



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**MISC. SUCCESSION CAUSE NO. 200 OF 2010**

**CONSOLIDATED WITH SUCCESSION CAUSE NO. 315 OF 2010**

**IN THE MATTER OF THE ESTATE OF JOSPHAT NJOKA MBIRIAI ALIAS NJOKA MBIRIRIA (DECEASED)**

**ROBERT NJOKA MUTHARA.....APPLICANT**

**VERSUS**

**JOYCE WANJIKU NJOKA.....1<sup>ST</sup> RESPONDENT**

**GRACE KARAU NJOKA.....2<sup>ND</sup> RESPONDENT**

**TERESIA GATURI NJOKA.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This ruling pertains to the Notice of Motion dated 24/01/2019 that seeks to have the ruling delivered by this court on the 21/12/2018 reviewed to the extent that;

*a) The applicant bear the cost of the application dated 19<sup>th</sup> June 2018 and subsequent mentions thereafter.*

*b) The applicant in his personal capacity to report the progress in the outstanding loan clearance with a view of releasing the securities for purposes of determining the probate issues.*

2. It is the applicant's case that the application dated 19/6/2018 was filed by the respondents herein and as such it's dismissal on the ground of res judicata should be borne by the respondents and not him.

3. The applicant further states that the loan advanced to Njoka Tanners Limited was advanced to the company and not to him in his personal capacity and as such he is not liable to file the report on loan repayment as ordered by this court.

4. In response, the 2<sup>nd</sup> respondent opposed the application on the ground that the application was not based on the discovery of new and important matters of evidence that were not within the applicant's knowledge and as such the applicant should have brought this information to the attention of the court.

5. The 2<sup>nd</sup> respondent further deposed that the application had been brought under the provisions of the Civil Procedure Rules and not the Probate rules. Further the 2<sup>nd</sup> respondent deposed that the case referred to by the applicant, case number HCCC No. 738 of 2001 was between himself and the I.C.D.C since he took the loan in his personal cause contrary to the allegations of the applicant in the instant application.

6. The applicant filed submissions in support of his case.

**B. Applicant's Submissions**

7. The applicant submitted that even though the court agreed with him in dismissing the application dated 19/6/2018 it condemned him to meet the costs of the application and subsequent mentions contrary to the doctrine of costs following the events that was espoused in the case of **HC Civil Case No. 17 of 2014 Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another** by Justice Kuloba and also section 27 of

the Civil Procedure Act.

8. The applicant also submitted that the court misdirected itself by ordering the applicant in his personal capacity to submit a report on the progress in the outstanding loan clearance as the loan advances made over the suit properties was made by Njoka Tanners Limited and not the applicant who was a director.

9. The applicant further submitted that Njoka Tanners Limited was a legal entity and that the corporate veil had not been lifted to make him liable for the actions of the company. He relied on the Court of Appeal case of **Standard Chartered Bank Kenya Limited v Intercom Services Limited & 4 Others [2004] 2 KLR 183** which provided instances under which the corporate veil may be lifted none of which applied to the applicant's case and as such Njoka Tanners Limited was the most appropriate to execute the orders given in the ruling delivered on 21/12/2018.

### C. **Analysis & Determination**

10. From the pleadings and submissions of the parties, two issues arise for determination. The first is whether the applicant has made out a case for review of the decision of the court made on 21/12/2018 and if so what orders should thus issue.

11. As to whether the Civil Procedure Act and Rules are applicable in succession matters as raised by the 2<sup>nd</sup> respondent, **Rule 63 of the Probate and Administration Rules** provides as follows: -

#### **63. 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.*

12. In considering whether Order 45 applies to succession matters, the court in **John Mundia Njoroge & 9 Others vs Cecilia Muthoni Njoroge & Another [2016] eKLR** quoted **Rule 63 of the Probate and Administration Rules** then stated as follows: -

*“As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.”*

13. In my opinion, the application dated 19<sup>th</sup> December 2016, which is expressed to be brought under Order 45 Rules 1, of the Civil Procedure Rules is properly before the court.

14. The next question to consider is whether the applicant has met the substantive requirements of Order 45, which provides 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)...

15. Order 45 thus provides three circumstances under which an order for review can be made. 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. A party may successfully apply for review, secondly, if he can demonstrate to the court that 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.

16. The question is whether, in this case, the applicant has met any of the conditions set out in order 45.

17. The applicant asserts that the application dated 19/6/2018 was filed by the respondents herein and as such it's dismissal on the ground of res judicata should be borne by the respondents and not him. He cites the well known doctrine that costs follow the event.

18. Further illumination on this position is in a work of this court in Orix Oil (Kenya) Limited v Paul Kabuu & 2 Other [2014] eKLR where the court stated:

*“...the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do”.*

19. The applicant further states that the loan advanced to Njoka Tanners Limited was advanced to the company and not to him in his personal capacity and as such he is not liable to file the report on loan repayment as ordered by this court. It is not in doubt that the respondent is in possession of some title deeds over some of the deceased's estate which were used to secure a loan in favour of Njoka Tanners Limited of which the applicant is a director. It is in his capacity as a director of Njoka Tanners Limited that this court ordered that the applicant file the report on loan repayment.

20. In regard to the applicant being condemned to pay costs for the application dated 19<sup>th</sup> July, 2018 this court's pronouncement was based on paragraph 23 of its ruling delivered on the 21<sup>st</sup> December 2018.

21. The court noted with concern that the applicant has delayed to repay the loan advanced to him for over eight (8) years. The securities held by the financier for the loan that is now over KShs. 130,00,000/= are part of the deceased's estate herein.

22. The court further noted that the deceased's family disputed the will that seems to be in the knowledge of the applicant herein. The validity of the will cannot be determined until the securities for the loan are released to facilitate distribution of the estate.

23. It was further noted that the applicant holds the rest of the family in abeyance since the succession cause cannot be determined. This was the reason for the court to condemn the applicant to meet the costs of the said application and mentions regarding the reports on the loan progress.

24. The applicant argued that he is only a director of Njoka Tanners Ltd which is a corporate body and that he should not be required to produce the loan statements or report on the progress. In this regard, I wish to state that the applicant being a director of the said company and the main cause of delay in this succession cause as explained above is obligated to update the administrators and other beneficiaries of any progress on the loan repayment. He has not disclosed to this court who the other directors are, if any.

25. The applicant is the one who is a party and a beneficiary in this case and has contributed immensely to the delay of this case due to reasons already given. This court is dealing with a succession cause with administrators and beneficiaries but not with the limited liability company. The applicant being the known director of the company cannot run away from his responsibility of ensuring that he assists the court in just and expeditious determination of proceedings that is alive to the efficient use of the available judicial and administrative resources.

26. I find no merit in this application and dismiss it with costs.

27. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Wambui Maina for Okwaro for Administrators**

**Ms. Kirugu for Applicant Robert Njoka Muthara**

**Ms. Muthoni for Beneficiary Margaret Njoka**