Nyamuthe v Omondi (Civil Appeal E285 of 2022)
[2025] KECA 77 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 77 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E285 OF 2022

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 24, 2025

BETWEEN

JANE ATIENO NYAMUTHE ..... APPELLANT

AND

PAMELA AKINYI OMONDI ..... RESPONDENT

(Being an Appeal from the Ruling of the High Court of Kenya at Homa Bay (Kiarie, J.) dated 28th September, 2022 in Homa Bay HCC Succ. Cause No. 889 of 2015 Formerly Kisii HC Succ. Cause No. 219 of 2004)

JUDGMENT

1. James Omondi Jure (the deceased) died on 5th March, 2004. He died intestate. Jane Atieno Nyamuthe, the appellant herein, petitioned for letters of administration intestate to the deceased's estate in her capacity as the second widow of the deceased. The respondent is the first widow; and the appellant so acknowledged in her petition for letters of administration intestate.

2. At the time the appellant filed for letters of administration intestate, all the children of the deceased, five in number, were minors. The respondent cross-petitioned for letters of administration intestate notwithstanding that she had been named as a beneficiary/dependent in the appellant's application. All the children of the deceased had been equally named as beneficiaries/dependents in the appellant's application for letters of administration. As Karanja J., observed in his ruling dated 30/10/2019, the respondent's cross-petition was treated as an objection. In the cross-petition, the respondent excluded the appellant as a beneficiary/dependent as she contested the appellant's status as a co-wife.

3. A fully-fledged hearing on the merit was conducted before Sitati J. The learned Judge delivered her judgment on 16/01/2015. In her judgment, the respondent minimally prevailed: the learned Judge directed that the grant of letters of administration intestate respecting the estate of the deceased be issued to both widows i.e. the appellant and the respondent having found that the appellant was,

indeed, a wife to the deceased; and that a summons for confirmation of the granted be taken out within sixty (60) days from that date. Importantly, the judgment dated 16/01/2015 settled the question of the identities of the beneficiaries of the estate of the deceased. These were: the appellant and the respondent (as wives of the deceased) and five children - three belonging to the respondent; and two to the appellant.

4. The judgment of Sitati J. was not appealed from.

5. In compliance with the judgment, the appellant took out the necessary summons for confirmation of grant dated 12/03/2016. The summons was supported by her affidavit of even date setting out her preferred mode of distribution of the estate to the identified beneficiaries. In response, the respondent filed an affidavit dated 14/04/2016 protesting both the mode of distribution and the extent of the estate; and suggesting her own mode of distribution. In particular, the respondent wanted the probate court to take into account that she had contributed to the acquisition of most of the assets in the estate of the deceased. However, during a scheduled mention of the succession matter, the parties' respective advocates confirmed to the trial judge that the only issue before the court was distribution of the estate of the deceased. The learned Judge (Majanja, J.) directed the parties to file affidavits with respect to the valuation of the various assets and to file written submissions in support of their respective positions.

6. In a short ruling, dated 24/06/2016, the learned Judge concluded that there were two contentious matters he identified in the cause which required ventilation through viva voce evidence before the matter could be determined conclusively. The first contentious matter identified by the learned Judge was whether some of the properties, and in particular, one called Kavirondo Hotel, were acquired jointly by the deceased and the respondent prior to the deceased's marriage to the appellant; and whether and to what extent the respondent should be credited for her contribution. The second contentious matter identified was whether some of the properties proposed by the appellant for distribution were the respondent's personal assets and, therefore, not available for distribution in the succession cause.

7. It fell upon Karanja, J. to conduct the directed viva voce hearing. At the hearing, the appellant testified and called two witnesses while the respondent testified and called one witness. After the parties filed their written submissions, the learned Judge (Karanja, J.) resolved the contentious issues in a ruling dated 30/10/19. In short, the appellant largely prevailed: the learned Judge found that there was no evidence that the respondent had personally contributed to the acquisition of the contested assets sufficiently to remove them from the list of assets available for distribution. Differently put, the learned Judge found that all the assets included in the list of distribution by the appellant were available for distribution. Conversely, the learned Judge found that none of the listed assets were the personal assets of the respondent and, therefore, not available for distribution. The learned Judge also directed that the distribution would be based on the statutory formula prescribed in section 40 of the *Law of Succession Act* meaning that the respondent's household would be entitled to four-sevenths (4/7) of the estate of the deceased while the appellant's household would be entitled to three- sevenths (3/7) of the estate of the deceased.

8. With the contentious issues resolved, the learned Judge directed the parties to "go back to the drawing board and agree on a scheme of distribution on the basis of the formula ...suggested by the court; after which they [the appellant and the respondent] may take fresh summons for confirmation of grant within the next three months from this date hereof (sic)." Additionally, in what would turn out to be the next contentious issue, the learned Judge added the pragmatic direction that "in default, the matter be forthwith referred to the Public Trustee for necessary distribution of the estate to all the beneficiaries in accordance with the law."

9. It would seem that both parties were aggrieved by the learned Judge's findings and directions – but for different reasons. The respondent, it would seem, was dissatisfied with the substantive findings of the court and sought leave to appeal. The High Court (Karanja, J.) declined to grant that leave vide a ruling dated 13/10/2020. That ruling also rejected prayers for stay pending the intended appeal. A similar application to this Court faired no better. Ouko, P. (as he then was), dismissed the respondent's application for leave to file an appeal vide a ruling dated 23/04/2021. In doing so, the learned President made the following revelatory comments which form part of his ratio:

> " Without delving into the merits of the intended appeal, the manner in which the estate of the deceased person who was engaged in polygamy is distributed is clearly prescribed under section 40 of the *Law of Succession Act*. But of significance is the fact that the learned Judge gave the parties an opportunity to agree on the distribution, failing which, the public trustee was to step in. The applicant [respondent] has not given the last option a chance."

10. It is instructive that at the Court of Appeal, in opposition to the respondent's application for leave, the appellant herein vigorously defended the ruling by Karanja J. dated 30/10/2019. In that defence, the appellant took the position that the intended appeal (by the respondent) was "frivolous and an abuse of the court process; that the intended appeal had no chances of success since the learned Judge merely restated the applicable law; that the applicant [respondent] has delayed, impeded and frustrated the administration and distribution of the estate since 2004 through multiple applications including the current motion; that on account of the applicant's [respondent's] conduct, the estate is not only wasting away due to the unwarranted expensive litigation, but the beneficiaries are also being denied benefits of the estate..." This is as summarized by Ouko, P. (as he then was) in his ruling.

11. Unfortunately, that ill-fated attempt to overturn the ruling of Karanja, J. did not end there. Back at the High Court, two motions were filed. The first one was by the respondent herein. It is dated 06/04/2021 (curiously only two weeks before the ruling by Ouko, P.). In the main, it sought for a stay of proceedings at the High Court pending the hearing and determination of the civil application that was by then pending before this Court as well as a stay of proceedings pending the hearing and determination of the intended appeal at this Court.

12. The second application before the High Court was the application by the appellant dated 16/09/2021. That application sought two substantive prayers as follows:

    a. "That the honourable court be pleased to vary the limb of the court order dated the 30th day of October, 2019 referring the matter to the Public Trustee for distribution of the net intestate estate of the deceased and do take up the issue [to] distribute the net intestate estate of the deceased to the beneficiary (sic) in accordance with the scheme set out in the court ruling dated 30th October, 2019.

    b. That in the alternative, the court be pleased to give such directions that would finalize the cause herein in respect of the distribution of the estate of the deceased."

13. The High Court (Kiarie, J.) heard the two applications together and gave a consolidated ruling dated 28/09/2022. That ruling is the subject of this appeal. In the ruling, the learned Judge dismissed both applications with no order as to costs. As to the respondent's application dated 06/04/2021, the learned Judge noted that this Court had already dismissed the application before it to grant leave to appeal out of time, and that, therefore, the application was moot.

14. Turning to the appellant's application dated 16/09/2021, the learned Judge noted that the application was, in fact, one seeking the review of the ruling of Karanja J. dated 30/10/2019 and not a summons for

confirmation as it had been titled. As such, the learned Judge pointed out, the application was governed by Order 45 of the Civil Procedure Rules. The learned Judge, then, reasoned that the application was without merit for two reasons: first, that there was an intended appeal by the respondent before this Court making review unavailable under Order 45; and second, that the "impugned ruling was made by Karanja, J., a judge of concurrent jurisdiction." The learned Judge opined that he could not "sit on appeal on an order issued by my colleague with concurrent jurisdiction. Whether the application in the Court of Appeal was withdrawn or not, what the petitioner is asking cannot be granted for want of jurisdiction."

15. The appellant's application having, thus, been dismissed, she is now before this Court seeking for its reversal and asks for the following prayers thereupon:

    a. The appeal herein be allowed and the Ruling and Order of Learned Judge dated the 28th day of September 2022 be set aside and substituted by an order allowing the Application in terms of prayer (1) of the application dated the 16th day of September 2021, by the Appellant.

    b. That in the alternative, the Court be pleased to set aside the Order of the Learned Trial Judge and direct that the succession cause be placed before another Judge other than Kiarie Waweru Kiarie (J), for directions and the net intestate estate of the deceased as identified and resolved by the High Court be distributed to the beneficiaries as identified and determined by the High Court as per the scheme and modality resolved by the court.

    c. The costs in the High Court and that in this Appeal, be borne by the Respondent.

    d. Such further and/or other Relief as the Court may deem necessary.

16. The appeal lists the following grounds:

    1. The Learned Judge of the High Court erred in Law when he failed to appreciate the scope and extent of the Jurisdiction and Powers bestowed upon the High Court sitting as Probate and Administrative Court thus dismissing the Application dated the 16th day of September 2021.

    2. The Learned Trial Judge failed to invoke his inherent Powers and the Principle of overriding objective and proportionality as envisaged under Section 47 & 76 of the Succession Act and Rule 40 & 76 of the Probate and Administrative Rules thus making orders which has thrown the proceedings before him to perpetual impasse and failing to take cognizance of the critical issue raised that the proceedings had been pending since the year 2004 and needed to be brought to finality.

    3. That the Learned Trial Judge erred in law by dismissing the Appellant's application dated the 16th day of September 2021 thereby occasioning great hardship and miscarriage of Justice.

    4. The Learned Trial Judge erred in law when he construed the application before him to be an appeal against the decision of his predecessor Judge of co-ordinate Jurisdiction rather than a prayer for variation of a portion of the earlier order and reversion of the file to Probate and Administration Court for final disposition.

    5. The Learned Trial Judge failed to comprehend and appreciate in totality the issues, scope and purpose of the application which had been mounted before him thus falling in error.

    6. The Learned Trial Judge failed to properly comprehend the issues articulated by the Appellant in her application, the law and principles thus reaching erroneous decision.

17. The appeal is opposed. It was canvassed by way of written submissions by both parties followed by brief oral highlights.

During the plenary hearing, Mr. Atanda, learned counsel, appeared for the appellant while Ms. Otieno, learned counsel, appeared for the respondent.

18. We have exhaustively considered the record of appeal, the ruling of the trial court, the appellant's grounds of appeal, the rival submissions by the parties as well as the law.

19. In reviewing decisions of this nature from trial courts, as a first appellate court, the legal standard of review to be deployed is an abuse of discretion standard. A trial court Judge is entitled to exercise his discretion in determining whether to review a ruling by that court or whether to give particular directions as a probate court. The outer limits of that discretion are contained in Order 45 of the Civil Procedure Rules as well as the *Law of Succession Act* and Probate Rules. Under this standard, this Court will only review a discretionary decision if it was made capriciously, arbitrarily, in plain error, or otherwise not in accordance with the law or logic. A reversal under this standard can only happen where this Court is persuaded that the reviewed decision lies beyond the pale of reasonable justification or range of permissible outcomes under the circumstances. In reviewing affidavits and other pieces of evidence placed before the trial court to assist it in using its discretion, the standard set in Selle vs. Associated Motor Boat Co. Limited (1968) EA 123) on a first appellate court's duty to reappraise the evidence and come up with its own independent evaluation and conclusions is applicable.

20. The singular issue for determination is whether the trial court erred in dismissing the appellant's application to review the ruling of Karanja, J. dated 30/10/2019 as prayed or by refusing to otherwise give directions aimed at finalizing the controversy related to the distribution of the estate.

21. In support of the appeal, the appellant argues that the respondent frustrated and refused all attempts of amicable resolution to distribute the estate of the deceased and that the Public Trustee, in their letter dated 23rd July, 2021 expressed their inability to comply with the court order of 30/10/2019. The appellant argues that the inability of the parties to agree on the mode of distribution coupled with the inability of the Public Trustee to act as directed by the trial court is what prompted the appellant to file the application dated 16/09/2021 seeking to have the trial court, as a probate court, distribute the estate of the deceased in accordance with its ruling dated 30/10/2019, or alternatively, to give such direction as would finalize the distribution of the estate of the deceased. The appellant laments that the trial court proceeded to dismiss her application and hence left the beneficiaries of the estate of the deceased an impasse – one in which the respondent and her house are deriving a benefit from.

22. The appellant cites section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules to argue that the High Court has inherent powers and jurisdiction to entertain and determine any dispute under the Act and to give and make such orders as may be necessary for the ends of justice and to prevent an abuse of the court process. The appellant argues that the trial court should have used these provisions of the law in order to prevent the "perpetual impasse" they find themselves in by giving comprehensive directions to advance and finalize the succession matter. The appellant relied on the persuasive decision in Priscillah Ndubi & Another v Gerishom Gatobu Mbui, Meru Succ. Cause No. 720 of 2013 to urge this point. The appellant urges this Court to grant the prayers it sought in its application before the High Court, or, in the alternative, to remand it before a Judge other than Kiarie, J. for the giving of directions aimed at comprehensively distributing the estate of the deceased.

23. On her part, the respondent opposes the appeal on three main grounds. First, she argues that the application dated 16/09/2021 was brought as a summons for confirmation of grant but did not meet

the threshold for such summons because it neither named all the beneficiaries nor included a proposed mode of distribution. Additionally, the application was brought prematurely because the beneficiaries had not agreed on the mode of distribution as ordered by the court in its ruling dated 30/10/2019. Second, the respondent argued that if the application dated 30/10/2019 was comprehended as one for review of the orders of 30/10/2019, then Order 45 of the Civil Procedure Rules governed it (by dint of Rule 63 of the Probate and Administration Rules), and it did not reach the threshold because what the orders sought were, in fact, meant to vary those of another Judge of concurrent jurisdiction. Third, the respondent pointed out that the application dated 16/09/2021 was out of time anyway because the orders of 30/10/2019 by Karanja, J. were that the summons for confirmation of grant was to be brought within three months of the date of the ruling. The appellant's application was, instead, brought almost two years later – way outside the period allowed by Karanja, J., and without the leave of the court.

24. The procedural history rehashed above makes it clear that there is a substantive decision of the High Court that has clearly identified the beneficiaries to the estate of the deceased. That is the judgment by Sitati J. dated 16/01/2015. That judgment was never appealed against by any of the parties. There is also a substantive decision of the High Court that has clearly identified the assets of the deceased that are available for distribution; and the formula for distribution: this is the ruling by Karanja, J. dated 30/10/2019. That ruling, it is accurate to say, is presently un- appealable, time having run out and leave to appeal having been denied vide the ruling dated 21/04/2021 by Ouko, P. (as he then was).

25. Yet, twenty years since the death of the deceased, his estate remains undistributed, or, in the words of the appellant, in "perpetual impasse." In place of distribution or progress towards it, there are endless applications, counter-applications and appeals.

26. When served with the court order of 30/10/2019, the Public Trustee, vide a letter dated 23/07/2021 addressed to the respondent's counsel wrote, in pertinent part that:

> "The Honourable Judge stated that parties may now go to the drawing board and agree on the basis of the formulae suggested herein above by the court; after which, they may take out fresh summons for confirmation of grant within the next three months from the date hereof. In default, the matter be referred forthwith to the Public Trustee for necessary distribution of the estate to all beneficiaries in accordance with the law.
>
> We note that on 16th January, 2015, the Honourable Judge in Kisii High Court Succession Cause No. 219 of 2004, in her judgment, issued a grant in the joint names of Pamela Akinyi Omondi and Jane Atieno Nyamuthe who are the first and second widows respectively.
>
> Therefore, the grant of letters of administration issued on 16th January, 2015 to the two widows still stands and the office of the Public Trustee is unable to come in and distribute the above estate for this reason, that will be intermeddling with the estate contrary to section 45 of the *Law of Succession Act*.
>
> Due to the foregoing, the parties may place the matter before the judge for directions since the Public Trustee has not yet been appointed the administrator."

27. We must note that the Public Trustee is correct in her appreciation of the law. In his ruling dated 30/10/2019, the learned Judge fell short of removing the two widows as the administrators of the estate of the deceased and, conversely, appointing the Public Trustee as the administrator of the estate. In the absence of the removal of the two widows as administrators and in the absence of the formal appointment of the Public Trustee as the administrator, the Public Trustee was legally disabled from complying with the orders of the court dated 30/10/2019. Administrators of estates cannot be

removed by implication; and neither can the Public Trustee be appointed as an administrator of an estate by implication.

28. The question, then, is what the proper course of action should have been for the parties. The appellant made the decision that the best way to progress the succession matter towards finalization would be to review the orders of 30/10/2019 in view of the Public Trustee's position, and in view of the parties' inability to reach a consensus. It is unclear what action the respondent would prefer as the way forward but in the submissions before this Court, she seems to suggest that the application dated 21/09/2021 by the appellant was objectionable because it was not a "proper" summons for directions; and because it was not filed timeously i.e. within the three months stipulated by the learned Judge in the ruling of 30/10/2019. Obliquely, the respondent concedes that there is an impasse in the administration of the estate.

29. What, then, would be the way forward? Differently put, faced with this situation, how should the learned Judge have responded bearing in mind the High Court's prime directive in succession matters being to finalize the distribution of the estate of the deceased?

30. Perhaps the place to begin would be the actual orders of the learned Judge in the ruling dated 30/10/2019. This are the exact words the learned Judge used:

> "The parties may go back to the drawing board and agree on a scheme of distribution on the basis of the formulae suggested hereinabove by the court; after which, they may take out fresh summons for confirmation of grant within the next three months from this date hereof (sic). In default, the matter be forthwith referred to the Public Trustee for necessary distribution of the estate to all beneficiaries of the estate in accordance with the law."

31. There is a need to unpack the meaning of these orders using the mischief rule: the learned Judge did not aim to create a "suicide pact" among the protagonists – that they reach a consensus (despite the history of the litigation which showed that the chances of agreeing were minimal); and if no such consensus was reached, then they were condemned to a "perpetual impasse" because the Public Trustee would, legally, have been unable to take up the matter as an administrator of the estate before the legal step of removing the appellant and respondent as administrators and appointing the Public Trustee as the administrator. The learned Judge could not have intended an absurd result. What, then, could be a pragmatic interpretation of the learned Judge's orders?

32. It is clear that, in the first place, the learned Judge gave the protagonists an opportunity to meet and agree on a scheme of distribution and then, hopefully, file a joint summons for confirmation of grant. If that was not possible, either of the administrators was still at liberty to file for summons for confirmation of the grant under section 71 of the *Law of Succession Act* proposing her own mode of distribution and demonstrating how her mode of distribution was in adherence to the formulae enunciated by the court in its ruling of 30/10/2019. It would then be incumbent upon the other side to either agree with the proposed mode of distribution or demonstrate why it was not in accordance with the ruling of 30/10/2019. In our view, the controversy had been delimited to that narrow space. The only catch was that either party was required to file the summons for confirmation within three months of 30/10/2019.

33. In our view, the only way the limb allowing the involvement of the Public Trustee could be triggered would have been, again, by the bringing of an appropriate application contemporaneously removing the administrators while appointing the Public Trustee as one. The application dated 21/09/2021, which was dismissed and the subject of the impugned ruling did neither.

34. The implication of our reasoning above is that, technically, the learned Judge was correct to dismiss the appellant's application dated 21/09/2021. The application did not comply with the orders of 30/10/2019 (because it was not a summons for confirmation of grant; and it was not filed timeously) and neither did it meet the technical threshold under Order 45 of the Civil Procedure Rules (because it impermissibly sought a variation rather than a review of the orders of 30/10/2019). The application, therefore, did not serve the substantive purpose the appellant hoped to achieve: to advance the distribution of the estate. However, given the nature of the case and the complexity created by the orders of 30/10/2019, we are of the view that the learned Judge could have latched on to section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules to fashion a remedy for the unique situation the parties found themselves in.

35. In accordance with our interpretation of the orders of the learned Judge dated 30/10/2019 above, and aware of our primary obligation to do justice and bring controversies to an end, we find that the option open to the appellant is the one suggested above: to bring an appropriate summons for confirmation of grant of the letters of administration issued herein while demonstrating the proposed mode of distribution adheres to the formula provided by the court in the ruling of 30/10/2019. We are mindful of the fact that the three-month period stipulated in the orders of 30/10/2019 have lapsed. We, therefore, find it necessary to grant either of the administrators thirty (30) days to take out the summons for confirmation. In the event both administrators fail to act, the trial court would be at liberty to exercise its powers under the Law of Succession and the Rules thereunder to formally remove them in their role as administrators and to formally appoint the Public Trustee in that role.

36. Overall, we must observe that this is a truly unsatisfactory position for all the parties involved – except, perhaps, the lawyers.

    We wish to remind the beneficiaries of the estate that all the substantive disputes in the estate have been resolved: the identities of the beneficiaries have been identified and the extent of the estate has been defined. So has the formula for distribution. All that remains is the actual application of the formula to the distribution of the various assets. It would be exponentially optimal for the parties if they sat down and agreed on the distribution as opposed to compelling a third party to do so. If ever there was a poster child for the application of Alternative Justice Systems (AJS) to comprehensively finalize a knotted controversy of the kind formal law hardly comprehends in all its legal, social and cultural complexities, this case is a prime candidate. We urge the parties to give AJS a chance to resolve the controversy.

37. The upshot of the above is that the identities of the beneficiaries having been identified; the extent of the estate defined as well as the formula for distribution, we allow the appeal to the limited extent of issuing orders that:

    i. Either of the administrators appointed on 16th January 2015, shall be at liberty to apply the formula ordered by the court to the distribution of the various assets; and take out summons for confirmation of the grant within thirty (30) from the date of this judgment.

    ii. In the event both administrators fail to act within the stated period, the letters of administration issued to the administrators on 16th January 2015 shall stand revoked, and the Public Trustee shall formally replace them as the administrator of the estate of the deceased and take appropriate action.

    iii. Each party shall bear their own costs.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR