



REPUBLIC OF KENYA



**In re Estate of Salim Juma Hakeem Kitendo (Deceased) (Succession Cause
200 of 2015) [2023] KEHC 21626 (KLR) (3 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 200 OF 2015
G MUTAI, J
AUGUST 3, 2023**

BETWEEN

ROSE FAITH MWAWASI 1ST PETITIONER

JUDITH MALALE MWAWASI 2ND PETITIONER

AND

FATMA ATHMAN ABUD FARAJ OBJECTOR

AND

MARLIN CORAM POWNALL INTERESTED PARTY

RULING

1. What's before this court is an application by the objector dated 17th March 2023 vide which she seeks the following orders:-
 - a. That this honourable court be pleased to order from the estate account payment of school fees for; ASJ, ASJ, BSJ and MSJ, who are the children of Juma Hakeem Kitendo from estate account;
 - b. That this honourable court be pleased to order payment of rent arrears of Kes.245,988.03 from the estate account for premises occupied by the widow and the children of the deceased;
 - c. That this honourable court be pleased to order payment of upkeep for the minors and widow of Kes.340,000/- per month from the estate account;
 - d. That this honourable court be pleased to order payment of Kes.800,000/- from the estate account of loan advanced to objector/widow; and
 - e. That the costs be in the cause.



2. The application is premised on the grounds therein stated and the supporting affidavit of the applicant sworn on 17th March 2023. The applicant in her affidavit stated that vide court judgement delivered on 25th March 2022 she and her children were declared legitimate wife and children of the deceased. That vide orders issued on 30th May 2019 this honourable court directed Myspace Properties Limited, the estate management and letting agents, to remit/deposit all income from the estate of Salim Hakeem Juma Mwakitendo into the Judiciary account.
3. She further stated that since the death of the deceased she has been solely responsible for the upkeep of the children. That the school fees for the said minors was due and she is unable to pay due to financial constraints. That if the school fees is not paid on the due date then the minors will not be allowed attend classes which will jeopardise their education resulting to violation of their constitutional rights under Article 53(1)(b) And 53(2) of *the Constitution* of Kenya, 2010. That the minors are also required to pay transport charges in the sum of Kes.40,000/- per term to take them to and from school.
4. She averred that she was then in rent arrears to the tune of Kes.245,988/- and that if the said sum was not paid she, together with her children, would be rendered homeless. That she borrowed Kes.1,000,000/- from a Mr. Omar Hamisi in 2019 for purposes of upkeep, maintenance and school fees for her children. Since then she had only been able to pay Kes.200,000/-. That the debtor has threatened to sue her for the balance. That she seeks to take a medical cover for the minors which cover she estimating as costing Kes.393,800/-.
5. Further that they are entitled to the funds sought from the estate of the deceased as beneficiaries of the estate. That it is in the best interest of the minors herein that the application be allowed as prayed.
6. The Objector/Applicant filed a further supplementary affidavit sworn on 29th May 2023 and filed on the same day. She stated that the Petitioners and the Interested Party are estopped from seeking orders through their affidavits. That it is the Petitioner and the Interested Party who are causing delay on the issue of DNA and thus are in contempt of court orders as they have not taken any step to actualize the same.
7. She urged the court to expunge the replying affidavit of the Interested Party from the court record for having been prepared and filed by an advocate who is not properly on record. She thus urged the court to allow the application as prayed.
8. In response the Petitioners filed Grounds of Opposition on the grounds that; the application presumes there is money held in court. The estate agent should be given an account of how much has been deposited before the application is heard; and the court is functus officio to grant the prayers sought.
9. The 1st Petitioner filed a replying affidavit sworn on 19th May 2023. She stated that the judgement determined the matter in full and conclusively, except the issue of DNA. She expressed her readiness to submit her children for sampling in compliance with the judgement. She however deposed that she doesn't have the required funds for the test as she is a housewife with no source of income save from what she gets as donations from church, relatives and friends. She urged that the costs of the DNA testing be paid from the funds held in court.
10. She further stated that the amounts asked for by the Objector are not available as the report prepared by Myspace Properties Ltd shows that the monthly rent is less than the Kes.245,9888.03 being sought by the Objector. She deposed that the estate has a huge liability with Absa Bank PLC and that even her children have school fees arrears. She stated that Objector, on the other hand, is an employee of Kenya Ports Authority and stays within the staff quarters.



11. She averred that it is best to have the issue of DNA concluded to enable the Court establish the number of dependants and have the parties appear before the Kadhi for distribution of the estate in accordance with the judgement herein.
12. She further stated that this court does not have jurisdiction to grant the prayers sought as it is functus officio and urged the court to dismiss the application with costs.
13. The Interested Party filed a replying affidavit sworn on 22nd May 2023 in response to the application and stated that the application is an abuse of court process as it invites the the court to sit on own appeal on its own judgment. That the children of the Objector have not been declared beneficiaries as the DNA test is yet to be conducted. That the decree that distribution should await DNA results has not been set aside.
14. She further stated that the needs of the children of the Petitioners and the Objector have to be considered and catered for pending the final distribution of the estate by apportioning the amount held by My Space Properties equally among the children. That her child is also in need of basic needs and school fees which she has solely catered for as a result of which she has borrowed heavily and urged that she also gets a share for her son's upkeep in the interim at Kes.1,118,000/- pending DNA tests.
15. On 6th April,2023 the court directed that the application be canvassed by way of written submissions. However, when the matter came up on 9th May 2023, Mr. Muniyithya counsel for the Petitioners told the court that he was relying on the Grounds of Opposition dated 28th March 2023 and urged the court to direct the parties to appear before the Kadhi for apportionment of shares according to Islamic law. That the share of his client be frozen until DNA test is completed. That his client can equally receive a share out of the amount held by court.
16. During the course of the hearing the Court ordered that the amount of Kes.300,000/- be released from the estate monies held in court to the Objector.
17. On 24th May 2023, Mr. Mkomba holding brief for Mr. Muniyithya for the Petitioners told the court that they will not be filing submissions they shall rely on the replying affidavit only. Ms. Ombat counsel for the Interested Party also told the court that she was relying on her replying affidavit.
18. The Objector filed her submissions dated 2nd May 2023 and filed on the same day and submitted on three issues namely; whether the applicant and her children are dependants; whether the funds from the estate of the deceased should pay for the dependant's expenses and whether the estate has funds to cater for the needs of the dependants and also whether the court is functus officio.
19. On the first issue the objector relied on Section 29 of the [Law of Succession Act](#) and submitted that she was declared a widow of the deceased vide judgement delivered on 25th March 2022 and her children held as the children of the deceased qualifying them as dependants of the deceased. That the said decision has not been stayed or appealed against.
20. The objector further relied on Section 28 of the [Law of Succession Act](#) and urged the court to consider the conditions therein.
21. On whether the court is functus officio the objector submitted that the duties of this honourable court have not fully accomplished as not all the beneficiaries have been fully identified hence the issue of DNA to determine the paternity of the Petitioner's children and the estate of the deceased is yet to be distributed thus this honourable court is not functus officio. She relied on the case of *Jersey Evening Post Limited -v- A. Thani* [2002] JLR 542 in particular to page 550 where the court held that a court is functus officio when it has performed all its duties.



22. In conclusion the objector submitted that she was not asking the court to relook at its decision but to have access to funds for basic needs of the minors and which funds belong to the estate and in custody of the honourable court. She urged the court to allow the application as prayed.
23. I have considered the application, the responses therein and submissions by the objector and I am now tasked to determine whether this court is functus officio and whether the orders sought should be granted.
24. This honourable vide its judgement of 25th March,2022 by judge J.N. Onyiego pronounced itself as follows:-
 1. That it is hereby declared and ordered that the Objector and the 1st Petitioner are widows of the deceased and therefore beneficiaries entitled to a share of the estate in accordance with Islamic Sharia Law;
 2. That the Interested Party's marriage to the deceased is null and void for lack of capacity to get married to the deceased hence not a widow to the deceased and therefore not a beneficiary;
 3. The children of the objector known as ASJM (Son), ASJM (Son), BSJM (Son) and MSJM (Daughter) being children born within wedlock are heirs hence beneficiaries to the estate entitled to a share in accordance with the Islamic Sharia Law;
 4. The child known as SSJHK is not a beneficiary of the estate herein as he is not a recognized heir nor was he a dependant;
 5. The fate of the three children sired by the 1st Petitioner and the Interested Party whose paternity is in dispute shall be subjected to a DNA test after extracting samples from their bodies and compared with those extracted from the bodies of at least two of the Objector's children whose paternity is not in dispute.
 6. For avoidance of doubt, the children to be subjected to DNA test are HSJHK (child to the Interested Party), LSK, TSK and HK (children of the 1st Petitioner).
 7. Properties comprising the estate and subject to distribution in accordance to Islamic sharia law include
 - a. Apt 5 Block A on LR No. 209/20045;
 - b. LR No.8436 Original No.5939/10/1/MN;
 - c. Kwale/Ukunda/3729;
 - d. 4 houses on Title. Kwale /Ukunda/3729;
 - e. Kwale/Ukunda on Plot 3729 Blue Jay Gas Station;
 - f. Kwale /Ukunda Plot 3673 and 2 houses Diani Msikitini;
 - g. 1 house on Plot 3673;
 - h. Plot No.12/111/MN Mtwapa Kilifi County together with kerosene tank;
 - i. 1/4N/III/2349 3 houses;
 - j. Lorry Mitsubishi Fuso KBP 679S;
 - k. Toyota KBP 481H;



- l. Cash and Carry Supplies business on Plot No.12/111/MN Mtwapa;
 - m. Barclays Account No.20XXXXXXXXX under Blue Jay Gas Station;
 - n. Barclays account 20XXXXXXXXX, local business account;
 - o. Barclays current account 20XXXXXXXXX;
 - p. First Community account 85XXXXXXXX;
 - q. DTB 01 Blue Gas Station account No.02XXXXXXXXX Blue Jay Gas Station;
 - r. Imperial Bank account 72XXXXXXXXX for Salim & Son Investment account;
 - s. KCB account 11XXXXXXXXX SJM; and
 - t. Cooperative Bank account 01XXXXXXX, Executive current account.
8. Parties to agree on which of the two children of the Objector will donate DNA samples for examination before a mutually agreed laboratory;
 9. Grant of letters of administration intestate made in favour of the Objector, 1st Petitioner and the Interested Party jointly and later to the public trustee is confirmed and a fresh grant do issue to the 1st Petitioner and Objector jointly;
 10. Parties to pursue the claim over ownership dispute in respect of Plot Numbers Kwale/Diani SS/2539 and 2274 before ELC;
 11. This being a family matter each party to bear own costs;
 12. Mention on 3rd May 2022 for confirmation of compliance with order (8) above and further directions.
25. On whether the court is functus officio, the petitioners filed grounds of opposition. On the other hand the Objector submitted that the duties of this honourable court have not been fully accomplished as not all the beneficiaries have been fully identified hence the issue of DNA to determine the paternity of the petitioner's children and the estate of the deceased is yet to be distributed thus this honourable court is not functus officio.
 26. The court in the case of *Jersey Evening Post Ltd versus Al-Thani and Others* [2004]2 LRC 1 stated thus:-

“A court is functus when it has performed all duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even where a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”
 27. Further the Court of Appeal held in the case of *Telkom Kenya Limited v John Ochanda (Suing on His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR that:-

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th



Century. In the Canadian case of *Chandler vs Alberta Association Of Architects* [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In *re St. Nazaire Co.*, (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. Where there had been a slip in drawing it up, and,
2. Where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. vs. J.O. Rose Engineering Corp.*, [1934] S.C.R. 186.”

...The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”

28. In this case the court cannot be said to be functus officio as the issue of DNA examination is yet to be done neither has the distribution of the estate been concluded.
29. On whether the orders sought should be granted, the objector seeks to have provision for upkeep for herself and the children, school fees, rent and payment of her outstanding loan of Kes.800,000/-. She produced receipts for tuition fees and lunch payment from M.M Shah and M.V Shah Academy for ASJ, BJ and MSJ, a fee structure for the 2023 new academic year for M.M Shah and M.V Shah Academy and a letter from the school confirming that the children are learners in the said school, account statement from Light Academy for ASJ, a letter from Kiragu & Mwangi Limited in respect to her rent arrears and a demand letter from A.O Hamza & Company Advocates on her outstanding loan of Kes.800,000/-.
30. The court in the case of *Esther Wangari Kingori versus Elias Njoroge Ndungu & another* [2005] eKLR faced with a similar case stated:-

“All the same, I am of the view that the applicant has made out a case for provision of some interim financial relief from the estate accounts pending the distribution of the estate for her upkeep and that of the said children. I would, however, agree with the respondents’ counsel that the applicant should not expect the court to order any payment to her so as to meet her personal financial obligations like repayment of the loan which she obtained from Equity Bank Ltd. Where the court has to intervene to order some interim disbursement of an estate’s funds pending distribution of the estate amongst the beneficiaries, it will only do so to meet some basic necessities of a beneficiary or to alleviate excessive suffering of such a person but not otherwise. Having taken all the relevant issues into consideration, I order that the applicant be allowed to withdraw a sum of Kshs.150,000/- from account number 0152094479700 in the name of Ndung’u Petroleum Co. Ltd at Standard Chartered Bank (K) Ltd, Nakuru Branch.”

31. This honourable court declared the children of the Objector beneficiaries of the estate of the deceased in its judgement delivered on 22nd March 2022. On the children of the 1st Petitioner and the Interested Party whose paternity is in dispute the court directed that they be subjected to DNA test. Thus, this



court cannot order for provision for the upkeep of the 1st Petitioner and Interested Party's children as it is yet to establish whether they are beneficiaries of the estate of the deceased or not.

32. Accordingly, it's my finding that the objector has established a case for interim financial relief from the estate accounts pending the distribution of the estate for school fees, rent and her upkeep and of the said children.

33. Further it's my view that this matter should be disposed of expeditiously for the good of all parties and direct that parties do comply with all directions and orders of the court. I order that the matter to be fixed for mention to confirm compliance and further directions on priority basis. I am guided by the case of *In re Estate of the Late Ishmael Muchiri Nkinyangi (Deceased)* [2021] eKLR where the court stated: -

“Finally disputes in the administration of estates of the deceased must be disposed of expeditiously for the good of all the parties. Delay only serves to escalate the dispute and bar parties from enjoying their inheritance. This matter has been pending since 1994. It should come to an end one way or another.”

34. The upshot of the above is that the application dated 17th March 2023 is allowed in terms of prayer 1, 2 and 3. Prayer 4 has no merit and is hereby dismissed.

Disposition

35. I therefore order as follows: -

1. An order is hereby issued that school fees in respect of ASJ, ASJ, BSJ and MSJ be paid from estate account forthwith;
2. Rent arrears in respect of the premises occupied by the Objector/Applicant and her children as their residence be paid from the estate account forthwith;
3. The Objector/Applicant be paid the sum Kes.340,000/- per month from the estate account as monthly upkeep pending further orders of the Court; and
4. Each party will bear own costs, this being a family matters.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN MOMBASA ON THIS 3RD DAY OF AUGUST 2023

GREGORY MUTAI

JUDGE

In the presence of:-

The Objector/Applicant – In person;

Ms. Ombat for the Interested Party;

No appearance for the Petitioners

