



**Said v Said & 3 others (Originating Summons E005 of 2024)
[2024] KEHC 15848 (KLR) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS E005 OF 2024**

G MUTAI, J

DECEMBER 13, 2024

BETWEEN

JAMAL SHEIKH SAID PETITIONER

AND

OSMAN TAHIR SHEIKH SAID 1ST RESPONDENT

AMINA TAHIR SHEIKH SAID 2ND RESPONDENT

SAID AHMED TAHIR SHEIKH SAID 3RD RESPONDENT

FATMA TAHIR SHEIKH SAID 4TH RESPONDENT

JUDGMENT

1. The deceased, Tahir Sheikh Said (popularly known as “TSS”), was a prominent businessman in Mombasa. In a will dated 12th June 2012, he appointed his children Osman Tahir Sheikh Said, Amina Tahir Sheikh Said and Said Ahmed Tahir Sheikh Said to be the joint executors and trustees of his said will.
2. The deceased died on 10th January 2017 in Johannesburg, South Africa, while, undergoing treatment. The cause of his death, as indicated in the certificate of death was cardiac arrest due to lymphoma, renal failure and septic bed sores.
3. Although more than 7 years have elapsed since the deceased died, the executors named in the will have not petitioned the Court for a Grant of Probate of his written will. Thus, in the meantime, the estate remains unadministered and undistributed.
4. Being dissatisfied with the state of affairs, the Petitioner herein filed the Originating Summons dated 12th May 2023, vide which he sought the following orders:-
 1. Spent;



2. That pending the hearing and determination of this case, the administrators be restrained, whether by themselves, agent's servants or representatives, from in any manner meddling in the administration of the estate of Tahir Sheikh Said or in any manner interfering with the estate or properties comprised thereof;
 3. That the administrators be compelled, whether by themselves, agents, servants or representatives, to deposit in Court all the title documents which they are holding in respect of property forming part of the estate of the late Tahir Sheikh Said;
 4. That the administrators be ordered to provide full, detailed and accurate accounts of the estate, including all income and expenditure, within 14 days;
 5. That in default in providing accounts above, the administrators be held personally and criminally liable as provided by law;
 6. That further, in providing accounts as above, the grant of letters of probate to the administrators be revoked and a new one issued to Jamal Tahir Sheikh Said;
 7. That Court do make such further orders as appropriate; and
 8. That the Respondents personally (not of the estate) do pay the costs of this application.
5. The grounds upon which the Originating Summons was based was that the grant of probate was issued to the Respondents. Since being so appointed they had mismanaged the estate and been negligent. They had also not distributed the estate. The Petitioner thus urged that the Originating Summons be allowed in the interest of justice.
 6. Although the Petitioners mentioned that the grant of probate was issued, he did not annex a copy of the alleged grant of probate of the written will, nor did he provide a cause number for the citation that he stated was filed.
 7. The Respondents entered appearance and filed their responses. An Interested Party was added in these proceedings.
 8. On 11th June 2024, the counsels for the 1st, 2nd and 3rd filed a Notice of Motion dated 11th June 2024 vide which they sought the following two orders:-
 1. They Originating Summons dated 12th May 2023 be struck out for being fatally defective; and
 2. The costs of this application and the petition be borne by the Petitioner.
 9. The applicants averred that neither they nor the 4th Respondent had been appointed as executors/administrators of the estate and that, for that reason, the Originating Summons was fatally defective. They averred further that the jurisdiction of the Court had not been properly invoked.
 10. The Petitioner filed a Replying Affidavit he swore on 4th October 2024, vide which he admitted in paragraph 3 that the 1st to 3rd Respondents/Applicants hadn't taken out a Petition for Grant of Probate and accused them of not doing so to avoid being held accountable.
 11. He urged this Court to invoke its jurisdiction under section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules and issue the order he was seeking.
 12. The application was canvassed by way of written submissions. The submissions of the 1st, 2nd and 3rd Respondents are dated 16th October 2024. Those of the Petitioner are dated 2nd December 2024.



13. The Applicants averred that the joinder of the 4th Respondent was without legal basis as she was not appointed as an executor in the will. While appreciating that a misjoinder cannot be a basis for striking out a suit, it was submitted that there was not, in fact, any suit as the Petitioner approached this Court using the provisions of Order 37 of the Civil Procedure Rules 2010. Counsel submitted that Order 37 does not apply to Probate and Administration proceedings as it is not listed in Rule 63 of the Probate & Administration Rules, 1980. In support of the said submissions, reliance was placed on the decisions of the Court of Albert Imbuga Kisigwa vs Recho Kawai Kisigwa [2016] KEHC 1528 (KLR) and re Estate of Emilia Muchora (deceased) [2013] KEHC 5081 (KLR).
14. The 1st, 2nd and 3rd Respondents/Applicants' counsels submitted that the Originating Summons could not be saved by reliance on Rule 73 of the Probate and Administration Rules. It was urged that the said rule could not be relied upon where there are adequate provisions.
15. Counsels impugned the Petitioner's decision to approach the Court using an Originating Summons. They submitted that the "Summons" under the Probate and Administration Rules is a Chamber Summons, secondly that Order 37 of the Civil Procedure Rules is inapplicable to the Probate and Administration proceedings and thirdly that a request for accounts under section 83 of the Law of Succession Act can only be made against the holder of a grant by way of Chamber Summons.
16. It was urged that the Originating Summons if allowed to stand, would open up the possibility of all the beneficiaries of the estate filing a multiplicity of suits, which would be oppressive, yet Rules 58 & 59 of the Probate and Administration Rules permit only one succession cause in respect of an estate of a deceased person.
17. It was thus urged that this cause be struck out with costs.
18. The Petitioner's counsel submitted that Order 37 of the Civil Procedure Rules permits beneficiaries to apply for and obtain an order for the administration of the personal and real estate of the deceased.
19. Counsel submitted that the foregoing, notwithstanding the administration of the estate of the deceased, is governed by the Law of Succession Act. It was urged that section 47 of the Law of Succession Act grants the High Court jurisdiction to deal with applications and to determine disputes over matters governed by it and to pronounce decrees and make orders as may be expedient in the context of the provisions of the Law of Succession Act.
20. The Petitioner/Respondent relied on the decision of Lenaola, J (as he then was), in re Estate of Isaka Muthembwa Kithome to urge that forms used are technical matters which should not be used to deny parties a hearing on merit. Further reliance was placed on the decision of the Court of Appeal in Floris Prezzo & another vs Giancarlo Falascons [2014]eKLR.
21. Counsel submitted that despite the effluxion of time, the estate hadn't been administered and was in danger of being wasted. Such wastage, counsel urged, was likely to be irreparable and could not be adequately compensated by an award of damages. Relying on the cases of In re Estate of Nzyinu Muloi (deceased) [2020] eKLR and In re Estate of Simon Kimendere (deceased) [2020], it was urged that the Court ought to preserve the same so that the ends of justice are met.
22. It was urged that principles used by the Courts in revoking grants are provided for in section 76 of the Law of Succession Act. Reliance was placed on the decision of the Court In re Estate of Prisca Ongayo Nande (deceased) [2020]eKLR.
23. Consequently, counsel urged that the grant issued herein be revoked on the basis that the executors had failed to diligently proceed with the administration of the estate of the deceased and had not rendered accounts as and when required.



24. I have considered the Originating Summons, the Notice of Motion the subject of this ruling, the responses thereto, as well as the submissions of the parties. I must determine if the application has merit and issue orders as appropriate.
25. To do this, I must first set out the statutory provisions that will guide my decision.
26. Section 47 of the *Law of Succession Act* states that:-
- “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:
- Provided that the High Court may, for the purpose of this section, be represented by Resident Magistrates appointed by the Chief Justice.”
27. Rule 73 of the said Probate and Administration Rules states 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.”
28. Section 47 of the Act and Rule 73 of the Rules does not give this Court carte blanche to act at whim and to issue orders willy nilly. Whatever this Court does must flow from the Act and be based on it.
29. In my view, and as admitted by the Petitioner, no grant has been issued in respect of the deceased person herein. There is, therefore, no grant to revoke. That being the case, I cannot understand what value submissions regarding section 76 of the Act add. The said section governs the revocation of grants that have already been issued.
30. As the Petitioner knows, there is a whose validity he does not contest; he has remedies under the *Law of Succession Act* and the Probate and Administration Rules, which he should exhaust.
31. This Court agrees with the submissions of the Respondents/Applicants that the inherent jurisdiction of the Court cannot be invoked where adequate statutory provisions exist. I am guided in this by the decision of the Court of Appeal in Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited [2017] eKLR where it was held inter alia that:-
- “And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in Taparn vs Roitei [1968] EA 618 that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case.”
32. By filing an Originating Summons seeking various orders that ordinarily require different pleadings and procedures, the Petitioner was casting his rather modest net over a large body of water. The Respondents, too, have a constitutional right to a fair trial. In my view, being aware of the case one is facing so that one can respond to it adequately is a characteristic of the right to a fair trial.
33. Although counsel has attempted to dismiss the importance of forms, this Court is of the view that procedural requirements are not mere adornments to be disregarded at will by litigants. Rules of procedure and forms exist so that substance and substantive disputes can be considered in a way that is fair and just to the litigants. For example, for there to be a fair trial a party against whom a claim is made must be able to understand what the claim is to be able to respond to it. How the claim is framed would be essential.



34. In the circumstances, I find that the Notice of Motion before me is merited. In the circumstances, I strike out the Originating Summons dated 12th May 2023 for being fatally defective. The originating Summons is based on misapprehension of facts and is thus misconceived.

35. As this is a dispute among family members I make no orders regarding costs.

36. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF DECEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Cheruiyot, holding brief for Mr Kongere, for the 1st, 2nd and 3rd Respondents/Applicants;

Mr Waziri, for the 4th Respondent;

Mr Chege, holding brief for Mr Matende, for the Petitioner;

Mr Obonyo, for the Interested Party; and

Arthur - Court Assistant.

