Obiero & another v Ochieng & 3 others (Civil Appeal E471 of 2022)
[2024] KECA 1505 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1505 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E471 OF 2022

LA ACHODE, PO KIAGE & A ALI-ARONI, JJA

OCTOBER 25, 2024

BETWEEN

ALBERT OBER OBIERO ..... 1ST APPELLANT

ANTONINAH NYAKARA OBIERO ..... 2ND APPELLANT

AND

ESTATE OF FELICITA OWUOR OCHIENG ..... 1ST RESPONDENT

JOSEPH LEO OCHIENG ..... 2ND RESPONDENT

JACQUELENE MORAA OBIERO ..... 3RD RESPONDENT

PATRICK M ODUDE ..... 4TH RESPONDENT

(Being an appeal against the Ruling of the High court Family Division at Nairobi (Thande J) dated 13th May 2022 in Nairobi HC P & A 387/2001)

JUDGMENT

1. This succession cause was initiated in 2001 and has traipsed the corridors of justice for 23 years. Several applications and rulings later, the matter came in this Court by way of an appeal filed by Albert Ober Obiero and Antoninah Nyakara Obiero, the 1st and 2nd appellants, respectively. The appeal is against a ruling rendered on May 14, 2022, in the High Court at Nairobi by Thande J. Joseph Leo Ochieng, the Estate of Felicita Owuor Ochieng, Jacqueline Moraa Obiero and Patrick M. Odude are the 1st to 4th respondents, respectively.

2. In sum, in the nine grounds of appeal the appellants allege that the learned judge erred by: holding that the residual powers of the court under Section 47 of the *Law of Succession Act*, were limited to the revisionary powers under Order 45 Rule (1) (a) of the Civil Procedure Rules: failing to hold that the original ruling dated October 18, 2011 by Nambuye J, (as she then was) was contrary to Section

5 of the *Trustee Act*: failing to find that the NCR Trust Fund was established solely for the benefit of the appellants herein, as per the NCR Staff Retirement Scheme: failing to utilize Order 45 of the Civil Procedure Rules and Rule 63 of the Probate and Administration Rules to review the order of Nambuye J (as she then was), distributing an award of USD 150,000 from the Kenya Airways Funds to the 2nd and 3rd respondent, at a time when the funds were non-existent and had already been depleted: failing to hold that the subsequent rulings dated 9th May, 2014 by Kimaru J (as he then was) and 18th October, 2011 by Muigai J were erroneous, having proceeded from the wrongful legal positions established by the judgement of Nambuye J.

3. The appellants further allege that the learned Judge erred by: holding that the application for review was made inordinately late by the appellants and that there was no plausible explanation for the delay, without considering that the appellants were at first instance minors when the original ruling was made and were out of the country studying: failing to find that the advocates of Jacqueline Moraa Obiero, failed to provide effective counsel to the appellants and they could only file the application upon attaining the age of majority and obtaining independent counsel who were instructed to make the application as soon as it was reasonably practicable: failing to consider relevant material which the court ought to have considered and wrongfully taking into consideration and placing reliance upon irrelevant factors and material: and, by failing to consider the provisions of Sections 28 and 29 of the Succession Act in determining the ratio of distribution to the dependents.

4. I have chronicled the journey of this dispute through the court corridors to bring the appeal in to perspective. The starting point was the death of Alloyce Melitu Obiero (the deceased), in a plane crash on 30th January 2001. He was an employee of an institution identified in the record as NCR (Kenya) Limited. He was survived by his wife, the 3rd respondent; two minor children, the 1st and 2nd appellants; his father, the 1st respondent; and mother, the 2nd respondent (now deceased). The Estate of the deceased consisted of half share in Nairobi/ Block 97/516, Kisumu Koru 67/1252, Ngong/Ngong 15201, Motor Vehicles KAH 333P and KUS 884, Insurance claim from Kenya Airways and Accrued benefits from NCR (Kenya) Ltd.

5. On 24th April 2001, a grant of letters of administration was issued to the 3rd respondent, and the deceased's brother, the 4th respondent, jointly. However, as is common, these two were unable to work together. Consequently, the 3rd respondent applied for confirmation of the grant solely and proposed a mode of distribution of the Estate, while the 1st and 2nd respondents filed a protest against the proposed mode of distribution. That notwithstanding, the 3rd respondent, hoping to steal a match from the two protesters, created a Trust Fund in respect of the NCR funds for the benefit of the appellants.

6. The dispute between the parties revolved around the distribution of funds forming the death compensation from Kenya Airways and from the deceased's employer NCR (Kenya) Ltd. The parties had their first audience before Nambuye J (as she then was). In her judgment dated 18th October 2011, the learned Judge directed that the funds be distributed as follows:

> Kenya Airways Compensation 3rd respondent – USD 150,000
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> 1st and 2nd respondent to get in equal shares USD 150,000 less Kshs. 1,250,000 already received.
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> NCR Funds
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> To be invested for the appellants in equal shares and the interest to be applied towards their education and general upkeep. The house purchased with a portion of the funds was to be registered in the names of the administrators and the trustees of NCR for the benefit of the appellants and the 3rd respondent.

7. It later transpired that at the time of the judgment, the entire compensation from Kenya Airways had been exhausted. This discovery precipitated an application by the 1st and 2nd respondents in the superior court, seeking an order that the amount awarded to them be paid from the NCR funds. This second application was canvassed before, Kimaru J (as he then was). Vide a ruling dated 9th May 2014 the learned Judge directed that the sum awarded to the 1st and 2nd respondents be appropriated from the Trust or any property purchased by the said funds. He further directed that any income accrued from the funds be shared equally between the 1st and 2nd respondents on one hand, and the 3rd respondent on the other.

8. Seeking to enforce the order of the court, a third application dated 23rd September 2016 was filed by the 1st respondent, which was opposed by the 3rd respondent in an affidavit sworn on 2nd March 2017. The 3rd respondent deposed that she had already used up the rental income from the two properties for her upkeep, school fees and rent for the children who were in universities in Canada and England respectively. The 1st appellant also opposed the application by a replying affidavit dated 27th April 2017. He faulted the ruling of Kimaru J (as he then was) and averred that the Trust fund did not form part of the free property of the estate available for distribution in succession proceedings.

9. The appellants then filed the fourth application dated 28th June 2017, seeking a review of the order of 18th October 2011 which directed that half of the Kenya Airways compensation funds, being USD 150,000 less Kshs1250000, be distributed to the 1st and 2nd respondents. They also sought a review of the second order made on 9th May 2014 directing that the amount distributed to the 1st and 2nd respondents be appropriated from the Children's Trust fund, and the income derived from the said fund be shared equally between the 1st and 2nd respondents on one part and the 3rd respondent on the other part. They sought a further court order for the NCR/AMO Children's Trust Fund to remain invested for the sole benefit of the appellants, and for the assets acquired therefrom to be transferred to them in accordance with the Trust Document.

10. Thande J considered the two applications and found the one dated 28th June 2017, the subject of the instant appeal, to have no merit and dismissed it. The learned judge found the application dated 23rd September 2016 to be meritorious, and allowed it. The appellants were not happy with that ruling hence this appeal.

11. The appeal was canvassed by way of written submissions. The firm of Ondieki Orangi & Co. Advocates filed submissions dated 24th January 2024 on behalf of the appellants, the respondents did not file any submissions, or appear in court during the plenary hearing though duly served with the hearing notice.

12. The appellants urge that they submitted before the trial court that Nambuye J erroneously directed that the 1st and 2nd respondents be awarded USD 150,000 from the Kenya Airways Funds. They posit that they only discovered that the said funds had been depleted after the judgment was rendered. However, the crucial information was at hand for the respondents and their counsel, being the signatories to the account that held the Kenya Airways Funds. They therefore, urge that the judgment dated 18th October, 2011 was ripe for review by the court given the discovery and the fact that the respondents themselves failed to bring it to the attention of the court.

13. The appellants argue that for the fourth time, Thande J's ruling continued to propagate the factual misunderstanding that was rooted in Nambuye J's (as she then was) wrong footing, and was replicated in the subsequent rulings dated 9th May, 2014 by Kimaru J, (as he then was) and 12th February, 2012 by Muigai J, over the same issue. That the court ought to have corrected the longstanding wrong as it was in its purview to do under Section 47 of the *Law of Succession Act*. Additionally, that the section

provides the High court with powers to entertain any application and determine any dispute under the Act, and to pronounce such decrees and make any such orders therein as may be expedient.

14. The appellants further urge that under Section 1A, 1B, and 3A of the *Civil Procedure Act*, the judge was clothed with jurisdiction to render justice to the appellants who had come of legal age and were able to plead independently for their legal rights. They invoked the maxim: equity will not suffer a wrong to be without a remedy and Article 159 (2) (g) of *the Constitution* stipulates that justice shall be administered without undue regard to procedural technicalities.

15. In addition, the appellants contend that the learned Judge's decision was entirely erroneous in law and fact, for failing to hold that the original ruling dated 9th May, 2014 by Kimaru J was contrary to Section 3(2) and 5 of the Trustees Act. This they gleaned from the reasoning of the Judge that the NCR Trust Fund and its proceeds formed part of the deceased's estate, and was part of the available estate for distribution to the general beneficiaries. In their view, this was an error of law apparent on the face of the record and as such, the orders of Kimaru J contravened the Trustees Act in purporting to redistribute a closed Trust in a manner inconsistent with the wishes of the Testator. The decision was therefore, illegal and void ab initio.

16. The appellants contend that the court, by holding that the reason given for the delay in filing for the review was not plausible, failed to consider exceptional circumstances that the appellants found themselves. They submit that at the time of the judgment of 18th October, 2011 and the ruling of 9th May, 2014, they were studying outside the country, and this was clearly stated in their pleadings. They were not therefore, able to appoint counsel, or even give instructions as it were. At the ages of 21 and 19 respectively, they had spent quite a bit of time outside this jurisdiction, were barely old enough to make informed legal decisions, and had no resources and/or support.

17. I have considered the record of appeal the rival submissions and the law. This being the first appeal, our mandate is as was succinctly stated in Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, that:

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

18. Bearing this mandate in mind and the circumstances of this case, I collapse the grounds of the appeal into two issues for consideration. The first issue is whether Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules limited the superior court's powers to revisionary only, and the second is whether the appellants' application dated 28th June, 2017, satisfies the requirement for review under Order 45 of the Civil Procedure Rules.

19. The two material provisions in the law of succession clothe the High Court with the power to entertain applications and make orders that are necessary for the ends of justice to be met. Section 47 of the *Law of Succession Act* stipulates that:

> "The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient."

Rule 73 of the Probate and Administration Rules provides that:

> " Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

20. The appellants in their application dated 28th June 2017 sought the following substantive orders:

    i. That the court be pleased to review and or vary and/ or modify the Ruling/ Orders made on 18th October 2011 ordering that half of Kenya Airways Compensation funds, being 150,000 US Dollars be distributed to the 1st and 2nd respondent less Kshs.1,250,000/= already paid out to them.

    ii. The court be pleased to review and/or vary and/or modify the Ruling/Orders made on the 9th May, 2014 by Kimaru J to the extent that the same held that the amount distributed to 1st and 2nd respondents should be appropriated from the AMO Children's fund, and that any income derived from the said fund should be shared equally between the 1st and 2nd respondents on one part, and the widow of the deceased on the other part as decreed by the earlier court.

    iii. That the court be pleased to order that the NCR/AMO Children's Fund remain invested for the sole benefit of the appellants, and assets acquired therefrom be transferred to them as per the Trust Documents.

21. From their prayers it is evident that the orders sought were for review of the judgment dated 18th October 2011 and the ruling dated 9th May 2014. Rule 63 of the Probate and Administration Rules recognizes that the provisions of Order 45 are some of the specific provisions of the Civil Procedure Rules applicable to succession proceedings. Rule 63 states that:

> " Save as 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.), ... shall apply so far as relevant to proceedings under these Rules."

22. Order 45 Rule 1 of the Civil Procedure Rules provides for review in the following terms:

> " (1) any person considering himself aggrieved-
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> a. by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or
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> 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."

23. Considering the foregoing circumscribed provisions, I am of the view that the learned Judge was not in error in limiting herself to the exercise of revisionary powers of the High Court. In the application

for Review the appellants challenged the mode of distribution of the assets of the estate, and what they perceived as interference with a closed Trust. I agree with the learned Judge that while the said issues may be good grounds for appeal, they could not sustain an application for review.

24. Turning to the second issue, this court in Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR laid down the grounds for review in accordance with Order 45 Rule 1 as follows:

> " The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay."

25. The appellants urge that the judgment of Nambuye J (as she then was) was erroneous in directing that the 1st and 2nd respondents should be awarded USD 150,000 from the Kenya Airways Funds, while the said fund was depleted. They posit that they only got to know about the state of the fund after the judgment was delivered. This was therefore, a discovery of information that was not available to them before judgment. They also argue that the ruling of Kimaru J (as he then was) was contrary to Section 3 (2) and (5) of the *Trustee Act*. That therefore, there was an error of law apparent on the face of the record.

26. It is not disputed that at the time Nambuye J, (as she then was) rendered her judgment, the appellants were minors and their interests were taken care of by the 3rd respondent, their mother. In the replying affidavit to the 2nd respondent's application for enforcement of the ruling of Kimaru J, (as he then was) the 3rd respondent deposed that the Kenya Airways funds were dissipated towards her upkeep and the appellants' school fees and accommodation abroad. It follows that the fact that the funds were depleted was within the knowledge of the 3rd respondent and by extension, the knowledge of the appellants themselves. Therefore, I am not convinced that this was a new discovery.

27. On whether the issues that the appellants require to be reviewed are errors apparent on the face of the record, the learned Judge rendered herself thus:

> " I have carefully considered the grounds upon which the applicants seek review of the orders of 18.10.11 and
>
> 9.5.14. It is clear in mind that these are issues that would require elaborate arguments. They are not errors apparent on the face of the record. Further, while the said issues may be good grounds for appeal, they cannot sustain an application for review. The issues raised by the applicants ought to be examined on appeal and not by this Court which lacks appellate jurisdiction."

28. It is evident from a reading of the application that the issues for which the appellants sought review are not errors apparent on the face of the ruling. From their application, it is apparent that they are challenging the judgment of Nambuye J as well as the subsequent ruling of Kimaru J. I am therefore, not persuaded that the application dated 28th June, 2017, satisfied the requirement for review under Order 45 of the Civil Procedure Rules. Hence, I find no reason to fault the holding of the learned Judge.

29. On the time the appellants took before filing for review, they urge that they gave a justifiable reason for the delay. That at the time of the judgment and the ruling, they were abroad and not in a position

to appoint counsel. Further that they were 21 and 19 years old respectively, and barely old enough to make informed legal decisions. On this issue the learned Judge held as follows:

> "To begin with, the Court notes that the decisions in respect of which review is sought were delivered on 18.10.11 by Nambuye J (as she then was) and 9.5.14 by Kimaru J. The present Application for review was filed on 29.6.17, respectively about 6 years and 3 years after the orders were made. This is by no means a reasonable period, and there had (sic) been inordinate delays. No explanation for the delay has been proffered by the Applicants or indeed the steps taken by the Applicants to come to Court as soon as practicable. The Court is aware that Albert and Antoninah were minors when their father, the deceased, died and that their interest were taken care of by their mother Jacqueline, in the proceedings in this matter. However, when the decision of 18.10.11 was made, Albert was already 18 years old. No reason has been given to the Court as to why he did not apply for review then and did so 6 years later. Additionally, when the decision of 9.5.14 was made, both Albert and Antoninah were adults aged 21 and 19, respectively. Again, no explanation was given as to why they waited for 3 years to file the present application for review."

30. I observe that the appellants' application for review dated 28th June, 2017 and the affidavit of even date sworn in support by the 1st appellant did not give reasons for the inordinate delay in filing the application. I find no basis to fault the holding of the learned Judge that the delay in making the review application was inordinate. This is first, because no reasons for the delay were placed before her for consideration, and secondly, because I am not persuaded that the reasons that the appellants have now brought before the Court of Appeal are plausible.

31. Consequently, upon subjecting the record of appeal, the grounds thereto and the rival submissions laid before me to thorough scrutiny, I find no merit in the appeal. Accordingly, I dismiss this appeal and these being members of one family, I make no orders as to costs.

It is so ordered

Judgment of Kiage, JA

1. I have had the advantage of reading in draft the judgment of my learned sister Achode, JA and I am in full agreement with her reasoning, the conclusion she reaches, and the order she proposes.

2. As Ali-Aroni, JA is also in agreement, the final orders in the appeal are as proposed by Achode, JA.

Judgment of Ali-aroni, J.A.

1. I have had the advantage of reading the well-reasoned judgment of my sister Achode, JA. Having read through the ruling of Thande, J of the 13th May 2022 I am equally in agreement with the same.

2. The matter before Thande, J which forms the subject of this appeal was seeking for review of two applications that were determined on the 18th of October 2011 and the 9th of May 2014; 11 & 8 years prior. Order 45 Rule 1 of the Civil Procedure Code sets the criteria for when a court can review its orders. A look at the grounds also indicates that the appellants expected the judge not only to review but to overturn the rulings as if on appeal. It is also not lost to me either that the appellants who were minors at the material time were ably represented in court by none other than their mother (now the 3rd respondent). The information they purportedly "discovered" was well within the knowledge of their representative (mother) who was satisfied with the rulings. She neither appealed against the orders nor sought review. Needless to say, the appellants came of age a couple of years ago, and they failed to give

plausible explanations as to why it took so long to seek recourse. Indeed, litigation must also come to an end.

3. I agree with the findings of my sister Achode, JA.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

L. ACHODE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar