



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Kulsumbai Nazareli Jiwa (DCD) and Kulsumbai Nazerali Trust
(Civil Suit 045 of 2014) [2025] KEHC 12129 (KLR) (9 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 12129 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 045 OF 2014**

F WANGARI, J

JUNE 9, 2025

IN THE MATTER OF THE ESTATE OF KULSUMBAI NAZARELI JIWA (DCD)

BETWEEN

YUSUF JIWA PLAINTIFF

AND

AUN JIWA 1ST DEFENDANT

ROSEMIN NAZERALI JIWA 2ND DEFENDANT

RULING

1. The Applicant filed a Notice of Motion Application dated 15/04/2024. The application seeks the following orders: -
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That this court be pleased to appoint Messers DK Real Estate Limited or any other person/body to manage and oversee the sale of trust property known as Mombasa/ Block XXVIII/22 in furtherance and to give effect to the judgment of this court dated 31/05/2019.
 - e. That the sale of the trust property be carried out by an auctioneer within 60 days or within such reasonable time as this court may deem fit by public auction as provided in the Trust Deed and in the judgment of this court.
 - f. Costs be provided for.



2. In support of the application, it was that the Respondents have failed to comply with the judgment of this court dated 31/05/2019 to have the property sold and provide accounts within 90 days of the judgment. 5 years later, the Respondents are yet to comply with the court's judgment. Instead, the Respondents have diverted most of the trust monies in their personal accounts, hence abusing their fiduciary duty.
3. The Applicant prayed that the application be allowed as the Respondents continue to be in contempt of court orders.
4. The application was opposed via the Replying Affidavit dated 03/06/2024 sworn by the 1st Respondent, it was stated that the Respondents having been dissatisfied with the judgment of the court, they filed an appeal and an application for stay of execution dated 11/07/2029 which is still pending determination before this court.
5. Further, the 2nd Plaintiff is now deceased and no probate proceedings have been filed in respect to his estate. There are 4 other matters relating to the trust property that have been filed but stalled due to the death of the 2nd Plaintiff. They are HCCC No. 59 of 2019, CA No. 49 of 2018, HCCC No. 71 of 2017 (OS), HCCC No. 45 of 2014 (OS) and MSA ELC MISC. APPL NO. E038 of 2023.
6. The Applicant in this matter is yet to comply with the court orders dated 20/02/2024 in the ELC matter where he was ordered to deposit Kshs. 1,590,400/= within 60 days and thereafter monthly deposit of Kshs. 28,400/= into the escrow account. The Respondents filed a citation in respect to the estate of the 2nd Plaintiff.
7. It was prayed that the parties await the outcome of the appeal and the pending matters referred to herein. The Respondents have denied that they have mismanaged the trust property or diverted the money into their private accounts. They stated that they are managing the property in a transparent and lawful manner in a manner to the benefit of all the beneficiaries.
8. It was further stated that the Applicant is seeking to protect his own interests to the detriment of the other beneficiaries. No prejudice would be occasioned to the Applicants if the orders being sought are not granted. He prayed that the application be dismissed with costs to the Respondent.
9. The application was canvassed by way of written submissions. Both parties filed their submissions in support of their rival positions. The Applicant's submissions are dated 02/08/2024 and the Respondents submissions are dated 25/03/2024, which I have considered.

Analysis

10. This Court has carefully considered the application, the response, the Applicant's submissions, the authorities cited as well as the law and the following issues falls for this Court's determination: -
 - a. Whether the application has merits.
 - b. Who bears the costs?
11. It has not been disputed that the judgment of the court dated 31/05/2019 ordered for the sale of the trust property. This court in paragraph 30 of the judgement held as follows;
 - a. In accordance with the wishes of the settlor, let the trust property known as Mombasa/ Block/ XXVIII/ 22 be valued at sold at the best value price by way of public auction within 90 days from today.



- b. Within 45 days from the date hereof, let the trustees file a true and accurate account regarding the financial affairs of the trust and to serve copies thereof upon all the parties to this suit.
 - c. Upon sale, let the proceeds of such sale and the accumulations from income in the hands of the trustees be applied by the trustees in terms of clause 8 of the deed of settlement.
 - d. On account of the fact that all the parties are related and connected to the trust, I order that each shall bear own costs.
12. The Respondents state that they filed an appeal against the said judgment and an application for stay of execution of the said judgment. The Respondent filed a Notice of Appeal dated 21/06/2019. No proceedings have been filed to confirm that indeed there is a pending appeal before the Court of Appeal. The Respondent filed documents in relation to the matters as mentioned in paragraph 5 herein above, but conveniently failed to attach any document as proof that there existed an appeal against the judgment as alleged.
13. Giving the benefit of doubt and deem it that an appeal had been filed against the judgment of this court, the Respondent filed an application dated 11/07/2019 seeking stay of execution of the judgment of this court.
14. I have perused through the proceedings in this matter. The Respondents have never taken any action to prosecute the said application almost 5 years after it was filed. Order 17, Rule 2 (5) states as hereunder;

“A suit stands dismissed after two years where no step has been undertaken”
15. The application having not been prosecuted for 5 years since its filing. The application was fixed for hearing on 01/04/2020 but no proceedings were recorded for the said date. The next proceedings are dated 05/10/2022 when the matter was fixed for mention on 21/01/2023. No proceedings are recorded thereafter until 22/05/2025 when directions were issued in respect to this application. The Respondents having taken no action for over 2 years, the application dated 11/07/2029 therefore stands as dismissed.
16. Despite there being no stay orders against the judgment of this court, the Respondent stated that the pending suits related to the subject matter ought to be determined first. I have perused through the annexed proceedings of the pending matters. They are all related to rent dispute in respect to the trust property save for the succession cause. The disputes between the tenants and the trustees is not a bar to the execution of this court’s judgment. I find that the orders ought to be granted as prayed.
17. On costs, the same follows the event. Considering that the parties are family members, each party to bear its own costs.
18. The upshot of the foregoing is that the court renders itself as hereunder: -
 - a. The Notice of Motion Application dated 11/07/2019 stands dismissed for want of prosecution.
 - b. The Notice of Motion application dated 15/04/2024 has merits and is allowed as prayed.
 - c. Upon the deposit of the sale proceeds and accumulated income in an escrow account in the name of both counsels on record, both counsels to ensure that all the liabilities are given priority pending distribution of the balance to the beneficiaries and/ or the estates of the deceased beneficiaries.
 - d. Each party to bear its own costs.



e. File is hereby deemed as closed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE, 2025.

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F. WANGARI

JUDGE

In the presence of;

N/A by the Applicant

N/A by the Respondent

Ms. Getrude, Court Assistant

