



In re Estate of Johnson Omae Aburi (Deceased) (Succession Cause 2 of 2019) [2024] KEHC 9813 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9813 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
SUCCESSION CAUSE 2 OF 2019**

PN GICHOHI, J

JULY 25, 2024

**IN THE MATTER OF THE ESTATE OF JOHNSON OMAE ABURI
(DECEASED)**

BETWEEN

JARED ONGWAE OMAE APPLICANT

AND

GRACE OBEGI OMAE 1ST RESPONDENT

GEORGE KENNEDY OMAE 2ND RESPONDENT

AND

PETER NYANDUSI PROTESTOR

RULING

1. On 31st March 2022 and under a certificate of urgency, the Applicant filed a Summons dated 30th March, 2022 under Rules 49, 59, 63 & 73 of the Probate and administration Rules, Order 45 Rules 1, 2,& 4 of the Civil Procedure Rules 2010, Section 71 & 76 of the *Law of Succession Act* Cap 160 Laws of Kenya and Articles 48, 50 (1) 159 (2) (d) & 165 of *the Constitution* of Kenya , 2010 seeking orders that:
 1. The Honourable court be pleased to Review, Vary and/or set aside orders of this honourable court rendered and/or made on the 28th February, 2022, whereby the honourable court proceeded to and indeed set aside the mode of distribution in the confirmed grant dated the 14th August, 2019 on the Grant of Letters of Administration intestate issued on 20th day of May, 2019.



2. The honourable court be pleased to restore and/or reinstate the mode of distribution in the confirmed grant dated the 14th August, 2019 on the Grant of Letters of Administration intestate issued on 20th day of May, 2019.
 3. Spent
 4. That the honourable court be pleased to make such other order and/or further orders/directions, as may be just and expedient in the circumstances.
 5. Costs of this application be borne by the Protestor.
2. The grounds on the face of the application and expounded in the Supporting Affidavit sworn by Jared Ongwae Omae on 30th March 2022. He deponed that the Grant of Letters of Administration were issued on 20th May 2019 and confirmed on 14th August 2019.
 3. That 15 months later, the Protestor mounted her objection and without leave of the Court, to protest the mediation agreement. That despite that, the Court nevertheless, in its Ruling dated 28th February 2022, set aside the mode of distribution in the Confirmed Grant dated on the Grant of Letters of Administration intestate issued on 20th May 2019.
 4. He further deponed that in that Ruling, the Court erroneously left out of the inheritance one beneficiary namely Daniel Nyasinga Omae (deceased) and survived by a wife and children despite the fact that the mediation agreement and the Grant of Letters of Administration intestate issued on 14th August 2019 had recognised him, his surviving widow and her children.
 5. He deponed that the that before his sudden death, the deceased had already subdivided the properties and marked the boundaries and those minutes were captured by the Protestor. That all beneficiaries embarked on having permanent boundaries marked with live fences and internal established access roads. That all the beneficiaries and administrators have planted mature permanent boundary marks / beacons /barbed wires as per their boundaries and beacons as per the mediation agreement and Court ruling and in line with the letters of administration intestate issued on 14th August 2019.
 6. He emphasised that the mediation agreement and the Grant issued 14th August 2019 which captured the wishes of the deceased and which is undisputed. He deponed that the Protestor and the 2nd Respondent placed two contradictory positions in this matter and wish to hold the other beneficiaries at ransom notwithstanding apparent lack of legal entitlement to estate of the late Johnson Omae Aburi (deceased). He therefore deponed that properties have been intermeddled by the Protestor and 2nd Respondent which renders them expansionists.
 7. Upon being served, the Protestor filed a Replying affidavit sworn on 4th May 2022 by Peter Nyandusi. He deponed that to his knowledge all beneficiaries were included in the distribution of the estate of the deceased. That there is no new and important evidence which was not within the knowledge of the Applicant and/or error apparent on the of the record or sufficient reason to warrant review of the Court's ruling dated 28th February 2022. That the only error in the ruling is that it appears to read 8 sons instead of 7 sons.
 8. That there is no dispute that the deceased (Johnson Omae Aburi) had three properties and two houses. That the first house had 8 children and the second house had one child (son). He maintained that the beneficiaries were not in agreement on how to share the property otherwise they could have signed the agreement. That in the circumstances, the annexures thereto were irrelevant.



9. It was his contention that there are no boundaries on ground as alleged except for the 9 acres p for the purchaser which are clearly demarcated and not in dispute. He urged the Applicant ought to have appealed if aggrieved by the ruling.
10. The 2nd Respondent also filed a Replying Affidavit sworn on 4th May, 2022 by George Kennedy Omaa where he also maintained that the Applicant ought to have appealed if not satisfied that all the eight children of the deceased could have gotten equal share from the three properties of the deceased. He deponed that it will be unfair to for a person to get 28 acres when other beneficiaries of the deceased get 3 acres. Lastly , he urged the court to dismiss the application herein for lack of merit.
11. The Applicant then filed a further affidavit which he swore on 27th July, 2022 and while maintaining his affidavit in support, he argued that there is no appeal preferred and therefore this Court has power to review pursuant to Provisions of Rule 63 (1) of the Probate and Administration Rules.
12. Further, he deponed that the 2nd Respondent's Replying affidavit did not depict the trued picture given that the mediation agreement was ordered by the Court but the 2nd Respondent chose not to attend the said meeting.

Applicant's Submissions

13. Counsel for the Applicant filed submissions on 4th October, 2022 and identified the following issue for determination: whether the applicant has established sufficient basis as required by law to warrant the review, variation and or setting aside of the mode of distribution as set out in this Honourable Court's Ruling rendered on the 28th of February, 2022.
14. He submitted that paragraph 5 of this Honourable Court's Ruling did not provide at all for the surviving widow and the children to one of the beneficiaries by the name Daniel Nyasinga Omaa (deceased) who had left behind a surviving spouse by the name Sarah Kemunto Otinga and children namely: Faith Kerubo Nyasinga, Vivian Mora Nyasinga and Emmanuel Junior Nyasinga.
15. Further, it was submitted that the decision of the Court was made on the basis of affidavit evidence of the parties which led to the setting aside of the mediation agreement which had been reached and or arrived at through a series of negotiations and compromises.
16. Citing High Court decision In re estate of Mbugua Njogu (Deceased) [2018] eKLR and NKM v SMM & Another [2019] eKLR where High Court emphasised on a mediation settlement agreement being binding to all parties who have signed it, Counsel urged the Court to find that the grant issued be confirmed in terms of the mediation agreement and if there is any particular issue which is contested, the same can be resolved through the said mediation by the parties herein. That there are sufficient reasons to warrant the review of the orders of this Court issued vide a ruling rendered on the 28th of February, 2022.

2nd Respondent's Submissions

17. In submissions filed on 19th September, 2022, Counsel for the 2nd Respondent submitted that the mediation report which the applicant intends to rely on and marked J002 is not signed by all parties affected in this cause and the same cannot be used to persuade the court to review its ruling.
18. While arguing that the provisions of Section 40 were rightly applied, Counsel submitted that the Court was aware of the Mediation report and considered it in its ruling and therefore, there is nothing new the Applicant has presented before this Court and the orders issued are appropriate and will make the parties to live in peace.



Protestor's Submissions

19. Counsel for the Protestor filed submissions on 19th September, 2022. He submitted that the mediation report which the protestor contested, gave one person a share equivalent to 28 acres and the least got a share of 3 acres.
20. While arguing that the applicable rules where the deceased was a polygamous man is Section 38-40 of the Law of Succession Act, he submitted that the mediation agreement was only signed by five out of ten beneficiaries signed which is a clear indication that they were not in agreement and/or satisfied with it and therefore, the Court cannot overlook that the same was captured in the ruling which the Applicant is contesting. Counsel submitted that when the court made the ruling in respect to the mode of distribution, all these factors were taken into account. Counsel urged the court to dismiss the said application with costs.

Analysis And Determination

21. The material placed before this Court has been considered together with the Ruling delivered on 28th February 2022 by R.E. Ougo J and the court record. The issue for determination therefore, is whether the Applicant's Summons dated 30th March 2022 warrants granting of the orders sought.
22. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides: -
 - “ Any person considering himself aggrieved—
 - (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.
23. The three limbs which are discernible in the above provision in regard to application for review are:-
 - 1 Discovery of new and important matter or evidence.
 - 2 Mistake or error apparent on the face of the record.
 - 3 Any other sufficient reason.
24. It is the Applicant's case that the Court's Ruling rendered on the 28th of February, 2022 did not provide at all for the surviving widow and the children to one of the beneficiaries by the name Daniel Nyasinga Omae (deceased).
25. It is also his case that the decision of the Court was made on the basis of affidavit evidence of the parties which led to the setting aside of the mediation agreement which had been reached and or arrived at through a series of negotiations and compromises.



26. The main contention in the application is thus whether one beneficiary, Daniel Nyasinga Omae (now deceased) who is survived by a wife and children was erroneously left out of the inheritance in the Ruling delivered on 28th February, 2022.
27. In his Replying Affidavit sworn on 4th May, 2022 the Protestor deponed at paragraph 8 and 9 that:
- “That I know of my own knowledge that all the beneficiaries were included in the distribution of the estate of the deceased whereby the said Daniel Nyansinga Omae was allocated shares in Kitaru settlement scheme/ 10 Nyaribari Chache/B/B/Boburia/2284 and Nyaribari Chache/B/B/Boburia/2280 all in equal share among the 8 children of Johnson Ommae Aburi and the allegation that he did not get a share is false.”
- That it is true that in the ruling the only mistake therein is 7 sons instead of 8 sons which can be easily amended.”
28. In his Further Affidavit sworn 27th July 2022, the Applicant deponed at paragraphs 7 and 8 as follows:
- “That as per paragraph 8 of the Protestor’s replying affidavit the averments made by the 2nd (sic) are not correct. KITARU SETTLEMENT SCHEME/10 was allocated to Daniel Nyasinga Omae, Josephine Nyanchama, Justus Omae, Evans Ogega Omae, George Omae and Peter Omae, Nyaribari Chache B/B/2284 was allocated to myself and Nyaribari Chache B/B/Boburia/2280 was allocated to Philip Arasa Omae.
- That as per paragraph 9 of the Protestor’s replying affidavit it does not depict the true picture, since Daniel Nyasinga Omae (now deceased) who is survived by a wife and children was erroneously left out of inheritance in the Ruling delivered on 28th February, 2022 and his survivors were left landless and cursed out of our father’s inheritary succession process.”
29. At paragraph 7 of his Further Affidavit dated 27th July, 2022, the Applicant admits that Daniel Nyasinga Omae was among the beneficiaries allocated KITARU SETTLEMENT SCHEME/10. He however maintains that Daniel Nyasinga Omae was erroneously left out of the inheritance in the ruling delivered on 28th February, 2022.
30. It is noted while setting aside the mode of distribution in the confirmed grant dated 14th August 2021, the Court held in its final orders:-
- a. The grant issued on the 20th day of May 2019 is not revoked.
 - b. The mode of distribution in the confirmed grant dated the 14th August 2019 is set aside.
 - c. The deceased’s estate shall be distributed as follows;
 - i. Nyaribari Chache B/B/Boburia 2284 to be shared equally amongst the 7 sons of the deceased.
 - ii. Nyaribari Chache B/B/Boburia 2280 be shared amongst the 7 sons of the deceased.
 - iii. 9 acres of Kitaru Settlement scheme is allocated to Charles Nyamweya.
 - iv. 2 cares of Settlement scheme is allocated to Josephine Nyanchama.
 - v. The remaining acreage in Kitaru Settlement scheme to be shared amongst the 7 sons in equal shares.



- vi. The administrators will comply with the court order of 20.5.2019 to have the survey done on Kitaru Settlement scheme to ascertain the share of each beneficiary. No orders as to costs.

31. It is worth to note that the application leading to the ruling dated 28th February 2022 was the Summons dated 24th November 2020 by the Protestor herein (Peter Nyandusi) seeking the setting aside of the grant of letters of Administration intestate issued on 20th May 2019 and the challenging the mode of distribution in the grant confirmed on 14th August 2019. He sought that the grant be amended a fresh one be issued.
32. From that ruling, it is clear that the mode of distribution was the issue just as it can be discerned from the application herein , the affidavits as and the submissions by the parties. It is not just the issue of alleged disinheritance of one Daniel Nyasinga Omae or his alleged omission in the mode of distribution in the in the said ruling. The authorities In re estate of Mbugua Njogu (Deceased) and NKM v SMM & Another (supra) would not come to his aid in the circumstances herein.
33. The issues raised in the application cannot be resolved by way of revision. If the Applicant is aggrieved by the decision of the Court, the recourse would lie on appeal.
34. In the circumstances, this Court issues the following orders:
 1. The Summons dated 30th March, 2022 does not meet the threshold for an order of review and therefore, it is hereby dismissed.
 2. The Applicant shall bear the costs.

DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 25TH DAY OF JULY , 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Applicant

N/A for 1st Respondent

N/A for 2nd Respondent

N/A for the Protestor

Ruto/ Aphline- Court Assistant

