



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

SUCC CAUSE NO. 34 OF 2017

FORMERLY MACHAKOS SUCCESSION CAUSE NO. 93 OF 2003

IN THE MATTER OF THE ESTATE OF DAVID KAINDI MBULUI (DECEASED)

ESTHER NDETE MBULUI

ERICK MUSYA KAINDI.....PETITIONERS/RESPONDENTS

-VERSUS-

DANIEL KIOKO KAINDI.....OBJECTOR/APPLICANT

RULING

1. The application for determination is dated 28/10/2018 and was filed under certificate of urgency. It is brought under Rules 49, 63 and 73 of the Probate and Administration Rules, Order 45, Rules 1, 2 and 3 of the Civil Procedure Rules and all other enabling provisions of the law. It seeks the following prayers:

a) *Spent.*

b) The Honorable court be pleased to review and/or set aside its orders (*Hon. Lady Justice H.I. Ong'udi*) dated 24/10/2019 dismissing the Applicant's protests filed on 12/10/2018 and 13/05/2019 respectively.

c) The Honorable court be pleased to review and/or set aside its orders (*Hon. Lady Justice H.I Ong'udi*) dated 24/10/2019 allowing the Respondent's summons for confirmation of grant dated 17/08/2018.

d) Consequent thereto, the Honorable court does revoke the summons for confirmation of grant issued pursuant to the orders of the court dated 24/10/2019.

e) Costs of the application be in the cause.

2. The application is supported by the grounds on its face, the Applicant's supporting affidavit sworn on the same day and a supplementary affidavit sworn on 16/12/2019. He attributes the dismissal of his protests to mischief of his outgoing *advocate* (*Ms. Kilonzo*) by deposing that Ms. Kilonzo deliberately and maliciously sat on instructions of the incoming advocate thus causing the court not to be properly addressed on the reasons of seeking the adjournment.

3. He deposed that he fell out with Ms. Kilonzo a day before the hearing and was constrained to look for a new Advocate but it was impossible to serve the '*Notice of change of advocates*' on time. That the incoming Advocate, Mr. Muumbi was unavailable to attend court on 24/10/2019 (*material day*) due to the short notice but he (*Mr. Muumbi*) instructed a Mr. Masaku to hold his brief and apply for adjournment.

4. Further, he deposed that Mr. Masaku attended court but left the brief with a pupil as he rushed to attend to another matter at the ELC. That when the matter was called out, the pupil requested Ms. Kilonzo to hold brief and she simply informed court that she had been served with a notice of change of advocates and was therefore not in a position to address the court. That as a result and owing to an application by the Respondent's counsel, the court dismissed the protests for non-attendance and proceeded to confirm the grant.

5. He deposed that had Ms. Kilonzo declined the brief and disclosed her status in the matter, the court would have been addressed appropriately and would have arrived at a different conclusion.

6. The application is opposed through the replying affidavit of Esther Ndeti Mbului sworn on 22/11/2019. She deposed that she acquired the estate with her late husband to the exclusion of the Applicant. She gave the history of the matter as follows;

- a) That together with her co-administrator, they petitioned for letters of administration in 2003 with the approval of her children including the Applicant. A copy of the grant and certificate of confirmation were exhibited as **EN-1 & EN-2**.
- b) The Applicant applied for revocation of grant on 21/08/2013 and the matter was listed several times and partly heard by Machakos court before being transferred to this court. The application for revocation was exhibited as **EN-3** and response as **EN-4**.
- c) That on 29/06/2017 the Applicant was ordered to render accounts to court and the estate for unpaid rent for his unauthorized commercial use of a part of the estate but he has never complied.
- d) That through hostility and other unorthodox means, the Applicant has blocked her and other dependants from accessing or using the most prime land known as Machakos/Konza North Block 1/122.
- e) That she is aged, in need of medical attention plus other personal needs and has to depend on her other children for monetary support yet her husband left an estate which can cater for all that.
- f) That the summons for revocation was fixed on a priority basis for hearing on 07/06/2018 and because the pendency of the matter was taking a toll on her health, she prevailed upon the other beneficiaries to allow the revocation and a consent was recorded in court on the same day.
- g) That to demonstrate good faith, the administrators attempted an out of court settlement and on 22/06/2018, and they spent a whole day at her advocate's office in Machakos whereupon most of the issues and division of property were agreed upon. However, when the parties took a break to enable the advocate prepare the consent, the Applicant never returned to sign. The current distribution is as per the agreement of that day.
- h) That they informed the court about the development and were directed to file summons for confirmation of grant within 30 days and protestor to protest within 21 days.
- i) That on 01/11/2018, the Court ordered all the witnesses to be in court on the hearing day as the matter would be heard and concluded in one day.
- j) On the date of the hearing (25/04/2019), the Applicant in his usual manner indicated that he wanted to amend his **protest and was allowed. The matter was adjourned to 24/10/2019.**
- k) On 24/10/2019, she attended court with all the witnesses and beneficiaries ready to proceed but the applicant was not in court and Ms. Kilonzo was shocked to find that she had been sacked but had not been notified.

- Ms. Kilonzo told the court that she had no differences with her client and was not aware as to why he was not in court, that day

7. Further, the 1st administrator deposed that when her Advocate was served with a 'Notice of change of Advocates' on 23/10/2019 after office hours, it was received under protest and an indication given that they would proceed with the hearing. The copy indicating the protest is exhibited as **EN-5**. That interestingly and to show bad faith, the Applicant wiped out the stamp, signature and endorsement of her advocate. The copy without the protest is exhibited as **EN-6**.

8. Further, the 1st administrator deposed that she was in court with three witnesses of which;

- a) One had come from South Sudan where she works.
- b) The second one was in Naivasha and had to leave Government training to attend court.
- c) The third one was from Nairobi and had to apply for one-day leave.

9. It is also her disposition that nobody has denied the applicant his right to legal representation but he should not be heard whining over something he created for himself.

10. She deposed that Mr. Masaku of Makau & Mulei advocates is personally known to her advocates and he was not in court on the material day but there were several other advocates and none was requested to hold brief. She applied to cross examine Mr. Masaku.

11. It also her deposition that the applicant has been operating a cottage with a club and restaurant on the estate without paying rent to the estate thus the reason he has been engaging the estate in endless litigation. She deposed that the Applicant will not be prejudiced as he has been provided for in the estate.

12. In rejoinder, the Applicant frowned upon the deposition that he had wiped out certain portions of the notice of change of advocates which

he described as false, devoid of merit and meant to unnecessarily malign his advocate's name before the court's eyes.

13. Further, he did not dispute that his advocate has a branch office at Wote but deposed that it was wrong for the Respondent to cunningly mislead the court that the advocate was based in Makueni. He attached a diary extract marked **DKK-1** to show that his advocate was before Justice O. Makau in Milimani Law Courts, Nairobi.

14. He acknowledged the Respondent's age and need for medical attention but deposed that justice demands striking of a balance on the competing interests. He accused the Respondent of failing to disclose that she has been collecting rent of over Kshs.100,000/= from the upper hill and Machakos properties which she has been utilizing for upkeep.

15. He deposed that there is nothing prime about Machakos/Konza North Block 1/122 save that he has put up a hotel on the property from his own sweat and that of his wife. He also deposed that the Respondent's stubborn fight for that particular parcel is calculated at bringing down his business which he uses for his upkeep and that of his family.

16. He deposed that the Respondent has a medical cover for both in and outpatient and as such, her claim of being in dire need of medicare is untrue. It's also his disposition that the 1st Respondent's claim of dependency is untrue and that she is actually the one who caters for her grandchildren's school fees from time to time.

17. He insists that although there was no appearance from him or his advocate, a pupil from the firm of O.N Makau & Mulei advocates requested Ms. Kilonzo to hold brief but she refused to act accordingly. He agrees that this is an old matter but denies being responsible for its delay. He denies being in contempt of court and deposes that the orders alluded to were set aside by Kariuki J. in the presence of all parties.

18. Directions were given that the application be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

Applicant's submissions

19. The Applicant submits that from Rule 63 of the Probate & Administration Rules, the following are the considerations to be taken into account by the court when deciding whether or not to grant a review;

- a) Whether there is discovery of a new and important matter of evidence which was not despite due diligence, within the Applicant's knowledge or could not be produced at the time when the order was made.
- b) Whether there is an error apparent on the face of the record.
- c) Whether there is any other sufficient reason for review.
- d) Whether there is an unreasonable delay in bringing the application.

20. The Applicant is relying on existence of sufficient reason to warrant the review and submits that this ground should not be tied to the others. He cites the case of **Pancras T. Swai –vs- Kenya Breweries Ltd (2014) eKLR** where the Court of Appeal held as follows;

“As repeatedly pointed out in various decisions of this court the words ‘for any sufficient reason’ must be viewed in the context firstly of section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.”

21. He reiterates the alleged mischief by Ms. Kilonzo and submits that he saw no need of attending court on the material day as his advocate had made arrangements for adjournment of the hearing. He contends that the explained reasons for failure to attend court are sufficient to warrant a reprieve from the court.

22. On denial of the adjournment, he submits that respective courts have held it to be a matter of judicial discretion but one that must be exercised judiciously and in a manner that does not occasion injustice. He cites the case of **Thomas Openda –vs- Peter Martin Ahn (1984) eKLR** where the Court of Appeal held;

“The refusal of an adjournment is what Buckley J in Rose –vs- Humbles (1970)2 ALL ER 519, 523f ChD called an extreme course for a judge to take but it's a matter for his discretion (Order VI Rule 1) and it should not be interfered with by any appellate court unless it has been exercised in such a way that it caused injustice then the appellate court must make sure it is further heard. Among the matters that should be taken into account are; any previous indulgence granted to the Applicant, was he solely responsible for the fact that he was not in a position to proceed with his case on the day on which adjournment was refused, was his evidence important, had he an arguable case on the merits and did illness or some physical difficulty he had prompt his application.”

23. He submits that the adjournment sought was his first, that the reason for seeking the adjournment was not his creation and that his evidence is of utmost importance in determining the issue at hand. Further, he submits that he will suffer injustice by being condemned unheard and will be forced out of the property he lives and carries out business thus causing him hardship.

24. He further submits that this court has jurisdiction to set aside its order under Rule 73 of the Probate & Administration Rules and disagrees

that the court is now *functus officio*. He contends that even after rendering the impugned orders, the court still holds the discretion to not only review but to also revoke the confirmed grant.

25. He submits that the confirmed grant should be revoked for reasons that the proceedings culminating in the grant were defective as per the provisions of section 76 of the Law of Succession Act. He cites the case of **Leah Wairimu Muruga –vs- SMT. Latika Bla Dassi & Others** where it was held that;

“The expression ‘defective in substance’ means that the defect was of such a character as to substantially affect the regularity and correctness of the proceedings.”

26. According to the applicant, the defects in the substance are; firstly, the grant was issued in his absence, secondly, Ms. Kilonzo impeded his audience with the court and thirdly, considerations such as the respondent’s age should have been treated with caution.

27. He finally submits that the fact of Ms. Kilonzo addressing court on the material day and failing to, at the very least, protect the interests of his former client is an indication that there was a possible attempt to jeopardize his case.

Respondent’s submissions

28. The Respondent submits that the allegations against Ms. Kilonzo are baseless as he did not make her a party to the application.

29. She contends that if indeed the Applicant’s new advocate operates from Nairobi despite having an office in Makueni, then he is doing so contrary to **Regulation 30(d) of LSK Code of Standards of Professional Practice and Ethical Conduct; Gazette Notice No. 5212 of 26th May 2017** which states;

“This standard requires the advocate to ensure that he/she does not maintain a branch office unless there is posted at that branch office on a full time basis a duly qualified advocate.”

30. She argues that no explanation was given as to why the advocate manning the branch office failed to attend court and contends that the totality of the facts points towards a scheme by the Applicant to mislead the court. It is her contention that neither advocate Masaku nor the alleged clerk swore an affidavit admitting or denying their involvement in this matter on the material day.

31. Further, she submits that she has right to a fair trial which includes speedy and timely determination of this case. That the Applicant should not infringe on her rights and those of other beneficiaries.

32. It is her submission that Rule 63 of the P & A Rules as well as the Law of Succession Act do not apply the Civil Procedure Rules with regard to setting aside of proceedings and court orders for failure

to attend court. She cites the case of **In Re Estate of David Kalasia Lwangu (Deceased)(2019) eKLR** where the Court held;

“14. Setting aside of court orders is sought where the orders were made in a flawed process. That is to say for example where the making of the orders was attended by procedural improprieties, such as where the proceedings were conducted in the absence of a party who had not been notified of the hearing.”

33. She submits that where section 80 of the Civil Procedure Act is not available, then the other grounds must be analogous with the ground of any other sufficient reason. She cites the case of **Executive Committee Chelimo Plot Owners Welfare Group & 288 others –vs- Langat Joel & 4 others (sued as the management committee of Chelimo Squatters Group) (2018) eKLR** where the Court stated;

“Lastly the court has to consider if there is sufficient reason to review the court’s earlier ruling. The Applicants have not elaborated any sufficient reasons to warrant a review of the court’s ruling. In the case of Sadar Mohamed V Charan Singh and Another it was held that ‘any other sufficient reason for the purposes of review refers to the grounds analogous to the other two (for example error apparent on the face of the record and discovery of new and important matter)’”

34. She also submits that where a party fails to present witnesses during hearing and an adjournment is declined, that cannot be a sufficient ground to seek review. She cites the case of **Francis**

Origo & Anor. –vs- Jacob Kumali Mungala (2000) eKLR where the Court stated;

“Mr. Machio has argued that the court’s refusal to allow the evidence of a key witness constituted ‘sufficient reason’ to invoke the review provisions. In the present case, the

Applicants failed to produce the key witness at the hearing and were not granted an adjournment. That should have been a ground of appeal to the High court...it cannot now be a ground for review.”

35. On whether there should be revocation, she submits that the grant and certificate of confirmation were issued legally and as such, the conditions in section 76 of the Law of Succession Act have not been met. She contends that the only way of interfering with the grant is through revocation and not review. Further, she contends that summons for confirmation of grant can only be dismissed or allowed but not

revoked.

36. On distribution, it is her submission that being the only widow, she would have insisted on the whole Estate devolving to her as stated in the law but she chose to be liberal and distribute the estate to all beneficiaries including the Applicant. She cites the case of **Tau Katungi – vs- Margrethe Thorning Katungi & Anor (2014) eKLR** where the Court Stated;

“16...in the context of section 35, Life interest is an interest held by the surviving spouse during their life ‘in the whole of the residue of the net intestate estate’. Its effect is that the surviving spouse first enjoys rights over the property and at his or her death, the property passes to other persons...

17. The effect of section 35 is that children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would

be entitled to exclusive right over the net estate. This means that if the net estate is generating income, she would be the person entitled exclusively to the income so generated.”

37. Having considered the application, the replying affidavit, the rival submissions and the entire record, I find that the only issue for determination to be whether sufficient basis has been laid for reviewing the orders of this Court made on 24/10/2019.

Analysis and determination

38. Rule **63(1)** of the P & A Rules provides as follows;

“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 Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 ([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.”

39. Clearly, the provisions of the Civil Procedure Rules dealing with review (*Order 45*) have been imported into the Law of succession. The grounds of review are as highlighted by the Applicant and the application is basically hinged on ‘*any other sufficient reason*’. Contrary to the Respondent’s submissions, it is now trite that this ground does not have to be analogous to the others specified in that order.

40. The Applicant blames his former advocate, Ms. Kilonzo, for his woes and considers the reason sufficient enough to warrant a favorable exercise of discretion by this court.

41. The record of the material day does not show that Ms. Kilonzo was holding brief for anyone. She informed the court that she had received a message from the applicant withdrawing instructions from her but was yet to be served with a notice of change of advocates which had already been served on the Respondent’s counsel. This is probably the reason why she appeared in court despite the applicant’s message.

42. According to the Applicant, there were differences between him and Ms. Kilonzo which necessitated withdrawal of the instructions. That may be so but why did he wait until the very last minute to put his house in order and inconvenience everyone else? The hearing date of 24/10/2019 was fixed by consent on 23/07/2019, exactly 3 months before and it is therefore evident that he had more than enough time to change representation.

43. At paragraph 5 of his supporting affidavit, he deposed that; *“...in the intervening period, differences arose between myself and my advocate..”* This intervening period must be read to be the period between 23/07/2019 and 24/10/2019. Accordingly, the Applicant should not expect this court to be convinced that the alleged differences arose on the eve of the hearing hence the late change of representation. The Applicant should therefore understand that rights and duties go hand in hand and as he talks about his right of legal representation, he should embrace his duties of prudence and diligence. There is no reasonable explanation for his failure to attend court on 24/10/2019 for hearing when the date was taken by consent.

44. It is also on record that an initial grant issued and confirmed way back in 2007 was revoked at the instance of the Applicant and an attempt of settling the matter out of court was unsuccessful. The Applicant seems to be in no hurry to conclude this matter.

45. As for the blame heaped on Ms. Kilonzo and which has been denied by the Respondent, there should have been at the very least an affidavit by Mr. Masaku confirming that he had been instructed to hold brief and detailing what transpired thereafter otherwise, it is basically the Applicant’s word against that of the Respondent.

46. I have looked at the schedule of distribution and indeed it is true that the Applicant has been provided for. He also has a share on the land (*Machakos/Konza North Block 1/122*) where he operates a hotel and as such, his business will not be affected.

47. From the foregoing, I find the reason given by the Applicant and the circumstances of this case not to support an exercise of discretion, in his favour by this court.

48. I further find that the application lacks merit and I dismiss it with costs.

Delivered, signed & dated this 3rd day of April 2020, in open court at Makueni.

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H. I. Ong'udi

Judge