



REPUBLIC OF KENYA



In re Estate of Kevin John Ombajo (Deceased) (Succession Cause 555 of 2018) [2023] KEHC 18583 (KLR) (Family) (2 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 555 OF 2018
MA ODERO, J
JUNE 2, 2023
IN THE MATTER OF THE ESTATE OF KEVIN JOHN OMBAJO (DECEASED)**

RULING

1. Before this Court for determination are two applications for determination as follows:

- (i) Notice of Motion dated 21st July 2021.
- (ii) Chamber Summons dated 3rd December 2021.

Following directions given by Hon. Lady Justice Achode (as she then was) on 8th December 2021 the two applications were to be heard and determined together. That applications were canvassed by way of written submissions. Counsel later appeared virtually on 2nd November 2022 to highlight their submissions.

Background

2. This Succession Cause relates to the estate of the late Kevin John Ombajo (hereinafter ‘the Deceased’) who passed away on 29th July 2017. A copy of the Death Certificate Serial Number xxxx appears as Exhibit 1 to the Petition for Grant of Probate dated 26th April 2018.

3. The Deceased was survived by his widow the Tracy Kamene and his daughter Shana Mwendu Ombajo (minor). His estate is indicated to be at least worth Kshs.80,000,000/= and comprises of the following assets:-

- i) Apartment No. L 2B L (particulars withheld)
- ii) L.R. No. 8784/364 (Original 8784/82;
- iii) Gem Ndere farm;
- iv) 667 share in True Blaq Limited;



- v) Motor Vehicles Registration numbers; KBR xxxx – Toyota Aphard and KBX xxxx – Toyota Landcruiser;
 - vi) Motor Bike;
 - vii) Contents of safe deposit box at Chase Bank;
 - viii) Proceeds of Bank Account with Chase Bank Account Number 008201xxxxxx;
 - ix) Barclays Bank Account Number 20221xxxxx;
 - x) CBA Big Kev Medical fund; and
 - xi) Terminal dues from True Blaq Limited.
4. The Deceased died testate having left a written Will dated 20th February 2015. A copy of the said Will is also annexed to the Petition for Grant of Probate. In his Will the Deceased named his widow Tracy Kamene and his sister Jacqueline Vivian Akinyi as joint Executors.
5. Following the demise of the Deceased his widow Tracy Kamene (‘the Petitioner’) filed in the High Court a Petition for Grant of Probate dated 26th April 2018. Whilst conceding that the written Will left by the Deceased named his sister Jacqueline Vivian Akinyi (the Respondent) as Co-Executor, the Petitioner stated that efforts to have the Respondent file a joint Petition with her were unsuccessful thus she had no option but to file as a single Petitioner. In her Petition the petitioner prayed that Grant of Probate be made jointly to herself and the Respondent.
6. The Respondent vide an Affidavit dated 26th June 2018 opposed the Petition for Grant of Probate. The Respondent proceeded to file an objection and cross-petition dated 1st August 2018. In her supporting Affidavit dated 20th August 2018 the Respondent averred that the Deceased had through an audio-visual recording on 23rd December 2016 detailed his last wishes in respect of his estate. The Respondent contends that this audio-visual recording revoked the earlier written Will dated 20th February 2015 and urged the court to give effect to said audio-visual recording.
7. On 18th September 2018 and 20th February 2019 the matter came up for directions, and the parties agreed by consent to have the letters of Administration issued jointly to the Petitioner and the Respondent. Consequently letters of Administration were on 25th July 2019 issued to Tracy Kamene and Jacqueline Vivian Akinyi .
8. The Objection and cross-Petition filed by the Respondent were heard by Hon. Lady Justice Achode (as she then was). The Honourable Judge delivered her judgement in the matter on 7th July 2021. In that judgement the court held that the oral audio-visual Will could not be deemed to have revoked the written Will dated 20th February 2015. The court therefore dismissed the Objection and cross-Petition filed by the Respondent and made the following orders:-
- “(i) That the Will executed by the deceased herein dated 20th February 2015 be and is hereby declared to be [the] valid will of the Deceased.
 - ii. That distribution of the deceased’s estate be and is hereby ordered [be done] in terms of the deceased Will dated 20th February 2015.
 - iii. No orders on costs.



9. Following this judgement of 7th July 2021 a certificate of Confirmed Grant of Probate dated 7th July 2021 was issued by the court. The confirmed Grant indicated that the estate of the Deceased would be distributed in accordance with the written Will dated 20th February 2015.
10. The Respondent was aggrieved by the judgement delivered on 7th July 2021 and purposed to appeal against said judgement. She filed the Notice of Motion dated 21st July 2021 seeking to stay any further proceeding in the matter pending hearing and determination of her intended appeal.
11. On the other hand the Petitioner who was anxious to proceed with the distribution of the estate as she needed to make provision for the minor child of the Deceased filed the chamber summons dated 3rd December 2021 seeking orders to compel her Co-Executrix (the Respondent) to proceed with the distribution of the estate. I will now proceed to consider each application separately.

(i) Notice of Motion dated 21st July 2021

12. The Objector/Respondent Jacqueline Vivian Akinyi filed this application dated 21st July 2021 seeking the following orders:-
 - “ 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of the intended appeal to the court of Appeal there be a stay of further proceedings in Milimani Succession Cause Number 555 of 2017. In the matter of the Estate of Kevin John Ombajo (Deceased).
 4. That the cost of this application be provided for.
13. The Application was premised upon Sections 1A, 1B, 3A and 6 of the *Civil Procedure Act*, Order 42 Rule 6 of the *Civil Procedure Rules* 2010, Articles 48, 50 and 159 of the *Constitution* 2010, was supported by the Affidavit of even date sworn by the Respondent.
14. The Petitioner Tracy Kamene – opposed the application through her Replying Affidavit dated 31st August 2021.
15. The Respondent averred that she was a sister to the Deceased and that she had objected to the Petition for Grant of Probate filed by the Petitioner.
16. The Respondent maintains that subsequent to executing the written Will dated 20th February 2015 the Deceased made his last and final testament vide an audio-visual recording made on 23rd December 2016 in which he revoked the written Will. That in the said audio-visual recording the Deceased clearly detailed how he wished his estate to be distributed and it was only right that the wishes of the Deceased be honoured.
17. The Respondent went on to aver that being dissatisfied with the decision of Hon. Lady Justice Achode (as she then was) contained in the judgement delivered on 7th July 2021, she filed a Notice of Appeal and sought for certified copies of proceedings and judgement to enable her file the substantive appeal.
18. The Respondent contends that her intended appeal raises serious arguable issues and has a high chance of success. That if the application for stay is not allowed then the entire appeal will be rendered nugatory as the estate may already have been distributed. The respondent urges to court to grant the stay of proceedings prayed for.



19. In opposing the application for stay of proceedings the Petitioner averred that she was a widow to the Deceased with whom she had cohabited for twelve (12) years. That they had one child together a daughter Shana Mwendu Ombajo who is a minor.
20. The Petitioner stated that the Deceased owned and operated a company called True Blaq Limited (hereinafter 'the company') which company was engaged in the entertainment industry. That she and the Deceased worked together to build up the company which was the source of their family income. The Petitioner states that she took out personal loans to help in running the company thus although the deceased retained a majority stake in the company, as a wife she had an equal stake.
21. The Petitioner conceded that she was fully aware that the Deceased had died testate leaving behind a written Will dated 20th February 2015 in which he named herself and the Respondent (who was a sister to the Deceased) as Executors. That the court had delivered its judgement on an objection and cross-petition filed by the Respondent in which judgement the court directed that the estate of the Deceased be distributed in accordance with the written Will dated 20th February 2015.
22. The Petitioner further stated that she was aware that the Grant of Probate which had been issued to herself and the Respondent on 25th July 2019 had been duly confirmed on 7th July 2021. The Petitioner's position is that the Respondent stands to suffer no prejudice if the estate is distributed in accordance with the written Will as the Respondent is both a beneficiary and Executrix of said Will. That since the demise of the Deceased the Respondent has been running the company and that instead it is the Petitioner who will be prejudiced as she has no gainful employment to sustain herself and the minor child of the Deceased having been kicked out of the company.
23. The Petitioner states that the Respondent who controls the estate funds has been slow and reluctant to provide monies for the upkeep and education of the child. That the medical cover for herself and the minor has been halted. She states that as a widow with a young child she has been denied access to the estate of her late husband and has difficulties sustaining herself and the child.
24. The Petitioner submits that to stay the proceeding will only extend her suffering and humiliation and will in effect turn the widow and child of the Deceased into beggars. That this application for stay of proceedings is only aimed at continuing to deny the family of the Deceased access to his estate. She urges the court to dismiss the application with costs.
25. It is not the duty of this court to comment on the merits or otherwise of the intended appeal. That is a matter which lies exclusively within the mandate of the court of Appeal. All that this court has to consider is whether the prayer for stay of proceedings is merited.
26. The Respondent herein has prayed that the proceedings in this Succession Cause be stayed pending the hearing and determination of her of her intended appeal.
27. Order 42 Rule 6(2) of the [Civil Procedure Rules](#) 2010 provide for the guiding principles that one must satisfy before the court can grant a stay of Execution or stay of proceedings as follows:-
 - “No order for stay of Execution shall be made under subrule (1) unless-
 - a. the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.



28. Halsbury's Law of England, 4th Edn. Vo. 37 page 330 and 332, it is stated that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

29. In Kenya Wildlife Services -vs- James Mutembei [2019] eKLR the court held as follows:

“...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...” [own emphasis]

30. In the case of Re Global Tours & Travel Ltd HCWC No. 43 of 2000 Ringera, J (as he then was) held that:

“... As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. An in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

31. The Respondent being aggrieved by the judgement delivered on 7th July 2021 has indicated her intention to file an appeal against the same. On record is Notice of Appeal dated 7th July 2021. However, the said Notice of Appeal has not been signed nor has it been stamped by the Hon. Deputy Registrar. Can such a Notice of Appeal be said to be valid? I think not.

32. In the case of Mistry (premji Ganji (investments) Limited -vs- Kenya Natina Highways Authority [2019] eKLR the court held as follows:-

“On the first issue, being the effect of lack of signature and endorsement of the date on a Notice of Appeal by the Deputy Registrar. We find this issue has been dealt with by this Court in the Monirei case (supra). It was held that under Rule 77 (1), the appellant must not only be seen to have lodged the Notice of Appeal, but must have served it upon the



respondent; that a Notice of Appeal which bears no rubberstamp of the High Court and/or which lacks any other endorsement by the registrar of the court is fatally defective. The Court went on to add that such a Notice of Appeal cannot be said to have been duly lodged and termed it a glaring deficiency in authentication. We see no reason to depart from that finding as in doing so we would send a message out there that parties can ignore the Rules and introduce a Notice of Appeal any time in the cause of the appeal without a signature or endorsement. Signature and endorsement is a form of authentication of a document that eventually forms the foundation of an appeal. [own emphasis]

33. The Respondent has not proffered any explanation as to why the Notice of Appeal was not properly filed. No steps have been taken to regularize this anomaly. To simply annex to her pleadings an unfiled Notice of Appeal will not suffice as proof of an intention to appeal.
34. As stated earlier the Notice of Appeal dated 7th July 2021 is not signed moreover the Respondent has not to date filed a Memorandum of Appeal. The court therefore questions the genuineness of this stated intention to file an appeal. Is there a genuine intention to file an appeal or is this claim just a strategy to ‘park’ the matter in court forever.
35. On 17th January 2023 the court advised the parties in this matter to engage and negotiate in hope that the parties would reach some consensus regarding interim orders pending the hearing and determination of the Appeal. When the matter came upon 10th February 2022 the court was told that due to absence of one of the Advocates parties had not able to reach a settlement. They requested for more time to engage. On 5th May 2023 when the matter was mentioned Ms Aluoch appearing for the Petitioner told the court that they had reached out severally to the Respondent but no compromise was forthcoming. It would appear that the Respondent is perfectly happy with the status quo and therefore is not willing to engage.
36. It is not in dispute that the Petitioner Tracy Kamene is the widow of the Deceased. Equally it is not disputed that the Deceased left behind a minor child, who requires to be maintained.
37. The court has already found the Will left behind by the Deceased to be valid. That decision has not been overturned and remains binding and enforceable.
38. In order to merit an order of stay of proceedings the applicant must demonstrate that they stand to suffer ‘substantial loss’ unless the stay prayed for is granted.
39. In the case of *Machira v. East African Standard* (No. 2) (2002) 2 KLR 63, Kuloba J. found:

“In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him a success at any stage... In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavits or other evidential material that substantial loss may result... in this kind of application for stay, it is not enough for the applicant merely to state that substantial loss will result. He must provide specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”
40. In determining whether or not the stay prayed for ought to be granted. The Applicant must demonstrate that he/she stands to suffer substantial loss if the stay is not granted. The term ‘substantial



loss' was explained in the case of *James Wangalwa & Another -vs- Agnes Naliaka* [2012] eKLR where the court held as follows:-

“No doubt in law the fact that the process of execution has been put in motion, or is likely to be put in motion by itself, does not amount to substantial loss. Even where execution has been levied and completed, that is to say the attached properties have been sold, as is the case here does not itself amount to substantial loss under order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect as to negate the very essential core of the applicant as the successful party in the appeal.... the issue of substantial loss is the cornerstone of both jurisdiction substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

41. The Respondent who is a sister of the Deceased is provided for in the written Will. She is also a Co-Executrix named in the Will, I fail to see what if any prejudice she stands to suffer if the stay is not granted and if the estate of the Deceased is distributed.
42. The court is mindful of the fact that the widow and child of the Deceased are in need of funds for their maintenance as well as the education of the minor. It is trite law that in any matter involving a minor courts are obliged to give priority to the “best interests” of the minor.
43. The Constitution of Kenya 2010 provides at Article 53 (2) as follows:-
 - “(2) A child’s best interest are of paramount importance in every matter concerning the child.” [own emphasis]
44. Section 8(1) of the Children’s Act of 2022 provides as follows:-
 - “8(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
 - (a) the best interests of the child shall be the primary consideration;” [own emphasis]
45. I find that the Respondent has failed to demonstrate the ‘substantial loss’ which she stands to suffer if the stay is not granted. In the premises I find no merit in this application for stay of proceedings. The Notice of Motion dated 21st July 2021 is dismissed in its entirety.

(ii) Chamber Summons dated 3rd December 2021

46. By this application the Petitioner Tracy Kamene seeks the following orders:-

- “1. Spent.
2. This Honourable Court be pleased to issue an order compelling the Respondent as Co-Executrix of the estate of the Deceased, to execute transfer forms in relation to administration of the Deceased’s estate within seven (7) days.
3. This Honourable Court be pleased to issue an order requiring the Deputy Registrar of the High Court to take all the requisite steps, including execution of documents, in relation to the administration of the Deceased’s estate, in place of the Respondent if upon lapse of seven



(7) days, the Respondent fails, neglects, refuses or otherwise declines to exercise her powers as Executrix of the estate of the Deceased.

4. In the alternative to prayers No. 2 and 3 above, this Honourable Court be pleased to appoint the Applicant as sole Executrix of the estate of the Deceased.
 5. The Honourable court be pleased to extend the time within which the Applicant is required 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 from six months to twelve months.
 6. Costs of this Application be born by the Respondent.”
47. The application which was premised upon Sections 1A, 1B, and 3A of the Civil Procedure Act, Sections 82 and 83 of the law of Succession Act, Rule 69 of the Probate and Administration Rules 1980 and all enabling provisions of the law was supported by the Affidavit of even date sworn by the Petitioner.
 48. The Respondent Jacqueline Vivian Akinyi opposed the application through her Replying Affidavit dated 28th January 2022.
 49. The Petitioner avers that on 15th November 2021 she invited the Respondent as the only other beneficiary and as Co-Executrix of the Deceased’s Will to participate in the administration process and to execute transfer forms relating to the distribution of the estate. That however the Respondent declined/neglected or and failed to participate in the administration of the estate or execute the requisite transfer forms.
 50. The Petitioner states that she desires to have the estate distributed expeditiously as she is a young widow with a small child to take care of. That she wishes to accord the minor the same status in life as the child had prior to the demise of the Deceased.
 51. The Petitioner avers that she has experienced difficulty in catering for her needs and that the child as she has no access to estate funds. That the Respondent has been reluctant to provide finances for the upkeep of herself and the minor including schools fees. That their medical cover which was being paid by the company has been stopped.
 52. The Petitioner concludes that she believes that in writing a Will the Deceased sole intention was to ensure that his widow and child were provided for after his death, thus any delay in administering the estate will not serve the interests of justice and will defeat the Deceased’s intention in writing a Will. She prayed that the present application be allowed.
 53. The Respondent opposed this application. The Respondent reiterated that she was aggrieved by the judgement delivered by Hon. Lady Justice Achode (as she then was) on 7th July 2021.
 54. The Respondent complained that she was not aware that a certificate of confirmed Grant had been issued. She averred that the present application was calculated to defeat her intended appeal as said appeal would be rendered nugatory of the estate was distributed.
 55. The Respondent challenged the Petitioners contention that part of the Deceased’s stake in True Blaq Limited was to go to the Petitioner. The Respondent alleged that the certificate of confirmed Grant was issued irregularly as no summons seeking to have the Grant of Probate had been filed and given that six (6) months had not elapsed between the date of issuance of the Grant and its confirmation as required by statute.



56. The Respondent further denied allegations that she excluded the Petitioner from involvement in running the company. She states that infact it was the Petitioner who opted to leave the company sometime in the year 2013, in order to pursue other interests. That she has been paying the Petitioner a monthly stipend and has always ensured that the minor's schools fees when demanded. The Respondent asserts that she has been catering for the expenses of the widow and child and claims to have paid to the Applicant approximately Kshs.18,635,243 to date.
57. The Respondent maintained that neither the Petitioner nor the Hon. Deputy Registrar can distribute an estate on the basis of a Grant that was irregularly confirmed.
58. The Petitioner filed a Further Affidavit dated 28th February 2022 in which she noted that the Respondent had not sought leave to appeal against the Judgement delivered on 7th July 2021. She averred that the court had powers to confirm a Grant after determining a dispute relating to the Succession Cause, thus the Grant was properly confirmed on 7th July 2021.
59. The Petitioner denied the Respondents claim that she left the company in 2013 and states that she actually continued working in the company until 2017 when the Respondents asked her to leave as the office that she was using was required for storage. That following the demise of the Deceased the Respondent told the Petitioner to stop going to the office.
60. The Petitioner insists that there has been reluctance on the part of the Respondent to pay the minor's school fees. The Petitioner states that she only wants to get what is due to her under the terms of the written Will left by the Deceased as she is currently not accessing her full entitlement to the estate.
61. The Petitioner concludes that the Respondents refusal to sign the relevant documents is a ploy intended to delay and /or frustrate the distribution of the estate.

Analysis and Determination

62. I have considered this application, the Reply filed thereto as well as the written submissions filed by both parties. Once again I reiterate that this court has no mandate to determine some of the issues raised i.e. whether the Grant was properly obtained and whether the Audio-visual recording made by the Deceased constitutes a valid Will. These are issue which can only be determined by the Appellate Court. This court cannot usurp the jurisdiction of the Appellate Court.
63. The Petitioner has prayed that the Respondent be compelled to execute transfer forms relating to the estate failing which the Hon. Deputy Registrar be authorized to execute the requisite forms. The Petitioner has stated despite reaching out to her, the Respondent who is the Co-Executrix has refused/neglected to participate in administering the estate in accordance with the wishes of the Deceased as contained in the written Will dated 20th February 2015.
64. The Respondent on her part indicates that her reluctance to execute the said documents arises from the fact that she intends to appeal the judgement of 7th July 2021 which gave validity to the written Will. The Respondent argues that if the estate is distributed then her intended appeal is likely to be rendered nugatory. For that reason the Respondent favours the maintenance of the status quo pending the determination of her intended appeal.
65. It is common ground that the High Court vide its judgement of 7th July 2021 found that the audio-visual recording made by the Deceased did not meet the threshold of a Will. Accordingly the court upheld as valid the written Will dated 20th February 2015 by which the Petitioner and the Respondent were appointed as Co-Executrixes of the Deceased's Estate.



66. It is also a fact that judgement a Grant of Probate was issued on 25th July 2019 which Grant was confirmed on 7th July 2021. The written Will stipulated the mode of distribution of the estate
67. As at this present time the judgement of 7th July 2021 remains valid and enforceable. The same has not been set aside, reviewed or overturned by way of an Appeal.
68. Personal representatives of an estate have a statutory duty to administer and distribute the estate in accordance with the discernible wishes of the Deceased or in accordance with the law. Indeed Section 83 of the law of Succession Act set out the obligations of a personal representative as follow:-
- “ 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 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 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.” [own emphasis]
69. In as much as the Respondent indicates her intention to appeal that judgement the fact of the matter is that as of the present time almost two (2) years after the judgement was delivered no Memorandum of Appeal has been filed. Given that the Grant of Probate issued in this matter has not been cancelled, annulled or set aside and given that no substantive appeal has yet been filed I find no reason to have the estate held in limbo indefinitely.



70. The Petitioner and the Minor child of the Deceased are in need of sustenance and desire to have the estate distributed. They cannot continue to be held at ransom at the mercy of the Respondent.
71. Section 47 of the Law of Succession Act vests court with wide discretion in granting protective powers of purposes of safeguarding the estate of a deceased person. It provides:
- “The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”
72. Likewise, Rule 73 of the Probate and Administration Rules provides that:-
- “Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
73. I therefore find that the estate ought to be distributed in accordance with the written Will dated 20th February 2015. If the Respondent refuses/declines to sign the relevant documentation then the Hon. Deputy Registrar is hereby authorized to sign the same on behalf of the Respondent.
74. In the case of *Tabitha Wangithi Muriuki v Wathiba Kimo* Succession Cause No. 372 of 2021 [2020] eKLR the court stated as follows:-
- “By ordering the Deputy Registrar to sign, the court will only be ensuring that the judgement is complied with and will not be descending into the arena of conflict. The orders are necessary for the ends of justice and to ensure that a party reaps the fruits of judgement and prevent abuse for the court process. I therefore find that the application has merits.”
75. I therefore grant prayers 2 and 3 of the Chamber summons dated 3rd December 2021.
76. Having granted prayers (2) and (3), the court will not consider prayer (4) which was an alternative prayer seeking to have the Petitioner appointed as the sole Executrix of the estate.
77. Suffice to say that in the written Will the Deceased appointed his widow and sister as Co-Executrices of his estate. Courts are very reluctant to interfere with the testamentary freedom of the testator and will be slow to alter and /or vary a written Will.
78. In a case where a person appointed a Executrix under a written Will is unable or unwilling to perform that function then the said Executor should resign and leave the other(s) to proceed with the administration of the estate.
79. In this case both Executrix are alive and well and have capacity to administer the estate. None has indicated their unwillingness or inability to carry out the duties of Executrix. The two need to find a way to work together for the benefit of the estate and the minor child left behind by the Deceased. I therefore decline to grant prayer (4) of the summons.
80. By prayer (5) the Petitioner seeks an extension of time within which the estate ought to be administered. This prayer is couched in terms which imply that the Petitioner is the sole Executrix which prayer was already declined by the court.
81. It is manifest that due to the standoff between the two Executrix no action to administer the estate of the Deceased has taken place since his demise. Having found that the written Will left by the Deceased



is valid there is no reason why the estate ought not be distributed in accordance with that written Will. Finally the summons dated 3rd December 2021 is partially successful.

Conclusion

82. This court now makes the following orders:-

- (i) The Notice of Motion dated 21st July 2021 is dismissed in its entirety.
- (ii) The Respondent Jacqueline Vivian Akinyi shall within fourteen (14) days of the date of this Ruling execute all the necessary transfer forms in relating to the administration of thE Kevin John Ombajo the deceased's estate;
- (iii) That if the Respondent fails to adhere (ii) above then upon lapse of the fourteen (14) days, the Hon. Deputy Registrar of this court is hereby authorized to execute on behalf of the Respondent all the necessary transfer forms in relation to the administration of the deceased's estate;
 - ii. That should the Applicant face any hindrances in carrying out the administration of the estate as required by law, she is at liberty to move this court for appropriate orders; and
 - iii. Given that this is family matter, I will order that each party bears their own costs.

DATED IN NAIROBI THIS 2ND DAY OF JUNE, 2023.

.....

MAUREEN A. ODERO

JUDGE

