In re Estate of Augustine Kimenjo Boen (Deceased) (Succession Cause 206 of 2000) [2025] KEHC 6652 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6652 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 206 OF 2000

JRA WANANDA, J

MAY 23, 2025

IN THE MATTER OF THE ESTATE OF THE LATE AUGUSTINE KIMENJO KIBOEN

BETWEEN

GRACE CHEKORIR BOEN (NOW DECEASED) ..... PETITIONER

AND

HILLARY KIPKURUI SONGOK ..... APPLICANT

AND

ALEXANDER KIRWA BOEN ..... ADMINISTRATOR

RULING

1. Before Court for determination is the 2nd Petitioner's Notice of Motion dated 12/08/2024. The same is filed through Messrs Chepkilot, Kiptoo & Co. Advocates and seeks orders as follows:

    i. That this Honourable Court be pleased to Review and/or set aside its ex parte proceedings of the 25th July 2024 that gave rise to the Amended Certificate of Confirmation of Grant and any other consequential orders issued on the said date and instead, order that the Application dated 11th March 2024 be heard afresh viva voce on its own merits.

    ii. Costs of this Application be provided for.

2. To appreciate the context of the Application, it will be prudent to first recount the background of this matter.

3. Augustine Kimenjo Boen, the deceased herein, died on 12/11/1997 at the age of 66 years. On 8/09/2000, Grace Chepkorir (1st Petitioner) and Hillary Songok (2nd Petitioner), as widow and son of the deceased, respectively, petitioned the Court for Grant of Letters of Administration in respect to the estate. In the Petition, they listed 13 survivors of the deceased, including themselves, as the beneficiaries

of the estate. They also listed 4 parcels of land as comprising the estate. The Letters of Administration was then granted to the Petitioners as co-Administrators on 5/04/2001 and the same was subsequently confirmed on 9/02/2009 and the properties distributed amongst the beneficiaries. The Certificate of Confirmation of Grant was later rectified on 13/02/2009 to correct some typographical errors. Unfortunately, the 1st Petitioner herself died around 8/08/2006-9/08/2006 and as a result, the Grant of Letters of Administration was revoked and re-issued afresh on 5/04/2001 in the name of the 2nd Petitioner as the sole Administrator.

4. The matter then went silent until 11/03/2024 when the Applicants, through Messrs Ngigi Mbugua & Co. Advocates, filed an Application seeking Further Rectification of the Grant in terms of removal of the 2nd Petitioner as Administrator, and replacing him with the Respondent, Alexander Kirwa Boen. The ground advanced was that the 2nd Petitioner, as the sole Administrator, had become unco-operative in executing documents for transfer of the beneficiaries' bequests and had basically refused or delayed to complete the transmission of the estate to the beneficiaries.

5. Despite there being successive Affidavits of Service on record indicating that the 2nd Petitioner/ Administrator was duly served, and despite adjourning the matter once to give the 2nd Petitioner an opportunity to attend Court, neither he nor his Advocates turned up on both occasions. Further, Mr. Simiyu, Counsel for the Applicants, on 20/06/2024, informed the Court that he had been served with a Replying Affidavit to the Application from the 2nd Petitioner's Advocates on record, Messrs Chepkilot Kiptoo & Co. Advocates. This therefore was sufficient proof that indeed, service had been effected. In the circumstances, and also noting that there were on record, consents from 3 other beneficiaries supporting the Application, I allowed and granted the same on 25/07/2024. It is these orders that have therefore triggered the filing of the instant Application

6. The instant Application is supported by the Affidavit sworn by the 2nd Petitioner, Hillary Kipkurui Songok, who deponed that upon being served with the Application, he filed his Replying Affidavit and served the same, but he was surprised to learn that the said Application proceeded ex parte and orders issued on 25/07/2024. He deponed that he was never served with further directions and all he had received was the Application requiring his attendance in Court on 30/07/2024 which he did through his legal representatives. He asserted his knowledge that the matter was listed in the e-filing portal as confirmed by his Advocate who attended Court even though the case was not reflected in the ordinary cause list. According to him, the matter was never called out during the call-over. He then deponed that his Advocate informed him that subsequently, upon inquiry, the Advocate was informed by the Court Registry that the Court file could not be traced, upon which, he deponed, he instructed the Advocate to lodge a complaint about the whereabouts of the Court file, only for it to resurface and that it is when he perused the file and upon service that he realized that the orders had been issued without his involvement or legal representation. He then deponed that he is a stranger to an Application that he stated, was dated 7/02/2024, and which, he stated, gave rise to a Ruling dated 8/02/2024, which Application he termed a forgery and also deponed that the schedule of distribution contained in the alleged Application is inflated.

7. He then stated that he has diligently and in good faith acted for the best interest of the estate and had even personally discharged a charge lodged against an estate property at a cost of Kshs 15,000/- from his own pocket. He also deponed that the consents filed in support of the Respondent's Application for Rectification were not dated and were suspicious. He added that he has not refused to distribute the estate as alleged but he suffered a tragic accident on 27/01/2024 but he is now stable, that the Respondent is not acting in good faith as he has already disposed a portion measuring 2 acres of the estate entitled to be the 2nd Petitioner's share, to a 3rd party who has fenced it and planted horticulture. In the end, he asserted that the Application has been brought timeously.

8. The Application is opposed by way of the Replying Affidavit sworn by the Respondent on 24/10/2024 and filed through Messrs Ngigi Mbugua & Co. Advocates, but which seems to have been wrongly titled "Further Affidavit". He deponed that prior to his being appointed an Administrator on 24/07/2024, the estate had been left in a state of destitute since the 2nd Petitioner, as the former Administrator, had refused to sign mutation forms which is a prerequisite for issuance of new title deeds. Regarding the ex parte orders, he pointed out that the 2nd Petitioner, upon being served, filed a Replying Affidavit and the matter was fixed for hearing on 26/07/2024, that the 2nd Petitioner was again served and an Affidavit of Service filed in Court but that as has been the norm, the 2nd Petitioner again failed to attend Court nor explain his whereabouts or absence from Court. He deponed further that the Court, noting the existence of the Affidavit of Service and the fact that the 2nd Petitioner had refused to sign the transfer documents without a valid reason, allowed the Application. He also pointed out that all the other beneficiaries were in support of the Application for Rectification due to the indolence of the 2nd Petitioner and stated that the 2nd Petitioner seems to be blaming everyone but not himself for his inordinate delay in finalizing the transmission of shares, including impugning an improper motive on the part of the Court and its Registry without any cogent evidence. Regarding the 2nd Petitioner's allegation that the schedule of distribution is inflated and the issue of acreage available for distribution being beyond the size of the estate, and also the allegation that the 2nd Petitioner used his own pocket funds to discharge a charge are strange claims and are not supported by any evidence. He deponed that the 2nd Petitioner had been running the show all by himself to the exclusion of the other beneficiaries and generally, further denied the rest of the allegations made by the 2nd Petitioner.

9. I then gave the parties the liberty to file written Submissions and gave timelines for doing so. However, until the conclusion of this Ruling, I had not come across any Submissions filed by or on behalf of the 2nd Petitioner, whether in the physical Court file or in the Judiciary Case Tracking System (CTS) online portal. In any case, the 2nd Petitioner, having failed to file his Submissions within the timelines and extensions given, by my orders made on 5/02/2025, I directed that any Submissions purportedly filed subsequently by the 2nd Petitioner out of time would not be admitted or accepted by the Court.

10. On the part of the Respondent, his Advocates filed the Submissions dated 25/10/2024.

Respondent's Submissions

11. Counsel for the Respondent, in respect to the prayer for Review, cited Rule 63 of the Probate and Administration Rules, Order 45 Rule 1 of the Civil Procedure Rules, and also Section 80 of the *Civil Procedure Act*. He also cited the case of Republic v Public Procurement Administrative Review Board and 2 Others [2018] eKLR. He then submitted that it is beyond peradventure that the ex parte proceedings of 25/07/2024 were regular in that the 2nd Petitioner was served and an Affidavit of Service is on record and which service the 2nd Petitioner has not disputed and he has also never called for cross-examination of the Process Server. He submitted that although the Court has a wide discretion in setting aside its orders, such discretion is to be exercised on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly, and not arbitrarily, whimsical or capriciously. He then generally denied the accusations and allegations made by the 2nd Petitioner in his Affidavit and reiterated that the 2nd Petitioner had inexplicably failed to execute his obligations as an Administrator and was therefore justifiably and properly replaced as such Administrator.

Determination

12. The issue for determination herein is "whether this Court should review and/or set aside its orders made on 25/07/2024".

13. Review of orders in Succession matters is governed by Rule 63(1) of the Probate and Administration Rules, which provides as follows:

> "63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules
>
> (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules."

14. It is therefore clear from the foregoing that the only provisions of the Civil Procedure Rules imported to the *Law of Succession Act* are those listed above, and which include Order 45 of the Civil Procedure Rules which relates to Review (see John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another [2016] eKLR).

15. In the circumstances, any party seeking review of orders in a probate or Succession matter must meet the requirements set under Order 45(1). The same provides as follows:

> "1.
>
> (1) Any person considering himself aggrieved—
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> (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."

16. Order 45 therefore provides for 3 circumstances under which an order for review can be made. The first one is where there has been "discovery of new and important matter or evidence", the second is where there has been "a mistake or error apparent on the face of the record" and the third is "for any other sufficient reason". In this case, the issue is non-attendance by the 2nd Petitioner in Court pursuant whereof ex parte orders were issued. The 2nd Petitioner has not disclosed the ground, amongst the 3 above, under which he has come, but seemingly, it is the third ground that may perhaps be invoked in advancing the grounds preferred. The question therefore is whether he has sufficiently brought himself within that ground.

17. On the issue of review, the Court of Appeal, in the case of National Bank of Kenya Limited v Ndungu Njau [1997] eKLR, guided as follows:

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.
>
> In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise, we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

18. In this case, the 2nd Petitioner's basis for seeking a Review is basically that the proceedings of 26/07/2024 went on ex parte yet he and his Advocate were present in Court and ready to proceed but that allegedly, the case was never called out. I will address this ground both under the limb of Review and also under that of setting aside an order issued after non-attendance, which, in any case, seems to be the more appropriate one anyway.

19. On the ground of setting aside orders, it is not in doubt that the Court possesses a wide discretion in deciding whether to allow an application seeking the setting aside of orders granted in the absence of a party who failed to attend Court. This discretion must however be exercised judiciously as was well-stated stated in the case of Shah vs Mbogo (1979) EA 116 as follows:

> " ..... this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

20. For the Court to exercise its discretion in favour of the 2nd Petitioner therefore, it must be satisfied that there is "sufficient cause" or "reason" to warrant such setting aside. The term "sufficient Cause" was explained in the case of The Hon. Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (UR), by Musinga, JA as follows:

> " 28. . "Sufficient cause" or "good cause" in law means:
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> "..... the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused". See BLACK'S LAW DICTIONARY, 9th Edition, page 251.
>
> Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

21. Similarly, the Court of Appeal, in the case of CMC Holdings Ltd vs James Mumo Nzioka (2004) KLR 173, guided as follows:

> " The discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error."

22. Lastly, in the case of Belinda Murai & 9 Others -Vs- Amos Wainaina [1982] KLR 38, the indefatigable C.B. Madan, JA (as he then was) pronounced himself in the following manner:

> " A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not forgive or condone it but it ought to certainly do whatever is necessary to rectify it if the interests of justice so dictate. The courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule."

23. In this case, the Application for Rectification first came before this Court on 20/06/2024. Although there was an Affidavit of Service on record, neither the 2nd Petitioner nor his Advocate attended Court. There was also indication that the 2nd Petitioner's Advocates had filed a Replying Affidavit. This was therefore sufficient proof that they had been served with the Application and were thus aware of the hearing date. In spite of this, I still adjourned the matter and fixed it for 25/07/2024. I did this in my own discretion so as to give the 2nd Petitioner a second chance. However, when the matter came up on 25/07/2024, despite there being an Affidavit of Service on record, again, neither the 2nd Petitioner nor his Advocate attended Court. It is therefore under these circumstances, and upon satisfying myself as to the merits of the Application, that I allowed and granted the same ex parte.

24. In view of the above record, I am not at all satisfied that the 2nd Petitioner has given any explanation for his or his Advocate's non-attendance in Court both on 20/06/2024 and again, on 25/07/2024. He claims that although he was in Court on 25/07/2024, the matter was never called out. He does not disclose whether he was in open Court or he attended virtually. If indeed the matter was never called out, how then did the Respondent's Counsel end up addressing the Court? What magic did he invoke? The 2nd Petitioner is also not clear on whether his Advocate, who is in fact the one who had the mandate to address the Court on the 2nd Petitioner's behalf, was himself present in Court on either or on both the said dates. Further, the Advocate has not even bothered to swear his own Affidavit to explain whether he attended Court and if not, his explanation for failing to so attend. In the absence of the Advocate's own Affidavit, this Application is dead on arrival. If by any chance the 2nd Petitioner and/or his Counsel were in Court on 25/07/2024, what about the similar non-attendance on the earlier date of 20/06/2024? Was the case also not called out on that date? Clearly, the 2nd Petitioner's or his Advocate's non-attendance was consistent, habitual and successive, and they cannot now turn around and purport to blame the Court for proceeding ex parte.

25. For the said reasons, I am not persuaded that any explanation has been offered for the non-attendance by the 2nd Petitioner and/or his Counsel on both the successive dates of 20/06/2024 and again on

25/07/2024. Clearly, there was lack of diligence on the part of the 2nd Petitioner and/or his Advocates and the allegation that the case was not called out on 25/07/2024 is nothing but a "red-herring". It is obviously false.

26. The current Application reminds me of the wise words of Madan, J (as he then was) which he made in the case of N vs. N [1991] KLR 685 as follows:

> " I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

27. The instant Application was a total waste of this Court's precious judicial time and was one very long shot. Had this not been a family matter in respect to which the Courts always try to promote and facilitate reconciliation, I would have swiftly penalized the 2nd Petitioner, and his Advocates, to pay costs of the Application.

28. In any case, I note that although the Certificate of Confirmation of Grant was issued to the 2nd Petitioner way back in the year 2009, as Administrator, to date, 16 years later, he has not made any progress in transmitting to the beneficiaries their shares long determined by the Court. For this reason, I draw the 2nd Petitioner's attention to the provisions of Sections 83 and 76 of the *Law of Succession Act*, which are premised as follows:

> " Section 83. Duties of personal representatives
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> Personal representatives shall have the following duties—
>
> .....
>
> (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;
>
> ....."
>
> Section 76. Revocation or annulment of grant
>
> " A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any Interested Party or of its own motion—
>
> .....

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) .....; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) ....."

29. From the foregoing, the 2nd Petitioner should know that appointment as an Administrator is not a carte blanche to hold other beneficiaries at ransom and does not place the beneficiaries at the Administrator's mercy. The appointment does not in any way confer upon the Administrator the right to lord over the beneficiaries or grant him the power to exercise benevolence over them at his will. He is appointed to undertake a specific duty on behalf of the beneficiaries, with clear statutory timelines and he must conclude that process within 6 months of confirmation of the Grant and also report back to Court, which if satisfied, may then discharge him from that duty. It is therefore not a permanent job. An Administrator is in fact required to render accounts and give an inventory of the estate within such 6 months.

30. All the above the 2nd Petitioner, 16 years after the Court distributed the estate and issued the Certificate of Confirmation of Grant, has not done in this case. Instead of now allowing other fit persons to take over that duty, he is still returning to Court viciously fighting to retain control as if the estate is his personal property. Instead of owning up for his own indolence, he is still trying to seek refuge in blaming everybody else, including the Court. To make matters worse, he is unapologetic for his evident 16 years lethargy. From the above statutory provisions, it is clear that the Court is empowered to, can, and will, intervene where an Administrator sleeps on the job and one of the remedies is to remove him from that duty and replace with him with another. This, the Court can do even suo motu, without being moved by any party.

31. It is therefore clear that even had the 2nd Petitioner and/or his Advocates attended Court and the matter of Rectification canvassed inter partes, the Application for his removal as an Administrator, would in most probability, still have been allowed on the basis of its merits.

Final Orders

32. In the premises, I rule and order as follows:

i. The 2nd Petitioner's Notice of Motion dated 12/08/2024 is hereby dismissed.

ii. The Respondent, as the current Administrator, is hereby directed to now move with speed to conclude the process of transmission of the estate as already distributed by the Court.

iii. This being a family matter in which Courts encourage, and wish to promote and facilitate reconciliation, I make no order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF MAY 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Kiptoo for the Applicant

Mr. Ngigi Mbugua h/b for Mr. Simiyu for the Petitioner

Court Assistant: Edwin Lotieng