REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(FAMILY DIVISION)

SUCCESSION CAUSE NO. 2 OF 2019

IN THE MATTER OF THE ESTATE OF NAZIR KHAN MOHAMED

(DECEASED)

NASEEM NAZIR KHAN……**PETITIONER/APPLICANT**

VERSUS

SAIDA MOHAMED SWALEH……**OBJECTOR/RESPONDENT**

AND

MOHAMED AYUB KHAN ……**INTENDED THIRD-PARTY**

RULING

1. Before the Court is a Notice of Motion dated **23rd September 2024,** vide which it is sought by the petitioner/applicant for the Court to enlarge the time within which the third party notice may be filed, for one **Mohamed Ayub Khan** to be made a third party, and for the costs to be provided for.

2. The petitioner/applicant avers in support of the application that she is the administrator of the estate, that the objector filed a settlement agreement dated **30th July 2013** in Court, which was executed by the deceased and the intended interested party, and that it was necessary for an indemnity to be provided, and also that accounts were necessary.

3. The application was opposed by the intended third party, who, in the notice of preliminary objection, stated that third party notices were not available in succession proceedings, which are *sui generis* with their own unique and special proceedings to regulate proceedings before the Probate & Administration Court.

4. The application was also opposed by the objector **Saida Mohamed Swaleh**, who, in a replying affidavit sworn on 2nd December 2024, averred in a similar vein that third-party proceedings were unavailable in proceedings before the Succession Court. She also averred that allowing the application would be prejudicial to her and was, in any case, an afterthought, meant to fill the gaps identified by the evidence of Tom Ambwere, Advocate.

5. The petitioner/applicant filed a supplementary affidavit sworn on **16th December 2024,** with the leave of the Court, vide which she reiterated that it would be in the interest of justice to allow the application.

6. The matter was canvassed by way of written submissions. The submissions of the petitioner/applicant are dated **21st January 2025.** It was argued in the aforementioned submissions that, following Mr Ambwere's testimony, it was necessary to reopen the case.

7. Counsel submitted that although the Probate &Administration Rules do not have express provisions allowing third-party proceedings, the same could be allowed under the Constitution and also under Section 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules.

8. It was also submitted that this Court could enlarge the time within which the third-party proceedings could be filed.

9. Counsel submitted that the Preliminary Objection had no merit and ought to be dismissed.

10. In the submissions dated **27th January 2025**, the objector/respondent opposed the application dated 23rd September 2024 on the ground that it lacks merit.

11. It was contended that under Rule 63(1) of the Probate & Administration Rules, Order 18 of the Civil Procedure Rules was inapplicable. In support of this reliance was placed on the decision of the Court in **Josephine Wambui Wanyoike v Margaret Wanjira Kamau & another [2013] KECA 443 (KLR).**

12. Mr Simiyu argued, relying on the case of **Wilson Evans Otieno v Law Society of Kenya & others [2011]eKLR**, that Article 159 could not cure all deficiencies, especially those that go to the core of the matter.

13. Counsel submitted that allowing the enlargement of time would amount to allowing the applicant to fill in the gaps in his evidence. Mr Siminyu, therefore, prayed that the application be dismissed.

14. I have considered the application dated **23rd September 2024**. This application was filed shortly after the testimony of Mr **Tom Ambwere**, advocate. It seeks to have a third party added to these proceedings.

15. It is trite law that the Law of Succession Act is a *sui generis* legislation with its own procedures. Probate & Administration Rules are separate from the Civil Procedure Rules. I have perused Rule 63 of the P&A Rules. It is clear to me that Order 18 of the Civil Procedure Rules is not one of the provisions of the Civil Procedure Rules that are applicable to the Succession Proceedings. The said Rule provides that:-

> **"(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 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.**
>
> **(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.**

16. I rely on the case of **Josephine Wambui Wanyoike** (supra) where it was stated that:-

> **"We hasten to add that the** Law of Succession Act **is a self-sufficient Act of Parliament with its own substantive law and rules of procedure. In the few instances where the need to supplement the same has been**

identified, some specific rules have been directly imported into the Act through its Rule 63(1)."

17. It would appear to me that the application is meant to fill the gaps in the case of the Petitioner/Applicant. This is because it was filed soon after Mr Ambwere, advocate testified. This is impermissible. I rely on the case of **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] KEHC 3930 (KLR)** where it was held that:-

"In my view, if the Plaintiff was allowed to re-open his case to so prove it would amount to allowing the Plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants."

18. I agree with Mr Siminyu that Article 159 of the Constitution is not carte blanche to ignore the rules. It is not true that the rules of procedure have no bite. Musinga, J, as he then was, in the Wilson Evans Otieno case (supra), rightly, in my view, stated that:-

"What should the court do in light of the submissions made by the petitioner that the court is obliged to disregard procedural technicalities in dispensation of justice? I do not agree with the petitioner that the issue of competence of pleadings, and particularly where such incompetence arises from circumstances as in this case, can be termed as a procedural technicality. This is a substantive question of law which goes to the root of the matter. The provisions of Article 159 (2) (d) of the Constitution cannot be relied upon as a panacea for incompetent pleadings filed by an unqualified person. The Petition and Chamber Summons dated 8th March 2011 must

therefore be struck out with costs to the respondents, which I hereby do."

19. This case has been pending for a long time. The matter must now be concluded. The Constitution of Kenya enjoins this Court to do justice without delay. Allowing the application would delay the matter and be prejudicial to all the parties.

20. In my view, this application lacks merit; the same is dismissed.

21. Since this is a family matter, each party shall bear her own costs.

22. It is so ordered.

Dated and **signed** at **Mombasa,** this **3rd** day of **October 2025. Ruling** delivered through Microsoft **TEAMS.**

Gregory Mutai

JUDGE

In the presence of:-

Mr Kiragu for the Petitioner/Applicant;

Mr Siminyu, for the Objector/Respondent; and

Arthur - Court Assistant.