exposition of the law, a failure to apply the appropriate law, an omission to raise and discuss appropriate legal issues or taking of an erroneous view of the law on debatable points..... with reference to what is an error simpliciter or what is an error on the face of the record, mulla, having admitted that the difference was a slim one, went on to opine that: -
>
> "it can be said of an error that it is apparent on the face of the record when it is obvious and self evident and does not require an elaborate argument to be established."

17. Such definition was in tandem with the definition given by the Court of Appeal in Muyodi Vs. Industrial & Commercial Development Corperation & Another [2006] 1EA 243 and Panaras T. Swai Vs. Kenya Breweries Limited [2014] KSCA 883[KLR] both of which were cited herein in the First Respondent's submissions in opposition to the Application.

In the first case of Muyodi Vs. ICDC [supra] an error apparent on the face of the record was described as follows: -

> " ..... an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its vey nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error or substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the record would be made out. An error which has to be established by long drawn process of reasoning or on point where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal."

18. The foregoing definitions of what constitutes an error apparent on the face of the record viewed in the light of the Applicant's present application whose target is paragraph 15 of the impugned ruling would render the application devoid of merit considering that the court did uphold the protest with or without any opposition and found that the protestor was truly a daughter of the deceased entitled to a share of the deceased's estate [See, paragraph 13 of the impugned ruling]

    As rightly stated by the First Respondent in her submissions, in paragraph 15 of the ruling the court was merely pointing to the deficiency of the Applicant's opposition to the protest.

19. It would not be farfetched for this court to opine that this application was intended to take advantage of the court's observation in the impugned paragraph 15 of the ruling in order that the Applicants could take a "Second bite at the cherry." It is no wonder that they seek an order for a DNA test at this juncture yet they had all the opportunity to apply for the same on learning of the protest fielded by the First Respondent and prior to its prosecution. Apparently, they seem dissatisfied with the court's finding on the protest, but instead of pursuing an appeal against the impugned ruling, they chose to move the court by way of review.

20. In any event, the Applicants have clearly failed to demonstrate valid and cogent grounds for grant of an order of review of this court's discretion in their favour.

    In sum, the present application is wanting on merit and is hereby dismissed with costs to the First and Second Respondents.

    Ordered accordingly.

DELIVERED AND DATED THIS 13TH DAY OF MARCH, 2025

HON. J. R. KARANJAH,

JUDGE