



REPUBLIC OF KENYA



**Ali v Anwar (Civil Appeal E033 of 2024)
[2024] KEHC 12003 (KLR) (Family) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12003 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E033 OF 2024
CJ KENDAGOR, J
OCTOBER 4, 2024**

BETWEEN

MOHAMED SHARIFF ALI APPELLANT

AND

MOHAMED ANWAR RESPONDENT

(Being an Appeal from the Ruling and/or Order of Hon. Kadhi Mohamed Garama Randu delivered on 26th March, 2024 in Nairobi Kadhi's Court Succession E001 of 2023)

JUDGMENT

Background

1. The Deceased, Ahmed Shariff Ali Othman, died on 25th July, 2021. The Respondent is a son of the deceased, while the Appellant is a brother of the Deceased. In 2023, the Respondent petitioned for Grant of Letters of Administration Intestate vide a Succession Cause No E001 of 2023. The Appellant objected to the making of Grant to the Respondent and filed an objection. His grounds of objection were that the deceased had died testate, leaving behind a Will dated 14th August, 2017, and that the Will appointed him (the Appellant) as the Executor and Trustee of the deceased.
2. He contemporaneously petitioned for a Grant of Probate of the Will through a petition by way of Cross-Application for a Grant. The Respondent filed a Replying Affidavit insisting the deceased died intestate and questioning the validity of the Will. He also claimed that the Appellant has wrongfully taken over the estate of the deceased and has not been disclosing to the beneficiaries the amount of rent collected from the estate since the deceased's death.
3. On 13th July, 2023, the Court ordered the Petitioner to prepare an audit report of the estate and serve the Respondent. The Petitioner prepared the audit report and served it to the Respondent, but the



Respondent was not satisfied with the audit and claimed some figures were missing. As a result, the Court gave the Respondent leave to conduct an independent audit report of the accounts. It also ordered the Petitioner to provide the Respondent with bank details and access to the bank account where rental income is deposited. The Respondent was also given access to all financial statements in regard to the accounts in the deceased's name held in Gulf African Bank and Dubai Bank Kenya Limited.

4. The Respondent conducted the forensic audit but claimed he needed to be supplied with the rent schedules, salary statements, and land evaluation reports to finalize the audit. The Court ordered the Appellant to supply the Respondent with the rent schedule, salary journals, receipt books, property valuation reports and supporting record documentation for the expenses. It also ordered the Petitioner to pay and cater for the forensic auditor fees.
5. The Respondent went back to Court and complained that the Appellant had refused to provide some books of accounts and had not paid the auditor. The Court found the Appellant in contempt for disobedience of the previous court orders and issued a warrant of arrest against him. The Appellant rushed to court and asked the court to lift the warrants of arrest. He stated that he had paid the forensic auditor's fees and supplied the Respondent with Bank Account statements, rent schedule and salary journals, and all other supporting documentation in his possession.
6. The Court lifted the warrant of arrest, and the Respondent's forensic audit team was set down to finalize the forensic report and table it on 18th December, 2023. The Respondent complained that the audit had revealed that there was no proper bookkeeping of the estate and there were no agreements with tenants; they operate on trust. He made an oral application seeking the appointment of a management company to take charge of the estate and open an escrow account where all amounts collected from rental income can be deposited. The Appellant opposed the report and suggested that a fresh one be done. He also objected to the oral application and sought the court's indulgence in having the Respondent file a formal application. The Court gave the Respondent leave to put in a proper application.
7. The Respondent filed a Notice of Motion dated 21st February, 2024 seeking immediate appointment of a Management Company to oversee and manage the rent collection pending the hearing and determination of the suit. He also sought that the parties create an escrow account, where all collected rent shall be deposited to ensure transparency and accountability. He also sought an order for a monthly upkeep allowance of Kshs.150,000/= for the beneficiaries to be disbursed from their share of collected rent to cover maintenance and other necessary expenses.
8. His application was mainly based on the claim that the Appellant had failed to manage the property in accordance with best practice and failed to provide essential books of accounts regarding rental income.
9. The Appellant opposed the application and filed a lengthy and comprehensive Replying Affidavit (with 39 paragraphs) dated 7th March, 2024. He argued that, there being no Grant of Representation, the Respondent's application dated 21st February, 2024 is fatally defective because the Respondent does not possess Grant of Letters of Administration. Thus, he argued that the application ought to be dismissed because the Respondent did not have the requisite locus standi.
10. He also stated that his difficulties in paying for the auditor's fees from the estate was because the estate had no grant of representation and, therefore, no expenses could be made out of it. He opposed the Respondent's claim for an upkeep allowance of Kshs.150,000/= arguing that there was no evidence tendered or proof produced of the reasonability of the sum. In addition, he states that the claim for



allowance can only be paid once the issue of representation has been sorted, arguing that failure to do so will be intermeddling with the Estate of the Deceased.

11. The Respondent filed an equally lengthy and comprehensive further affidavit (with 54 paragraphs) dated 12th March, 2024, where he re-emphasized why the Court should grant him the orders in the application dated 21st February, 2024. His affidavit gave a chronological description of the matter and the back-and-forth situation with regard to the forensic audit reports, blaming the Appellant for delaying the matter and denying the beneficiaries justice. His further Affidavit also justified why it was necessary for the Court to appoint a management company and the establishment of an escrow account.
12. The Court delivered a ruling on 26th March, 2024, allowing the Respondent's application and granting him all the orders prayed in the application dated 21st February, 2024. This culminated in five orders of the court, which I reproduce as follows:-
 1. That there be immediate appointment of a managing company that will oversee and manage the collection of rent pending hearing and determination of this suit,
 2. That there be a creation of an escrow account by the parties, where all collected rent shall be deposited to ensure transparent and accountability pending hearing and determination of this suit.
 3. That the management company furnish the court with comprehensive financial reports every three months, detailing the management and allocation of the collected rent pending hearing and determination of this suit.
 4. That the court is pleased to grant a monthly upkeep allowance of Kshs. 150,000 for the beneficiaries to be disbursed from their share of the collected rent to cover for maintenance and other necessary expenses pending hearing and determination of this suit.
 5. That all arrears and previously owed money of rent collection to the beneficiaries which have not been remitted by the objector to be reimbursed pending hearing and determination of this suit.
13. The Appellant was dissatisfied with the ruling of the Court and appealed to this court vide a Memorandum of Appeal dated 5th April, 2024. He listed 10 grounds of appeal which are that:
 - a. The Honourable Kadhi erred in law and in fact in issuing orders that are contrary to the Will (Wasiyyah) of the Late Ahmed Shariff Ali (the Deceased) dated 14th August 2017 before it was propounded.
 - b. The Honourable Kadhi erred in law and in fact in issuing orders appointing a Management Company to manage and collect rent where the Will (Wasiyyah) dated 14th August 2017 appointed the Appellant as Executor and Trustee.
 - c. The Honourable Kadhi erred in law and in fact by making orders on property that does not form part of the Estate (Tarikah) of the Estate of Ahmed Shariff Ali Othman.
 - d. The Honourable Kadhi erred in law and in fact in placing reliance on a biased and a subjective Forensic Report where the Forensic Auditor was appointed by the Respondent alone and hence lacked impartiality and independence affecting the credibility of audit findings.



- e. The Honourable Kadhi erred in law and in fact granting the orders where Respondent does not have the requisite locus standi as there is a Will (Wasiyyah) dated 14th August 2017 appointing the Appellant as an Executor/Trustee.
 - f. The Honourable Kadhi erred in law and in fact by making orders that the Estate be distributed to the beneficiaries where there are outstanding debts and where the distribution is contrary to the Will (Wasiyyah) dated 14th August 2017.
 - g. The Honourable Kadhi erred in law and in fact in ordering payment of monthly upkeep allowance of Kshs.150,000/= to the beneficiaries where there are outstanding debts and where the payment is contrary to the Will (Wasiyyah) dated 14th August, 2017.
 - h. The Honourable Kadhi's Ruling is contrary to the Parties' evidence on both law and fact in that:
 - a. It fails to make any or any proper findings on the evidence adduced before court.
 - b. It is contrary to the weight of and inconsistent with the evidence adduced by the parties; and
 - c. It held that a trial was held where no trial has been held
 - i. That the Honourable Kadhi erred in law and in fact by failing to consider the Appellant's submission.
 - j. The Honourable Kadhi erred in law and in fact in making orders that are not clear and are hence ambiguous.
14. He asked the Court to allow the appeal with costs and set aside the ruling. He prayed that the matter be referred to a different Kadhi for propounding of the Will (Wasiyyah) of the Late Ahmed Shariff Ali (the Deceased) dated 14th August, 2017. He also prayed for further or other orders that this Honourable Court may deem just to grant.
15. The Appeal was disposed by way of written submissions.

Appellant's Submissions

16. The Appellant submitted that the Honourable Kadhi erred in law in issuing orders that are contrary to the deceased's Will (Wasiyyah). According to the Appellant, the deceased's Will had stipulated that any distribution of his estate is to be done after all debts have been paid. Thus, he argued that, the Court's ruling requiring the Appellant to pay a monthly upkeep allowance of Kshs.150,000/= before the settlement of all the debts is irreconcilable with the deceased's Will (Wasiyyah). On this part of his submission, he quoted various authorities like the Quran, Saheeh Bukhari Hadith, and the Authoritative Book of Muhammad Al-Jibali titled "Islamic Will & Testament."
17. Secondly, he submitted that the Honourable Kadhi erred in law by issuing orders concerning property not part of the deceased's Estate. He argued that, with respect to LR No 36/447/VII [Original 35/5], the deceased owned just 25% of the property, while he owned 75% of the property. Based on this fact, he argued that the court's ruling requiring the entire rent collected from the whole property be deposited into an Escrow Account, and appointing a management company to oversee the entire property was violating his property rights because it affects his shares which are not part of the deceased's Estate.



18. Lastly, the Appellant argued that the Respondent did not have standing and thus the Honourable Kadhi erred in giving him the orders in question. He submitted that, since he had been appointed the executor of the Will, the Respondent did not have capacity. He submitted that, under Islamic law of Inheritance, the heirs of a Muslim have no capacity where an executor has been appointed by a Will.
19. He cited several authorities namely, *In Re Estate of Kassim Abdalla Hussein (Deceased)* [2020] eKLR, *Re Estate of Lawrence Nginyo Kariuki (Deceased)* [2021] eKLR, *Administrator General v Abdul Hussein* 4 EALR 26 (Hamilton J), and *In Re Estate of Mohamed Kismala (Deceased) (Succession Cause 15 B of 2015)* [2017]KEKC 17 (KLR).

Respondent's Written Submissions

20. The Respondent submitted that the Kadhi's court had jurisdiction to entertain the matter before it and give a ruling as it did. In addition, he submitted that the Court had all the power to exercise its inherent power and grant interim orders so as to preserve the suit property from further mismanagement and in turn safeguard the beneficiaries share in the suit property. Further, he argued that the Court was right in ordering the parties to open an escrow account and in allowing the appointment of a management company because the two would go a long way in preserving and protecting the beneficiaries' share in the suit property. He also defended the order on Kshs.150,000/= arguing that it would help the beneficiaries meet their daily needs.
21. Secondly, the Respondent argued that he had the locus standi to make the application dated 21st February, 2024. He argued that, having already filed for Letters of Administration where the same was gazetted and being a beneficiary made him an interested party. He submitted that as a beneficiary, he had the legal standing to bring the application to protect the estate of the deceased as the application is anchored on an existing suit and proceedings. Thus, he argued that his application for the orders was competent. On the issue of Locus, he relied on the case of *In the matter of the Estate of Geoffrey Meitamei Linina-* [2012] eKLR.
22. Lastly, the Respondent argued that the Appellant does not have the legal authority to continue acting as an estate agent because he is not a registered estate agent under the Estate Agents Registration Board. Thus, he argued that the Appellant has no legal authority to rent and manage the subject project. For this reason, he submitted that a qualified management company is the most suitable option because it will provide the necessary expertise to address the current challenges facing the management of the estate. He relied on the case of *In Re Estate of G.K.K* [2011] eKLR.

Issues for Determination

23. I have carefully read and analyzed the submissions from both parties and their cited authorities. I have also taken note of the arguments advanced by their respective advocates during the highlighting of the submissions on 10th July, 2024. The Court notes that the Appellant raised 6 issues for determination while the Respondent raised 8 issues for determination. However, having taken account of all the above materials before the Court and the relevant law, the Court identified the following as the issues for determination namely;-
 - a. Whether the Respondent had the locus standi to bring and file the application dated 21st February 2024.
 - b. Whether the orders of the Honourable Kadhi infringe on the Appellant's property interests in LR No 36/447/VII [Original 35/5].



The Duty of the Court

24. Being a first appeal, the duty of this Court is to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court held:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

Whether the Respondent had the locus standi to bring and file the application dated 21st February, 2024.

25. The authority of the Respondent to file the application dated 21st February, 2024 is contested by the Appellant. The Appellant, in his replying affidavit dated 7th March, 2024, stated that the application is fatally defective and incompetent because the Respondent did not possess Grant of Letters of Administration, and thus did not have the locus standi to bring the application.
26. On the other hand, the Respondent maintained that he had the locus standi to make the application. His argument is that, although he had not obtained the grant, he nonetheless had the locus standi by virtue of being an interested party in an existing administration cause. He argued that he was an interested party because he had filed for Letters of Administration and he was a beneficiary of the estate of the deceased. In other words, he was saying that an interested party in an existing administration cause has the locus to approach the Court for any orders, even if they have not obtained Letters of Grant. He sought to bring himself within the decision of the court In the matter of the Estate of Geoffrey Meitamei Lonina- [2012] eKLR.
27. I have examined the Court file and all the pleadings to ascertain this issue. Both parties are in agreement that the Respondent did not have Letters of Administration at the time when he filed the application. They differ on whether the lack of Letters of Administration had any legal implications on the Respondent’s application dated 21st February, 2024. The Appellant argued that the lack of Letters of Administration is fatal, while the Respondent argued that Section 45 (1) & (2) of the [*Law of Succession Act*](#) (Cap 160) creates a special exception to the rule and gives locus standi to interested parties who are yet to obtain Letters of Grant.
28. Questions about the legality of applications filed by persons without Letters of Administration have been exhaustively interrogated in the past. In the case of *John Marete Kirema & another v Gladys Karimi M’Muthamia & 3 others* [2013] eKLR where it was argued that the applicant did not require a Grant of Letters of Administration to pursue an application under Section 45 of the [*Law of Succession Act*](#), Makau J. (as he then was) held that:

“....an intended administrator or a person who has made a petition to be appointed as administrator is not a personal representative of the deceased person and therefore has no locus standi to bring any action independent or within the petition until a grant of letters of representation has been made to him or her as case may be. I therefore do not agree as this is a petition cause and not a civil suit as submitted by the counsel for the applicant, he



does not require grant of letters of administration to pursue the application under Section 45 of the *Law of Succession Act*”.

29. More recently in the case of *In re Estate of James George Maruti (Deceased)* [2021] eKLR Riechi J summarized it as follows-

“The applicant may be having a cause of action or interest as a beneficiary to protect and preserve the estate or intermeddling and waste. She however has lacked locus standi to secure the relief sought. Without first obtaining either limited or full grant of letters of administration”.

30. Most recently, *In re Estate of Nelson Zadok Otieno (Deceased)* (Succession Cause E1131 of 2022) [2023] KEHC 24893 (KLR), the court pronounced itself on this issue as follows;

“In Conclusion I find that it is well established by law and judicial precedent that for a party to move to preserve the estate they need to be clothed with the requisite mandate, in this instance letters of administration. The orders sought are also not issuable against the Respondents as they have not taken out letters of administration with respect to the estate”.

31. Based on the above-cited authorities, I hold that even though the Respondent might have had a legitimate objective to preserve the estate of the deceased, he did not have the requisite mandate to move the court to preserve the estate because he did not have letters of administration. I also find that the orders sought under the application dated 21st February, 2024 are also not issuable against the Appellant as he has not taken out Letters of Administration with respect to the estate.

32. Having found that the Applicant had no locus standi to file the application, I cannot proceed and consider the merits of the orders emanating from the Application.

Whether the orders of the Honourable Kadhi encroach on the Appellant’s property interests in LR No 36/447/VII [Original 35/5]

33. There is no dispute with regard to the shared ownership of the Property, LR No 36/447/VII [Original 35/5]. The parties agree that the deceased owns 25% shares of the property, while the Appellant owns 75% of the property. In his Replying affidavit dated 7th March, 2024 (para 22), the Appellant stated that the deceased owned 25% of the property while he owned 75% of it. He produced a Postal Search to prove the ownership status. The Respondent did not controvert this in his further affidavit dated 12th March, 2024. However, while highlighting the submissions on 10th July, 2024, the Advocate for the Respondent agreed with the Appellant’s assertions when he said, “The Appellant has 75% and Deceased has 25%.”

34. The Appellant submitted that the Honourable Kadhi erred in law by issuing orders on a property that did not form part of the deceased’s estate. He argued that, with respect to LR No 36/447/VII [Original 35/5], the Court subjected the entire property to the Succession Cause instead of limiting itself to the specific proprietary interests of the Deceased, which was 25% of the property. He argued that the orders issued by the court encroached into his property which comprises the remaining 75% of the property.

35. The Courts have handled disputes on how administrators should to deal with a property of the deceased where the property is owned by under a tenancy in common set up. In the case of,

“On the argument that title numbers Aguthi/Gatitu/4617 -4620 were jointly owned by the respondent and the deceased, this court is not clothed with the jurisdiction to determine



ownership of land in ordinary circumstances. However, concerning matters where the deceased has a share in the tenancy in common, a succession court has jurisdiction to deal with the land only to the extent of the deceased's share and may also determine whether the share of the deceased forms part of his estate for purposes of distribution".

36. Similarly, in *G.A.A.M & another v M. O. A. O* [2016] eKLR, the High Court held as follows;

"For the Court to order administrators to render a true and accurate account, representation must relate to an estate of a deceased person as provided for in the Act. Section 3 of the Act defines an "Estate" as the free property of a deceased person, and "free property" is defined as the "property of which that person (deceased) was legal competent freely to dispose of during his lifetime and in respect of which his interest has not been terminated by his death."

37. Recently, in *re Estate of Pradeep Behal (Deceased) (Succession Cause 465 of 2013)* [2022] KEHC 3188 (KLR), the High Court held as follows;

"However, if the finding was that the two were co-tenants or held the property as a tenancy in common in equal shares, or proportionate to the contribution of each to the acquisition of the property, then the portion that would have been found to accrue to the deceased would form part of his estate for distribution in his estate, while the other part would pass to the late husband of the protestor, for devolution in his estate".

38. Based on the above authorities, the Court holds that in this case, the focus and mandate of this Succession Cause is limited to 25% of LR No 36/447/VII [Original 35/5], being the extent of the deceased's interest in the property.

Disposal of the Appeal

39. The Appeal is merited and is hereby allowed.

40. The Ruling of the Kadhi's Court delivered on 26th March, 2024 is set aside.

41. Having found that the Applicant had no locus standi to file the application, I am unable to proceed and consider the merits of the orders emanating from the application.

42. The matter is referred to a different Kadhi for the purposes of determining the Respondent's petition for Grant of Letters of Administration Intestate and the Appellant's petition by Cross-Application.

43. No order as to costs.

44. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 04TH DAY OF OCTOBER, 2024.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mohamed Timamy: Advocate for Appellant



