



In re Estate of Suleiman Kassim Dada (Deceased) (Succession Cause 255 of 2001) [2024] KEHC 15233 (KLR) (3 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 255 OF 2001
G MUTAI, J
DECEMBER 3, 2024**

BETWEEN

SAKINABAI SULEIMAN KASSAM DADA PETITIONER

AND

LATIFA SULEIMAN KASSAM DADA 1ST RESPONDENT

ZAINAB SULEIMAN KASSAM DADA 2ND RESPONDENT

KHATOONISA SULEIMAN KASSAM DADA 3RD RESPONDENT

FATMA SULEIMAN KASSAM DADA 4TH RESPONDENT

RULING

1. The Petitioner herein, Sakinabai Suleiman Kassim Dada, died on 30th November 2023. At the time of her death, she was 75 years old. I shall hereafter refer to her as Sakinabai. She was the wife of the deceased, with whom he had 9 children, and the executor of his last will and testament.
2. On 17th February 2021, this court, differently constituted, in a ruling delivered on 5th March 2021 held at paragraph 17 as follows: -

“In the end, I direct as follows: -

- (a) The Executrix shall forthwith distribute Kshs 14,846,279/-, and Kshs 6,279,159/- shall be shared amongst the beneficiaries in accordance with the will of the deceased;
- (b) This matter shall be mentioned on 16th March 2021 for directions on the taking of viva voce evidence:-
 - i. From the Executrix or the administration of the estate;



- ii. On the costs of construction of the flats Mombasa/Block XV/101 and the contribution of each of the five beneficiaries;
 - iii. On the operation of the Popat Brothers milling business;
 - iv. Yasmin’s share;
 - v. From the auditor on the auditor’s accounts.”
3. Being dissatisfied with the decision, the Executrix appealed against the said decision. Upon hearing the matter, the Court of Appeal, in a judgment delivered on 10th November 2023, held as follows, in paragraph 31: -
- “In the premises, we uphold the decision of the learned trial judge save that we set aside the order directing the Executrix to distribute Kshs 14,846,279/- and that Kshs 6,279,159/- be shared amongst the beneficiaries in accordance with the will of the deceased. To that extent only does this appeal succeed.”
4. With the death of the Executrix, the question arose as to what would happen to the orders issued by Thande, J. Did they abate as suggested by Mohamed Karega, learned counsel for the Executrix, or can the said orders be salvaged by the appointment of a universal legatee, as proposed by Mr Asige, learned counsel for the Respondents?
5. In an attempt to unravel this question, the court, on 18th April 2024, asked the parties to file written submissions.
6. The submissions of the Respondents are dated 29th June 2024.
7. The Respondents’ counsel submitted that the cause of action survived the demise of the Executrix and that a legal representative should be appointed upon the application by a beneficiary under the applicable law to continue with the prosecution of the cause to its logical conclusion.
8. Counsel relied on the provision of Section 63(2), as read with Section 65, of the *Law of Successions Act* and submitted that since, in his view, the cause of action survived the demise of the executrix, a residual or a universal legatee should be admitted upon application to the court.
9. Mr Asige urged that the Executrix hadn’t complied with Section 83(c) of the *Law of Succession Act*, in so far as she had not produced to the court 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, “for that reason, it would be necessary to appoint a universal or residual legatee to comply with statutory imperative.”
10. Counsel urged that under Rule 73 of the *Probate and Administration Rules*, this court has inherent power to make such orders as may be necessary for the ends of justice to be met or to prevent the abuse of the process of court. It was submitted that as the orders of Thande, J had not yet been complied with it would be necessary to appoint a residually or universal legatee to conclude the pending proceedings to ensure that the estate of the deceased testator is not abandoned in limbo, but concluded and determined in accordance with the law.
11. The submissions of the counsel for the deceased Executrix are dated 2nd July 2024. Mr Karega submitted that the ruling of Thande, J was in personam and not in rem, as it only bounds the parties to it. He urged that the ruling the court delivered on 5th March 2021 related to the deceased’s Executrix’s management of the estate. By dint of that, it was in personam.



12. Counsel submitted that the primary estate of the deceased herein was subdivision number MN/II/570 Mtwapa, which was sold in February 2014 for Kshs 145,00,000/-, which was subsequently shared out to the beneficiaries. Some of the beneficiaries pooled funds to develop title No Mombasa / Block XV/101, which under the will belonged to the deceased Executrix and her daughter Yasmin. What remained in contention, counsel submitted, was the application of funds in respect of the latter venture, hence the decision by Thande, J to call for viva voce evidence from the deceased Executrix.
13. It was submitted that even if a personal representative was appointed, such a personal representative would not be able to account to the estate or be held liable for the lapses of the Executrix.
14. On the issue of the appointment of a residual legatee, counsel urged that Section 63 of the *Law of Succession Act* was irrelevant to the matters at hand. Secondly, even if it were relevant, paragraph 8 of the will of the deceased effectively made all the beneficiaries residuary legatees. Counsel asked who would become an applicant(s) and the respondent(s) in such an event and whether they would be able to cross-examine themselves.
15. Regarding the provision of Order 23 of the *Civil Procedure Rules*, counsel urged that the said provision not applicable to Probate and Administration matters under Rule 63 (1) of the latter rules.
16. Counsel urged that this matter be marked as closed as the orders of 5th March 2021 were in personam and did not survive the demise of the deceased executrix.
17. I have read the court file, the proceedings and the submissions of the parties. It is evident that this court found in its ruling dated 17th February 2021 and delivered on 5th March 2021 that the estate had not been fully administered and, for that reason, gave specific orders /directions regarding further proceedings.
18. Whereas it is true that some of the orders were directed at the Executrix and, to that extent, were in personam, the court notes that provision of statement of accounts, and generally the distribution of the estate of the deceased hasn't been completed. I say so as:-
 1. The cost of the construction of flats in Title Number Mombasa/Block XV/101, and the contribution of each of the 5 beneficiaries hasn't been ascertained;
 2. Report on the operations of the Popat Brothers milling business hasn't been provided;
 3. The status of the shares of Ms Yasmin SK Dada, a person suffering from mental illness, hasn't been provided;
 4. The report of the auditor hasn't, to the best of my knowledge been considered by the beneficiaries; and
 5. No statement of account required under section 83 of the *Law of Succession Act* has been provided.
19. Without the matters I have listed being concluded it would be premature to say that the estate of the deceased person has been fully distributed.
20. I agree with the holding by the Court in *Japheth Nzila Muangi v Kenya Safari Lodges & Hotels Ltd* [2008] eKLR, that:-

“...It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement in personam. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement in rem. This is a judgement



which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally...”

21. Having said so it is my view that the part of the decision that was in personam was that part requiring the Sakinabai to attend court to give viva voce evidence regarding how she administered the estate. This is a duty that only she could discharge. No other person could account for or be held liable for any actions or omissions Sakinabai engaged in other than herself. That being the case, I find and hold that the only part of the ruling that can be said to have abated is the one that called for the Executrix to account for her actions.
22. What then should happen next? Mr Asige proposed that the provisions of Order 24 of the [Civil Procedure Rules](#) on the death or bankruptcy of parties would be applicable. Although this is attractive, Rule 63 of the [Probate and Administration Rules](#), 1980, which provides for the application of the [Civil Procedure Rules](#), 2010 in Probate and Administration matters, does not list Order 24 as being applicable to such proceedings.
23. Although Mr Karega disagrees, I agree with Mr Asige that it is necessary to appoint a residuary or a universal legatee to administer the estate to the extent that it remains administered. I say this as there is still a substantial part of the estate that remains un-administered. As has often been said, this court's primary duty is to distribute a deceased person's estate to his beneficiaries. This court has no intention of shirking this duty and won't do so in this case.
24. Rule 63 of the [Probate and Administration Rules](#), 1980 states that:-

“When a deceased has made a will, but:-

 - (a) he has not appointed an executor; or
 - (b) the only executors appointed are legally incapable of acting, or have renounced their executorship, or have died before the testator or before receiving a grant of probate of the will, or have failed within the time limited by a citation to apply for probate thereof; or
 - (c) all proving executors have died before completing administration of all the property to which the will applies, a universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be un-administered.”
25. Section 65 of the said Act states that:-

“When there is no executor, and no residuary legatee or representative of the residuary legatee, or if every such person declines or is incapable of acting, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or the Public Trustee, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.”



26. Nyamweya, J (as she then was), *Mumbua Musyoki & 6 others v Mbenya Musyoki* [2016] eKLR defined the residuary and universal legatees as being: -

“ A residuary legatee is a person named in the will to receive the residue of the deceased’s estate, while a universal legatee is a residuary legatee that receives the entire residuary estate. The parties herein will therefore need to determine whether the deceased’s will had a residuary or universal legatee, and if not, who among them has priority to apply for a grant of letters of administration with will annexed.”

27. Since all the beneficiaries are named in paragraph 8 of the deceased’s last will and testament as being in effect, the residuary legatees, I direct that the beneficiaries do agree amongst themselves, within 30 days of the date hereof, as to which of them ought to be issued with a grant *de bonis non*, so as to complete the administration of the estate of the deceased. If the beneficiaries do not agree, the said grant shall be issued to the Public Trustee on the 31st day from the date hereof.

28. To bring this protracted matter to a close, I order the administrators *de bonis non*, or the Public Trustee, as the case may be, to complete the administration of the estate within 120 days of the date of their appointment.

29. I order the new administrators, or the Public Trustee, as the case may be, to comply with the above-referenced ruling of Thande, J in respect of Order b.(ii) to b.(vi)

30. I do not make orders regarding costs as this is a succession dispute between close family members.

31. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 3RD DAY OF DECEMBER 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

Gregory Mutai

JUDGE

In the presence of:-

Ms Ongesso, holding brief for Mr Karega for the deceased Executrix;

No appearance for the Respondents; and

Arthur - Court Assistant.

