Kamau v Kamau (Probate & Administration 10 of 1985)
[2023] KEHC 22745 (KLR) (25 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22745 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PROBATE & ADMINISTRATION 10 OF 1985

RN NYAKUNDI, J

SEPTEMBER 25, 2023

BETWEEN

MONICAH WAMBUI KAMAU ..... PETITIONER

AND

DANIEL MWANIKI KAMAU ..... RESPONDENT

RULING

1. The applicant approached this court vide an application dated 3rd July 2023 seeking the following orders;
    1. This application be certified as urgent and service thereof be dispensed with in the first instance.
    2. Pending Interpartes Hearing of this Review application there be temporary stay of the Courts orders of 17.05.2023 and thereafter till further direction of the Court.
    3. This Honourable Court be pleased to Review its orders of 17.05.2023 by setting them aside and substituting them with an Order dismissing the application dated 26.10.2021.
    4. Costs be provided for.
    5. Any other and further relief that this Honourable Court shall deem just and expedient to grant.
2. The application is premised on the grounds set out therein and the contents of the affidavit in support of the same.

Applicant's case

3. The applicant contends that the ruling delivered on 17.05.2023 complicates her efforts to have all the cases filed against her be concluded expeditiously since the Ruling seems not to take into account the numerous court cases in which the Petitioner/Applicant is embroiled in and so long as these cases

continue to persist the Petitioner/Applicant will not be in a position to do any distribution if any until and unless the properties are free from any court cases which should be viewed as encumbrances.

4. The applicant submitted that part 3 of The Law of Succession Act which comprises Sections 26 to 30 deal with Provision for dependants out of the estate of the deceased. However, the part is however self-contained in that it also incorporates a period of limitation within which an application for dependency can be entertained by the Court. the applicant urged that the elders were guided by their wisdom on apportioning the deceased's property and the learned Judge was satisfied with the arrangement and went ahead to record their Consent. That Consent cannot now after 38 years be challenged.

5. The applicant urged that the Respondent cannot also apply for Review of the Consent Order recorded in the year 1985 for the simple reason that he was not a participant in the Succession Proceedings. It is her case that under the inherent power of Courts recognised by Section 3, 3A Civil Procedure Codeand Rule 73 of the *Probate and Administration Rules*, a Court has no power to do that which is prohibited by the Act. That, in other words, the Court cannot make use of the special provisions of Section 3, 3A Civil Procedure Code and Rule 73 of the Probate and Administration Rules where a party had his remedy provided elsewhere in the Act and he neglected to avail himself of the same. He relied on the case of *Taparuvs. Roitei*[1968] 1 EA 618 (HCK) & *Hastings Irrigation(K) Ltd Vs. Standard Chartered Bank(K) Ltd& 2 Others*[1987] KLR 532.

6. The applicant concluded by submitting that the Constitution of Kenya 2010 cannot be applicable to the issues that were closed in 1985. Further, that no child of the Petitioner or that of her co-wife was mentioned by name in the Consent recorded on 30.09.1985. She urged that the review application be upheld and the respondent's application dated 26.10.2021 be dismissed with costs.

Respondent's case

7. There are no submissions on record for the respondent

Analysis & Determination

8. Upon consideration of the pleadings and submissions on record, the following issues arise for determination;

    1. Whether the ruling of this court delivered on 17th May 2023 should be reviewed

Whether the ruling of this court delivered on 17th May 2023 should be reviewed

9. Review of decisions of a probate court is governed by Rule 63 of the Probate and Administration Rules, which provides as follows: -

> Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules
>
> (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
>
> (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be

those existing and in force immediately prior to the coming into operation of these Rules.

10. It is, therefore, clear that any party seeking review of orders, in a probate and succession matter, is bound by the provisions of Order 45 of the *Civil Procedure Rules*.

11. The substantive provisions of Order 45, state as follows:

1.

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) ..."

To be successful, the applicant must demonstrate to the court that;
There has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed.There has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.

12. In *Paul Mwaniki vs. National Hospital Insurance Fund Board of Management* [2020] eKLR, it was said:

> "... a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

13. A reading of the application and the submissions reveals that the application is premised on the grounds that there is an error apparent on the face of the record.

Whether there was an error apparent on the face of the record

14. The Court of Appeal in *Muyodi vs. Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243 considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:

> "In *Nyamogo & Nyamogo vs Kogo* (2001) EA 174this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of

> indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal."

15. The error the applicant has raised is that the decision does not take into account the provisions of section 30. Further, that the provisions of rule 73 are provisions of a subsidiary legislation which cannot override any express provision of statute. The applicant has also faulted the application of the Constitution of 2010 to a grant which was confirmed in 1985 as the same is retrospective application of the law. The applicant also contended that the court failed to consider the fact that there are no properties in the name of the deceased as at the date of the application and that the jurisdiction of the court is thus ousted.

16. The issue of the application of section 30 of the Law of Succession Act is, in my view, one that has to be established by long drawn process of reasoning. It is evident that determining the alleged error on the face of the record requires a process of reasoning as there are more than one opinion on how the law should be applied to this cause. The applicant's position is that given that the grant was confirmed in 1985 pursuant to a consent adopted as a judgement by the court, the provisions of the Constitution of Kenya 2010 cannot be applied. The Law of Succession Act came into force in 1972 and it governs the distribution of an estate where the deceased was polygamous. Section 40 gives the provisions under which the estate should be distributed with each beneficiary considered as a unit. The court is alive to the fact that there is a consent on record that was adopted as an order of the court on 16th October 1985. The principles that govern a consent are the same as those that govern a contract. In the case if *Flora Wasike vs. Desmond Wambeolla* [1980] I KAR the court held that :-

> "consent judgment or order has contractual effect and can only be set aside on grounds which justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out."

17. I mention this because a contract cannot be enforced if it perpetuates an illegality. However, in granting the orders on 17th May 2023, the court did not review the consent order. I am in agreement with the applicant that the judge did not apportion any properties to her children but by virtue of the provisions of section 40, the children of the deceased were entitled to a share of the estate. The omission of the children in the consent does not deprive them of their right to inheritance as it creates a trust, where the wives were to hold the properties in trust for their children. The respondent could not have participated in the succession proceedings as he was a child at the time. To implement the consent order verbatim would be to distribute the property of the deceased in contravention of the provisions of section 40 of the Law of Succession Act. If the deceased had left a will where the respondent was expressly excluded from inheriting any part of the estate, the court would have still construed and interpreted the letter and spirit of the testamentary in accordance to Section 38 and 40 of the *Law of Succession Act* in conjunction with Article 27 (4) of the *Constitution*. There is a legitimate expectation on the part of the beneficiaries that the Law of Wills was not meant to violate the law on testate succession. The general inclination of the courts has been towards a lenient interpretation of the Act in order to save wills from invalidity. This, however, has not only been a consistent inclination with the result that not only has the language of the Act been severally tested but also a mass of difficult, conflicting decisions has been created. The

idea of constitutionalism on distribution of the intestate and testate estate is bolstered by the specific entrenchment of the founding provisions Under Section 35,36,37,38, & 40 of the Succession Act to protect heirship Rights. In the new dispensation, it seems central to the conception of our constitution order that the essence of distribution in whichever way the courts look at the various instruments on distribution none should be used to promote an illegality or unlawfulness of the statute. Surely that happens it is to turn things upside down. It makes more sense for a probate court in construing various models of distribution whether testate or intestate to determine first whether there has been violation of the equality clause in Section 38 &40 of the Succession Act. Legality of a decision means lawfulness in the sense that exercise of discretion of judicial power must flow from the Constitution and its established statute ordaining the dispute. It is a requirement of Section 40 of the Act the court's decision to capture the spirit in the case of *Scolastica Ndululu Sava vs Agnes Nthenya Suva* (2019) eKLR in which the court of Appeal revisiting Rono Vs Rono made the following observations: "That the probate court had the discretion in ensuring a fair distribution of the deceased's estate but that the discretion must be exercised judicially on sound legal and factual basis...It is therefore evident, that, although Section 40 of the Law of Succession Act provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate." To that extent, the circumstances of this case with a consent or conduct by administrator inconsistent with the purposes and objectives of the Succession Act in the distribution of the estate of the deceased is invalid. It suffices to say that whatever the outer boundaries of the consent signed by the beneficiaries and its adoption by the court it must be within the very heartland of the constitution and regulatory framework of the Succession Court. Although there may be distinctions in some cases on the waiver by some beneficiaries not to exercise a fundamental right on the equality clause there by electing to settle for a lesser share while others take a lion share of the estate nevertheless the use of such model might not necessarily result in unfair distribution. The effect of waiver by any of the beneficiaries depends on the nature and unique circumstances of the estate survived by the deceased and the purpose of the fundamental rights on inheritance. There is a general duty on every court to promote the spirit, purport and objects of the constitution and the Succession Act on matters of inheritance of the deceased estate. The point is the provisions of Section 38 & 40 of the Succession Act are not misleading it is only that a narrow interpretation which do not confirm with the Bill of Rights might render an absurdity outcome which borders the same to be in violation of Article 27 of the Constitution. While the court must always be conscious of the unique characteristics underlying a typical African family and its values it is nonetheless of a task to interpret any instrument on distribution of the deceased estate to avoid the influence of any one heir personal, social, moral, and intellectual prejudices and preconceptions to defeat the underpinning of the law on inheritance. The respondent in this case has shown that the conduct by the mother has a discriminatory effect intended to discriminate against him as I have seen from inheriting any of his rightful shares to the deceased estate. The importance of the right of a child to inherit his or her parent's estate is central in the Succession Act and must be emphasised at the outset. The measures taken by the petitioner since the initiation of this proceedings way back in 1985 to deny the respondent access or right to ownership are not justified best to be described as cruel and inhuman to her own child. The broad spectrum of claimed rights by the petitioner are unambiguously restated in Section 84 provision of the Law of Succession Act which reads: "Where the administration of the estate of a deceased person involves any continuing trust, whether by way of life interest or for minor beneficiaries or otherwise, the personal representative shall, unless other trustees have been appointed by a will for the purpose of the trust, ne the trustees thereof: Provided that, where valid polygamous marriage of the deceased person have resulted in the creation of more than one house, the court may at the time of confirmation of grant,

appoint separate trustees of the property passing to each or any of those houses as provided by Section 40.

18. The structure of the enquiry I set out in the affidavit evidence by the petitioner and the respondent appear quite systematic. One first the court has to consider whether in this Succession Cause there has been a violation of the right to equality to inheritance by the respondent as stipulated in Section 38 & 40 of the Law of Succession Act rendering the whole scheme of the intestate estate a threat or infringement of his fundamental rights on the right to property survived of the deceased. In the many affidavits filed by the petitioner at various levels of this litigation since 1985, I hold that her conduct is discriminatory, unfair, and unjustified under the law as against the respondent. It somewhat difficult to conceptualise taking into account all facts of this cause as to why the petitioner invites this court to exercise differentiation on rights to property as between her own children survived of the deceased. I am satisfied that the respondent has discharged the onus by putting up a formidable explanation to comfortably accommodate under this analysis on infringement of his rights under Article 27(4) of the Constitution and Section 38 & 40 of the Succession Act. The criteria identified by the petitioner that separate differentiation on inheritance amongst her own children and children of the deceased be held as permissible is frowned at as wholly irrational conduct which is aimed at limiting right to inheritance which forms the foundation of the constitution and the Succession Code of Kenya. The law of Succession as enacted in 1981 sought to achieve a worthy and important societal goal intended to protect the rights of dependants recognized within the scope of Section 29 of the Act. A series of court challenges appears on the face of it to be a substantive cause of action but manifestly and directly is an intentional conduct by the petitioner to continue agitating various judges to give a listening ear to limit the right of inheritance accorded to the respondent as a rightful beneficiary to the estate of the deceased. While there is no doubt whatsoever, that the respondent is a son to the deceased the evidence before me and from the historical litigation the implementation of the aforesaid consent referenced by the petitioner broadly remains not to give effect to the purpose of the legislation on dependency and distribution of the intestate estate as provided for in Section 35,36, 37, 38, 40, & 41 of the Act. For purpose of this ruling it remains to be seen why the beneficiaries have allocated massive family resources to approach this court on a non-suited cause of action. What the court is being asked to do is to exercise its jurisdiction or power not in the interests of justice and equity but to be looped in notably to facilitate the weaponization by family members of the deceased against each other. There must be an end to litigation and it would be intolerable for probate courts in this jurisdiction to continue granting leave of access to court against the explicit provision on suited and non-suited subject matter and or locus standi. If the petitioner wishes to end this litigation generally speaking the jurisprudence relating to identification of the beneficiaries, free property of the deceased and application of the model in Section 38 & 40 would sufficiently end the impasse. The cause of fairness has hardly been served by this litigation and it detriment to the beneficiaries of the deceased estate.

19. The significance of death and its consequences even in traditional African societies more often than not is difficult to fathom by the survivors. For the petitioner it may be that the respondent has wronged you and not worthy the passage of time and the fruit of your womb, may the heart of forgiveness be extended to your son the respondent to restore him and not doomed to be a wanderer and a fugitive in the earth, that after all is said and done he can inherit the land of his father.

20. As for the instant application from the point of view of the facts and applicable law, the perpetuation of this litigation is a kind of scheme which is admittedly unfortunate given the unconscionable nature of the new and old elements purposed as causes of action for various judges to exercise adjudicatory powers over the dispute in terms of Article 50 (1) of the Constitution. Most directly in point in terms of Section 38 & 40 of the Succession Act the claim lodged by the respondent is therefore statutory and if not sufficiently addressed is a violation of his fundamental right to inheritance unless compelling

reasons exists for the court not give proper effect to the law. In so far as the application for review is concerned the same is unmerited and having given considerable thought to it I declare it dismissed with costs to the respondent. In my view, the context of this litigation calls for the exercise of inherent jurisdiction under Section 3(a) of the CPA and Rule 73(1) of the Probate and Administration Rules for a declaration to issue of freezing all interlocutory applications by any beneficiaries to this intestate estate save for leave of the court. It is so ordered.

DELIVERED AND DISPATCHED VIA E-MAIL ON THIS 25TH DAY OF SEPTEMBER 2023.

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R. NYAKUNDI

JUDGE