



In re Estate of the Late Lalji Ladharam Thanki (Deceased) (Succession Cause 119 of 1978) [2024] KEHC 9485 (KLR) (Family) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9485 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 119 OF 1978
HK CHEMITEI, J
JULY 25, 2024**

BETWEEN

MUKESH LALJIBHAI THANKY APPLICANT

AND

JITENDRAKUMAR LALJI LADHARAM THANKI RESPONDENT

RULING

1. Before the court are two applications dated 30th March 2023 by the Applicant hereinafter referred to as Mukesh and 14th June 2023 filed by the Respondent who for purposes of distinction is referred to as Thanki. There is also a preliminary objection dated 10th August 2023 filed by Mukesh.
2. The court shall proceed to deal with them seriatim.
3. The application dated 30th March 2013 is asking the court for the following orders:-
 - (a) That Jitendrakumar Laljibhai Thanki do forthwith deposit into court the sum of Kshs.82,142,568.4 plus interest thereon at court rates from the date of receipt of sale proceeds to date being the undisputed amount from the sales of LR. NO. 1870/IV/89 and 3734/352.
 - (b) That Jitendrakumar Laljibhai Thanki go give an account of and deposit into court all the jewellery belonging to the estate which were held in Bank of India, Nairobi for distribution.
 - (c) That Jitendrakumar Laljibhai Thanki be compelled to produce on oath the following documents from the time of deceased death to 12th July 2017 when the court made the ruling;
 - (i) All signed leases, contracts, agreements and receipts issued for the rents received;
 - (ii) Bank statements where the rent and other incomes were received;



- (iii) All receipts for alleged repairs for letting fees referred to;
 - (iv) All receipts and agreements for letting the fees referred to;
 - (v) All receipts for commissions on property management;
 - (vi) There is no evidence furnished as to bank money remittances/transfers for the sale prices of properties.
 - (vii) Expense details for plot no 209/1120/3 Batu Batu road from the year 2001 to date.
- (d) That in default of compliance with the orders above Jitendrakumar Laljibhai Thanki be cited for contempt of court and his properties be attached to satisfy the orders of the court made on 12th July 2017.
4. He also prayed for the costs of the application.
5. The second application by the Respondent prays for the following orders:-
- (a) The mediators report dated 17th June 2019 be and is hereby adopted as an order of the court in so far as the same relates to the provision of accounts in respect to property LR No 1870/IV/IV/89 and LR No 3734/352 as well as documents relating to their sale as directed in the order made herein on 12th July 2017.
 - (b) That part of the order made herein on 12th July 2017 restraining the eviction of Mukesh Laljibhai Thanky from property LR No 209/120/3 be and is hereby set aside and discharged.
6. The Applicant prayed for the costs of the application as well.
7. The parties herein filed their respective replies to the two applications as well as written submissions which they highlighted orally in court.
8. The two applications are essentially intertwined and dealing with them wholesomely may be appropriate in the circumstances.
9. The two Applicant's are brothers and sons of the deceased herein. The Respondent is the administrator of the estate of their late father who died in 1978 intestate.
10. The said administrator was granted the grant which was subsequently confirmed. The issue before the court was how he has managed the estate from the time he obtained the grant. Two applications dated 29th July 2015 and 26th August 2016 were filed and the court on 12th July 2017 made the following orders;
- “(i) The Respondent is restrained from evicting the Applicant from LR No 209/1220/3.
 - (ii) The administrator of the estate Jitendrakumar Lalji Ladharam Thanki is hereby ordered to give a full account of the rent received on behalf of the estate properties to wit no 1870/IV/89 and LR 3734 /352 from the time of the deceased's death the same to be done within 60 days from the date of this ruling. The same to be served on the counsels for the Applicant within the said 60 days.
 - (iii) The administrator is hereby ordered to furnish all the relevant documents relating to the disposal of the other estate properties and the actual sale price



of LR No 1870/IV/89 and LR No 3734/352 within 60 days from the date of this ruling.”

11. The court went ahead to direct that the other issues of distribution of the estate shall be dealt with once the above orders were dealt with.
12. The Respondent being dissatisfied with the above ruling proceeded to the Court of Appeal and on 9th July 2021 the said court dismissed his appeal.
13. The parties thereafter went for mediation exercise and it appears from the evidence on record the same was not conclusive as the Applicant, Thanki, disputed the same.
14. The applications herein are therefore an attempt on either side to enforce the ruling of Ougo J of 12th July 2017. They all zeroed in on one Jacqueline Waihenya as the mediator.
15. In his supporting affidavits Mukesh contents that the mediator was unable to complete her work because the Respondent did not produce all the documents and or evidence he was meant to produce as directed by the court. His accountants in particular were unable to get any meaningful documentations to prepare proper accounts.
16. Annexure MLT1 of his affidavit in support of the application contains a letter dated 21st May 2019 which shows the items requested but were not availed by the Respondent such as banking records, audited accounts and balance sheet for the period requested.
17. The Respondent has contested the above allegations by the Applicant and through his affidavit dated 14th June 2023 he has attached the minutes and notes from the mediator indicating the extent to which he had complied with the orders of the ruling of 12th July 2017.
18. It was therefore Thanki’s case that based on the findings of the mediator there was need to bring this matter to a close by adopting the same and discharging the injunctive orders in favour of the Applicant.

Analysis and Determination

19. I have perused the pleadings herein and the submissions by both sides both written and oral and as stated above both are ideally talking the same language, namely, foreclosure of this matter.
20. I have extensively perused the minutes of the mediator of various days when she carried out the mediation exercise and i think that the issues which remained were not as much compared to the extent she had helped the parties reach. Despite the complaint by Mukesh I respectfully think that the mediator had attempted to crystallise the issues. In her report dated 15th June 2019 she said under clause 8.0 that;

“A substantial amount of records pertaining to the estate were exchanged. However, the 1st Applicant’s auditors indicated that they were unable to generate an agreed set of financial statements with the administrator/Respondents auditors apparently for the reason that bank account statements, audited accounts and statements of financial position were not available.

As a result, real opportunity to conclusively resolve the distribution of the estate of the late Lalji Ladharam Thanki (deceased) was lost.”

21. She went on to indicate that the parties had agreed and signed the minutes of 14th January 2019, 1st February 2019 and 11th March 2019 respectively.



22. She finally recommended that:-
- “(a) the matters duly agreed upon and partly settled by the parties as hereinabove set out be adopted by the court and
 - (b) The matters that have not been agreed upon be placed before the honourable court for further orders and or directions accordingly.”
23. It was submitted on the part of the Respondent that this report cannot be adopted because the parties had not agreed and therefore being disputed the same ought to be rejected. The Applicant argued otherwise and was of the view that being a mediator’s report and having been signed by the parties the same ought to be adopted.
24. I find that the report although as found by the mediator was not 100% conclusive for the reasons she gave, the same was however partially conclusive in most of the key areas. It will not be efficacious in my view to dismiss the same considering the labour and the hours the parties have put.
25. This position is buttressed by the fact that the parties signed all the minutes alluded to by the mediator. As a matter of fact, the handwritten reports were signed by the parties or their counsels on record. This signing legitimises the same and the Mukesh cannot be heard to cry foul.
26. For instance, in the meeting of 1st February 2019 apart from delivery of the 12 boxes of documents from m/s Colbums Holdings Limited, which I suppose were due for further analysis they agreed on the issue of the jewellery which was to be delivered to the relevant beneficiaries. The parties and their counsel signed the same.
27. In my considered view it is necessary to adopt the report as it is and proceed to carry out the recommendation by the mediator. The report ought to be taken as a partial settlement as there are key components which need further discussion by the parties. Even for argument sake and contrary to Mukesh perspective, if the mediation only dealt with the issues say of jewellery then the report would have been adopted as the parties had agreed and signed it by consent.
28. In other words, it would be irresponsible for this court to turn a blind eye on the report which the parties although they may not have agreed fundamentally on all the key issues to rubbish away the issues they have consented to. It will be akin to throwing away the baby and the bathwater. I find the report by the mediator although not fully settled the issues fair and reasonable in the circumstances.
29. The mediator recommended that the court directs what should be done with the remaining part. It is true that the period between the death of the deceased and 12th July 2017 is long and it may not be practicable for the parties least of all the administrator to put on the table all that was being requested by Mukesh auditors. Nonetheless I have not seen any evidence to suggest that he had any difficulty in producing the same.
30. I find that the only way out is for the administrator to provide the required records as demanded by the mediator. He has been in charge of the estate and it is expected that he must have kept all the relevant records whether financial or otherwise. Section 83 of Cap 160 is succinctly clear and it provides that:-
31. Duties of personal representatives Personal representatives shall have the following duties—
- (a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;



- (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
 - (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
 - (d) to ascertain and pay, out of the estate of the deceased, all his debts;
 - (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. (Underlining mine)
32. At the same time I do not think it will be necessary at this moment to order Mukesh to vacate the premises as requested by the administrator. The issues raised by the mediator ought to be sorted out first. In essence if the administrator wants Mukesh to vacate the house then he has to provide the relevant documentations demanded by the auditors and by extension the mediator.
33. Further and for continuity if the same mediator is still available I think it is better for the parties to engage her unless of course she is of the contrary view or either of the parties herein is of a contrary opinion. Otherwise to start with a new mediator may be challenging to the parties. Nonetheless the court will leave it to their discretion.
34. For the reasons which I have adduced above I do not find any reason to deal with the preliminary objection which in my view was not meritorious for the reasons that the issues discussed herein were not res judicata. The ruling of 12th July 2017 is yet to crystallise and thus it has not been fully implemented.
35. In view of the above this court makes the following orders in respect to the two applications:-
- (a) The mediators report dated 17th June 2019 is hereby adopted as an order of the court in so far as the same relates to the provision of accounts in respect to property LR No 1870/IV/IV/89 and LR No 3734/352 as well as documents relating to their sale as directed in the order made herein on 12th July 2017.



- b. The above (a) adoption is partial to the extent of issues agreed upon by the parties as per the mediators report only.
- (c) That Jitendrakumar Laljibhai Thanki is hereby directed to produce the following documents as demanded by the Applicant's (Mukesh) auditors and the mediator, namely:-
 - (i) All signed leases, contracts, agreements and receipts issued for the rents received;
 - (ii) Bank statements where the rent and other incomes were received;
 - (iii) All receipts for alleged repairs for letting fees referred to;
 - (iv) All receipts and agreements for letting the fees referred to;
 - (v) All receipts for commissions on property management;
 - (vi) Evidence of bank money transfer, and or remittances for the sold properties.
 - (vii) Expense details for plot no 209/1120/3 Batu Batu road from the year 2001 to date.
- (d) The aforementioned documents be presented to the same mediator within 45 days from the date herein or alternatively they be at liberty to choose another mediator as shall be guided by the Mediation Registrar.
- (e) This matter shall be mentioned before the Mediation Registrar within 14 days from the date herein for further directions on how to proceed with the remaining part of the mediation.
- (f) The issues as agreed in the partial settlement herein are hereby adopted as the order of the court and the parties are at liberty to implement the same save those still in contention.
- (g) The prayer for setting aside eviction of Mukesh Thanky is denied.
- (h) Costs in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 25TH DAY OF JULY 2024.

H K CHEMITEI

JUDGE

