

REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT ELDORET
SUCCESSION CAUSE NO. 34 OF 1986

IN THE MATTER OF THE ESTATE OF JAMA MOHAMED (DECEASED)

FATUMA JAMA MOHAMED.....1ST
PETITIONER
ABDI AWIL MOHAMED.....2ND PETITIONER
MAULID ISSA FARAH.....3RD PETITIONER/APPLICANT

VERSUS

HASSAN JAMA MOHAMMED.....RESPONDENT

RULING

1. Before Court for determination is the 3rd Petitioner's Chamber Summons dated 17/07/2023 filed at the Chief Magistrate's Court at Bungoma before the file was transferred to this Court. The Application is filed through **Messrs Robert Wamalwa & Co. Advocates**, and prays that the orders granted in the lower Court file on 17/04/2023 be reviewed and set aside, and the Applicant be granted leave to oppose the Application dated 14/02/2023.
2. The Application is supported by the Affidavit sworn by the 3rd Petitioner, **Maulid Issa Farah**, in which he deponed that he is the 3rd Administrator of the estate of the deceased herein, and the 1st Petitioner/Administrator died sometime back. He deponed that sometime in mid-July 2023, he viewed on social media (Facebook), the Respondent, **Hassan Jama Mohammed**, boasting how he had been appointed a co-Administrator of the estate herein, that upon inquiry from his then Advocate, **Mr. Anwar**, the Advocate denied any knowledge of the appointment but since he did not believe the Advocate, he, through a friend, consulted **Advocate Robert Wamalwa**, to assist, and through whose intervention, he learnt with shock that the Respondent, is indeed, now a co-Administrator. He deponed that his then Advocates were never served with the Application dated 14/02/2023, and were also never notified to appear in Court on 17/04/2023 when the Application was allowed. He deponed further that either way, on 17/04/2023, the matter was coming up for Mention and there therefore is no way the Application dated 14/02/2023 could have been allowed on the same date, and that it is against the rules of natural justice to be condemned unheard. He urged further that the Respondent is a stranger to the estate herein, and he cannot therefore be appointed a co-Administrator. In conclusion, he deponed that he is ready to file his response to the said Application dated 14/02/2023 if the orders granted on 17/04/2023 are set aside.

3. The Application is opposed by the Respondent by way of his Replying Affidavit filed on 26/7/2023 through **Messrs Kogo Kimutai & Co. Advocates**. He deponed that the instant Application is an afterthought and baseless. He urged that he filed the Application on 14/02/2023 and on 15/02/2023, the 3rd Petitioner's Advocates were served with the Application, together with the subject Court order, via the e-mail address supplied by the 3rd Petitioner's Advocates s Secretary, namely, anwaradvocates@gmail.com. He urged that the Advocates however chose not to respond nor attend Court despite service as aforesaid. He urged further that the Applicant has not offered any explanation as to why his Advocates failed to appear on 6/03/2023 when the Application came up for hearing. He contended further that on 17/04/2023, in the absence of any response from the 2nd and 3rd Petitioners, the Court had no choice but allow the unopposed Application. He also observed that although the Applicant depones that he learnt of the Respondent's appointment as a co-Administrator through social media, he has failed to exhibit any print-outs and/or extracts of the alleged social media posts. He thus contended that service was proper and the Applicant has failed to demonstrate that **Messrs Anwar & Co.** was never served.
4. The Applicant, in a re-joinder, filed the Supplementary Affidavit sworn on 25/06/2025. The same however simply reiterates the matters deponed in the Supporting Affidavit.
5. The Application is also supported by the Replying Affidavit sworn on 3/04/2025 by one **Hassan Issa Farah**, who described himself as a grandson of the deceased, being the son and Administrator of the estate of the late **Halima Jama**, a daughter of the deceased. The Affidavit, filed through **Messrs SKY Advocates**, is however not helpful as it completely deviates from what is in issue before Court and detours totally into a different tangent. I say so because all the Affidavit does is to challenge the substantive merits of the Applicant's appointment as a co-Administrator, and giving a long narration of the history of this matter, without addressing the issue whether service of the Application was effected, which is what is before Court.
6. The Application was then canvassed by way of written Submissions. The 3rd Petitioner/Applicant's Submissions is dated 24/06/2025, while the Respondent's is dated 20/08/2025.

Applicant's Submissions

7. The Applicant's Counsel, **Mr. Wamalwa**, in his short 2-page Submissions, reiterated that service upon the 3rd Petitioner's previous Advocate was never effected. He however appears

to change tune by submitting that even if such service was effected, and that the mistake of the Advocate should not be visited upon an innocent litigant.

Respondent's Submissions

8. I have come across a Notice to Act in Person filed by the Respondent, and subsequently, also a Notice of Appointment of Advocates filed by the law firm of **Bornes & Partners Advocates LLP** indicating that firm's appointment to come on record for the Respondent. I therefore presume that the Respondent replaced the law firm of **Kogo Kimutai & Co.** as his Advocates.
9. Be that as it may, Counsel for the Respondent, **Ms. Bornes**, restated the principles applicable in dealing with Applications for stay of execution, and authorities. I however find this line of Submissions strange since the remaining prayer before Court is the one seeking review and setting aside of the orders made on 17/04/2023, not stay of execution. In the relevant portion of the Submissions however, Counsel averred that the 3rd Petitioner has come before Court with unclean hands, as there is a regular judgment, and that the same should not be set aside. She urged further that the 3rd Petitioner was well aware of the matter, and he should not mislead the Court that he only learnt of it through social media. On mistakes of an Advocate being visited upon an innocent litigant, she urged that a case belongs to the litigant and not the Advocate, and it was therefore his duty to follow up on the progress of the suit.

Determination

10. The issue herein in this matter is **“whether the Court should set aside the orders issued in the lower Court file on 17/04/2023, on the ground that the 3rd Administrator/Applicant was not served with the Application that gave rise to the orders.”**
11. This is one hopeless Application. I may sound impolite but I have to state that it is one of those irritating Applications that do nothing but completely waste the Court's time.
12. It is evident that at the lower Court, the 3rd Petitioner was all along represented by **Messrs Anwar & Co Advocates**, but after the current Respondent's Application dated 14/02/2023 was allowed by that Court and the 3rd Petitioner appointed a co-Administrator, the 3rd Petitioner replaced the said law firm with **Messrs Robert Wamalwa & Co.**
13. From the record of the lower Court (now transferred to this Court), I note that the Application dated 14/02/2023 came up in Court on the same date before **Hon. Mutai, SPM, Eldoret High Court Succession Cause No. 34 of 1986**

on which date, the Court granted prayer (1) thereof pending inter partes hearing on 6/03/2023. On 6/03/2023, Counsel for the current Respondent prayed that the Application be allowed as unopposed, whereas Counsel for the current 1st and 2nd Petitioners stated that he had only been served a few days back and thus sought an adjournment. The Court granted the adjournment and fixed the matter for Mention on 30/03/2023. On 30/03/2023, Counsel for the 2nd Respondent indicated that he was not ready to proceed as his client was yet to sign the Response drafted, and again, sought an adjournment. The Court again granted the adjournment and fixed the Application for 17/04/2023. On 17/04/2023, Counsel for the current 2nd Petitioner, yet again, had still not filed a Response, and also indicated an intention to cease acting. The Court, treating the Application dated 14/02/2023 as unopposed, and obviously considering that it had given sufficient time for filing of Responses, proceeded to grant the Application as prayed.

14. It is evident from the above chronology that the current 3rd Petitioner/Applicant or his Advocate did not attend any of the lower Court sessions relating to hearing of the said Application dated 14/02/2023. As aforesaid however, the Respondent, in his Replying Affidavit filed herein on 26/7/2023 through **Messrs Kogo Kimutai & Co. Advocates**, exhibited a print-out copy of an e-mail address dated 15/02/2023 indicating that the law firm of **Anwar & Co**, then acting for the 3rd Petitioner, was duly served on that day via the email address, anwaradvocates@gmail.com. It has not been denied that this address indeed belongs to the said law firm. If that law firm chose not to attend Court despite being served as aforesaid, the lower Court cannot be faulted. In any case, neither **Mr. Wamalwa** nor his client (3rd Petitioner) work at the firm of **Anwar & Co.**, and cannot therefore purport to conclusively confirm whether service was effected upon that law firm as alleged. All they allege is thus simply hearsay. I am therefore baffled that even after having sight of the email print-out, **Mr. Wamalwa** still chose to pursue the Application knowing very well its futility.

Final Orders

15. For the said reasons, the 3rd Petitioner's Chamber Summons dated 17/07/2023 fails, and is hereby dismissed.

16. I would have penalized the 3rd Petitioner's Counsel to personally pay the costs of the Application for pursuing an obviously baseless and futile Application but, considering that this is a family matter, I am not minded to make any order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 13TH DAY OF FEBRUARY 2025

.....
WANANDA JOHN R ANURO
JUDGE

Delivered in the presence of:

Mr. Wamalwa for the 3rd Petitioner-Applicant

Mr. Melilei h/b for Me. Bornes for the Petitioner

Ms Akinyi h/b for Mr. Yusuf for Hassan Issa Farah

Ms Soita h/b for Bornes for one Mohamed Adan and Abdi

Yusuf

Court Assistant: Brian Kimathi