



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1331 OF 2016

**IN THE MATTER OF THE ESTATE OF RIYAZ TAJDIN RAHEMTULLA
DHANJI (DECEASED)**

**SHAHNAZ AMIN AMERSHI.....
PETITIONER**

VS

**ALNOOR HASSAM EBRAHIM KASSAM.....
PROTESTOR**

**ALEYA RIYAZ TAJDIN DHANJI..... SOLE
BENEFICIARY**

RULING

1. This court is seized of two applications. The first is the application dated **24th September 2024** - summons for review and rectification of grant and the second application is dated **12th February 2025** - summons for revocation of grant.

Application dated 24th September 2024

2. This is the protestor/applicant's summons for review and rectification of grant which is supported by the grounds therein and the affidavit of the applicant dated the same day.

The Summons seeks the following orders;

1. Spent
2. Spent

3. **THAT** the judgment delivered on the 4/08/2023 by Hon. Lady Justice Maureen A. Odero herein be partly reviewed and rectified by deleting and replacing all references to Milimani ELC Suit No. E352/2021 with Milimani ELC Case No. 1019 of 2016 and thereby including properties known as Apartments No. B4 erected on L.R NO. 28223/2 Nairobi; Apartment NO. B5 Cedar Springs erected on LR NO. 330/256 Nairobi; Apartment No. E10 erected on LR No. 330/375 Nairobi and Apartment No.C2 erected on LR No. 1870/v1/51 Nairobi in the list of properties to be excluded from distribution of then estate of Riyaz Tajdin Rahemtulla Dhanji (deceased)
4. **THAT** this Honourable court be pleased to review and set aside its orders of 14/3/2024.
5. Spent
6. **THAT** this Honourable court be pleased to issue any other orders as it deems fit
7. **THAT** any other orders which the Honourable court may deem fit and just to grant
8. **THAT** costs of this application be provided for.

3. The applicant in her affidavit avers that she was not present when the judgment dated 4th August 2023 was pronounced by

Maurren Odero J and that the same erroneously captured the ongoing ELC Case.

4. The applicant states that the court records being the mode of distribution and the confirmed grant of letters of administration indicate that the subsisting court case is ELC 352 of 2021 and not Milimani ELC No. 1019 of 2016 which is an error apparent on the face of the record.
5. The applicant further states that the Judge made errors by referring to a defective affidavit by the sole beneficiary which was not produced as evidence in this case.
6. The application is opposed by the petitioner vide a Replying affidavit dated 30th October 2024 in which he states that the applicant herein seeks to stay transmission of apartment E10 which is not part of the judgment pronounced by Maurren Odero J on 4th August 2023 and is actively contested in ELC proceedings.
7. That the application is brought in bad faith and should be dismissed.
8. The parties filed their respective submissions.

ANALYSIS

9. I have had the benefit of examining the pleadings, affidavits, annexed documents, and the written submissions on record. The core issue for determination is:

i. Whether there is a sufficient basis to review and/or rectify the grant and certificate.

10. The deceased's estate comprises, among others, several properties whose legal and/or beneficial ownership has been called into question. During confirmation proceedings, these properties were distributed despite the ongoing ELC Case No. 1019 of 2016, in which the same parties dispute their entitlement. The impugned Probate Court judgment, as originally rendered, cited "**ELC No. 352 of 2021.**"

11. The applicant states that the correct case is ELC 1019 OF 2016 and hence the judgment has an error apparent on the face of it.

Under section 47 of the Law of Succession Act and Rule 63 of the Probate and Administration Rules, the High Court draws review powers from Order 45 of the Civil Procedure Rules.

Order 45 mandates that review may lie only on:

- a) Discovery of new and important matter or evidence;*
- b) Existence of a mistake or error apparent on the face of the record;*
- c) Any other sufficient reason.*

Rectification of a grant, under section 74 of the Law of Succession Act, is limited to clerical errors or ambiguities and not to substantive errors implicating the distribution or subject matter of the estate.

In **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR**, the Court of Appeal elaborated the “error apparent” threshold:

“An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, it must be an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning.”

In that appeal, the Court refused to permit a review where the applicant merely disagreed with the reasoning, as opposed to a demonstrable factual slip.

Similarly, in **Nyamogo & Nyamogo v Kogo [2001] EA 174**, the East African Court of Appeal stated:

“An error apparent on the face of the record is not one for which an elaborate argument is required. It must be self-evident.”

12. The High Court in **In the Matter of the Estate of Charles Kibe Karanja (Deceased) [2015] eKLR** further clarified that where assets are actively disputed in other court proceedings, it is proper for the probate court to refrain from

distributing such assets until the dispute is resolved. In the words of Musyoka J:

“A grant should not be confirmed where it comprises property whose status is the subject of ongoing litigation elsewhere. The court must avoid parallel or contradictory orders.”

The rationale for judicial restraint in the face of sub judice proceedings was given further emphasis in **Alfred N. Mutua v Ethics & Anti-Corruption Commission & 3 Others [2016] eKLR**, where the High Court held:

“The court must exercise its discretionary power so as not to render pending or parallel litigation before a court of competent jurisdiction nugatory or academic.”

It is elemental that probate assets must be “free property”—not subject to competing claims.

13. This court agrees with the above quoted cases. However the pleadings filed by the applicants in the suit and the mode of distribution of the estate referred to ELC CASE NO.352 OF 2021. There was no mention of the properties in ELC 1019 of 2016 and as such the court could not determine the same. It is trite law that Parties are bound by their pleadings. To sneak in ELC 1019 of 2016 into these proceedings goes beyond the powers of review and would materially change the character of the orders issued by the court. This is not permissible.

14. This court finds that there was no rationale for the Judgment dated 4th August 2023 to refer to properties that were not in its purview and as such the court only considered the properties in the mode of distribution filed and referred to the ELC case that was referenced as well.

15. The applicant in this instance application seems to be raising new issues that do not fall under the threshold of a review and as such I find that the application dated 24th September 2024 lacks merit and is hereby dismissed.

APPLICATION DATED 12TH February 2025

16. Before Court is the Sole Beneficiary's application dated 12th February 2025. The application seeks the following orders;

1. Spent
2. Spent
3. **THAT** pending the hearing and determination of this application, this honorable court do grant power limited to preserving, managing, administering and collecting all the rental income of the estate to the sole beneficiary, ALEYA RIYAZ TAJDIN DHANJI, through her advocates, P.J KAKAD ADVOCATES LLP.
4. **THAT** pending the hearing and determination of this application, the Respondent, **SHAHNAZ AMIN AMERSHI** be restrained from exercising her powers

as the Executor granted to her by the Honourable Court on 28th October, 2019.

5. **THAT** this honorable court do order the Executor/Respondent to file an accurate inventory of all the assets of the estate at the time of issuing the order.
6. **THAT** this honorable court be pleased to appoint **ALEYA RIYAZ TAJDIN DHANJI**, as Executor of the written Will herein.
7. **THAT** the Grant of Probate issued to Respondent, **SHAHNAZ AMIN AMERSHI** of Post Office Box Number 47845-00100 be revoked and/or annulled.
8. Spent
9. The costs of this Application be awarded to the Applicant.

17. The application is opposed vide the Replying Affidavit of Alnoor Hassam Ebrahim Kassam ("the Protestor") sworn on **5th June 2025**.

18. The application and protest are the latest in a protracted series of disputes pitting the Sole Beneficiary, Executors, and the Protestor over the completion, rectification, and final accounting of the Deceased's estate. The factual and procedural background is lengthy, characterised by parallel litigation in this suit as well as ELC case

19. The Deceased died in 2016, leaving a Will that appointed, among others, the Protestor (Mr. Kassam) as alternate executor. Grant of probate was obtained; disputes over administration, distribution, and accounting arose almost immediately. The Protestor has consistently advanced claims to specific estate properties, maintaining he made substantive financial contributions and is entitled under the Will or by equity.

Analysis

20. The court has looked at the Summons and the submissions filed and the main issue for determination is;

a) Whether the Sole Beneficiary's application, in its form and substance is, competent and properly before this court.

c) Whether the court should issue orders for administration or, alternatively, direct the executor to account?

21. Sections 51, 76 and 83 of the Law of Succession Act (Cap 160) lay out the jurisdiction and criteria for challenging grants and accounting obligations for executors or administrators. Section 83 specifically provides that *“personal representatives shall within six months or such shorter period as the court may direct... produce 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 such account.”*

Any person seeking to intervene in the administration must frame their remedies within these confines.

In the Estate of **Onesmus Kibira Wanjohi (Deceased) [2025] KEHC 4079 (KLR)**, the court methodically outlined the approach to disputed administration and review. It emphasized that a party contesting the actions of an executor named in a will must first exhaust remedies provided by statute, including demanding an account and only subsequently seeking removal if warranted. At paragraph 89, the court stated:

"It is well settled that the integrity of testamentary wishes, as embodied in the grant and in the identity of the nominated executors, enjoys a presumption of validity. To displace this presumption, the challenger bears the burden of tendering specific evidence of misconduct, incapacity, or dereliction of duty within the statutory matrix established under section 76 and section 83 of the Act."

In **Matheka and Another v Matheka [2005] eKLR**, the High Court underscored the importance of procedural compliance before removal of an executor, stating at paragraph 22:

"The preferred course is to call for an account under Section 83 of the Law of Succession Act. Only if the executor fails, refuses, or neglects to file full and satisfactory accounts can the court proceed to more drastic orders such as removal or appointment of an alternative administrator."

22. The Law of Succession Act and the authorities cited above conclusively require that a party dissatisfied with the actions or inaction of an executor must move the court for an account under **section 83**, accompanied by credible evidence of mismanagement, concealment or maladministration, afford the executor the statutory opportunity to file a complete and accurate account before court in compliance with expressly ordered timelines and seek removal or further orders only where default or continued non-disclosure is demonstrated by evidence on record. This sequence is not optional, failing which the court will not accede to applications for administration or distribution that sidestep the law or undermine the testator's intent, unless exceptional circumstances are patent on the record.

23. In light of the above, the sole beneficiary's application dated **12/2/2025** is premature in substance, and, in the circumstances, I find that the proper way to administer the estate of the deceased is to mandate the Executor to comply with the Section 83 of the law of succession act and produce before this court proper records of accounts.

24. In the upshot I make the following orders;

1. The application dated **12th February 2025** is hereby dismissed in its entirety.

2. The executors (specifically, Shahnaz Amin Amershi) are directed to give a detailed account, supported by bank records and receipts, of all estate assets including rental income received from July 2016 to date within 30 days from today.
3. Costs in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7th day of OCTOBER, 2025.

**E.K OGOLLA
JUDGE**

In the presence of:

**Otieno holding brief Maosa..... for the
Objector**

**Ms Koki for Sole
Beneficiary/Applicant**

**Ms Mukobi for the
Executor**

**Gisiele..... Court
Assistant**