



REPUBLIC OF KENYA



**Takwa v Shiundu & another (Family Appeal E030 of 2023)
[2024] KEHC 15324 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 15324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E030 OF 2023**

**G MUTAI, J
JULY 19, 2024**

BETWEEN

ESTHER SAYO TAKWA APPELLANT

AND

AZIZA LEYA SHIUNDU 1ST RESPONDENT

KENYA PORTS AUTHORITY 2ND RESPONDENT

*(Being an appeal arising from the orders of the court in a ruling dated 22nd
December 2022 and an order dated 6th February 2023 delivered by the
Honourable D.O. Mbeja in Mombasa CMC Succession Cause No E039 of 2020)*

JUDGMENT

1. The 1st Respondent herein petitioned the trial court for letters of administration intestate as a wife of the deceased. In the supporting affidavit, she listed several persons, including the Appellant, as the survivors of the deceased, as well as the properties forming the estate of the deceased. The same was supported by the consent dated 8th October 2020, purported to have been signed by the Appellant. A grant of letter of administration intestate was issued on 16th July 2021.
2. The Appellant then filed a chamber summons application seeking revocation of the grant, temporary injunction and stay of execution orders on the grounds that the grant was obtained on the basis of false pretence as the 1st Respondent was not a wife of the deceased. The trial court issued an order on 16th December 2021 revoking the grant issued to the 1st respondent on 16th July 2021.
3. The Appellant then moved the trial court via chamber summons application dated 22nd April 2022 seeking the following orders:-
 - a. Spent;



- b. That the honourable court be pleased to issue an order directing the OCS Central Police Station Mombasa and OCS Port Police to investigate the matters surrounding the file of the estate of the deceased, Josephat Muliro Okwapubi who was the employee of the 2nd defendant/ respondent;
 - c. That the honourable court be pleased to issue an order directing the OCS Central Police Station to investigate fraud and forgery of the consent in the grant issued to the 1st respondent / defendant, which was revoked by an order of the court on 8th December 2021, and anyone found culpable to be arrested and be brought to this court till further orders;
 - d. That the honourable court be pleased to order the 2nd respondent to furnish to the court all accounts of any money paid out to the estate of Josephat Muliro Okwapubi from the inception of his death to date and the Bandari Sacco Savings.
 - e. That the honourable court be pleased to order the 2nd respondent to allow the applicant access to the file belonging to the deceased Josephat Muliro Okwapubi and be given copies of the same since she has a grant ad colligenda bona in Succession Cause No E36 of 2020 dated 26th October 2020; and
 - f. Costs of this application.
4. Upon hearing the parties, the trial court in its ruling held that:-

“A cumulative consideration of all the material presented before this court leads to the conclusion that the applicant has made an allegation of forgery against the first respondent. The allegations are purely criminal in nature and require investigations and if any party is found culpable then the Director of Public Prosecutions should consider preferring charges against the first respondent. Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony, and he is liable unless owing to the circumstances of the forgery or the nature of the thing forged, some other punishment is provided, to imprisonment for three years. The proceedings to obtain a grant guided by the affidavit evidence so far on record were defective in substance, and the applicant, in the opinion of the court, has a valid claim to the estate of the deceased. However, given the nature of the orders sought by the applicant, which border on criminal culpability, this court is albeit reluctant to allow the application before the court dated 22nd April 2022, and on the same wavelength, the application is dismissed with no order as to costs all circumstances considered. Parties at liberty to apply.”

5. Dissatisfied with the court’s ruling, the Appellant appealed to this court seeking to have the ruling of the trial court varied and or set aside with costs, and in the alternative, for commencement of the investigations into the forgeries done in the Succession Cause No. E039 of 2020, and if anyone is found culpable, they should be arrested and brought to court to answer for the crimes committed.
6. The appeal is based on ten grounds that need not be listed here.
7. The appellant filed her written submissions dated 22nd March 2024 and submitted that the 1st Respondent was found guilty of the offence of forgery by the trial court and that notwithstanding, no warrants of arrest were issued.
8. On the application dated 22nd April 2022, the trial court disallowed the prayer for access to the deceased’s file in the custody of the 2nd respondent, which was unfair and a denial of justice.



9. The 1st respondent, on the other hand, through her advocates, Ochieng Eddie Vincent & Co. Advocates, filed her written submissions on 5th May 2024.
10. On whether the appeal is arguable, Counsel submitted that on the 1st ground, the alleged offence did not happen in court, that there was no forgery as the Appellant was present when the consent to the Petition for the Grant of Letters of Administration Intestate to persons of equal or lesser priority was being made. On the second ground, counsel distinguished the authority relied on by the Appellant. On the third ground, it was urged that no provision of the law provides that rulings and/or proceedings must be handwritten before they are typed.
11. Regarding grounds 4, 5, and 6 of the appeal, counsel submitted that investigations are commenced at the police station and not in court or by a judicial officer. He urged that the grant had already been revoked and the matter had proceeded substantially.
12. On ground 7, counsel submitted that the trial court's ruling was elaborate and referred the court to pages 5 and 6 of the Record of Appeal. Counsel urged that ground 8 was a repetition of ground 2.
13. On grounds 9 and 10 of the appeal, counsel submitted that the Appellant was at liberty to make a formal complaint at the Directorate of Criminal Investigations for her allegations to be investigated.
14. In conclusion counsel urged the court to dismiss the appeal with costs.
15. The 2nd Respondent took no part in the proceedings.
16. In its decision, the court below found that the Appellants' application had merit and observed in part that "guided by affidavit evidence so far on record, the Applicant did not sign the consent Form 38." On that basis, the grant issued to the 1st Respondent was revoked on 8th December 2021.
17. Having found that the Appellant did not sign the Form 38 presented before it, the court below ought to have allowed the application as the production of forged documents is a serious offence against the administration of justice. By failing to allow the application the court below erred.
18. In the ruling dated 22nd December 2022, the court below did not consider all prayers sought by the appellant. No consideration was made to the prayers for the provision of accounts by the 2nd Respondent. This was a grave error on the part of the court justifying the disturbance of its decision.
19. In the circumstances, I allow the appeal and set aside the ruling of the Court below, dated 22nd December 2022 and all the consequential orders.
20. I order that the DCI Office Mombasa and OCS Port Police Office Mombasa investigate fraud and forgery surrounding the consent purportedly signed by the Appellant and prosecute anyone reasonably suspected of forging documents.
21. I order the 2nd Respondent to furnish the Appellant with the statement of account of all payments made in respect of the deceased's estate from the time of his demise to date. I further order the said 2nd Respondent to grant the Appellant access to the file it keeps regarding the personnel records of the deceased and to be given copies thereof.
22. I make no orders regarding costs as this is a succession matter.
23. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF JULY 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.



GREGORY MUTAI

JUDGE

In the presence of:-

Mr Ochieng for the 1st Respondent;

Ms Esther Sayo Takwa; and

Arthur – Court Assistant.

