



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK, JJA)**

**CIVIL APPEAL NO 305 OF 2017**

**BETWEEN**

**CHARLES MUVISI KYULI.....APPELLANT**

**AND**

**ANN AMANGA NTHALE.....1<sup>ST</sup> RESPONDENT**

**DAVID KYULI KAINDI..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling of the High Court of Kenya Family Division at Nairobi (Musyoka, J.) dated 30<sup>th</sup> June, 2017*

in

**HC SUCCESSION CAUSE NO. 3403 OF 2005)**

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**JUDGMENT OF THE COURT**

This appeal relates to the estate of **David Kyuli Kaindi**, “deceased”. The appellant being one of the children of the deceased was appointed by the deceased as the executor of his will. The 1<sup>st</sup> respondent, **Ann Amanga Nthale** is a widow to and administrator of the estate of one of the deceased’s sons, namely **John Nthale Kyuli**, while the 2<sup>nd</sup> respondent is the son of both the 1<sup>st</sup> respondent and the late John Nthale Kyuli. He is therefore a grandson of the deceased. The grant of probate in respect of the estate of the deceased was made to the appellant and confirmed on 14th February, 2011. The respondents thereafter waited for the distribution of the estate in accordance with the Will by the appellant to no avail. On 7th February, 2014, they were compelled to take out an application seeking orders from the High Court to compel the appellant to complete the execution of the Will and render accounts regarding the status of the estate.

On 31st July, 2015, the High Court in its ruling found that the appellant as the executor of the estate of the deceased had failed in his statutory duty of completing administration of the estate within six (6) months after confirmation of probate as required by section 83(g) of the Law of Succession Act, hereinafter “**the Act**”. The court however extended the period by a further ninety days to allow the appellant to complete administration, in default of which the grant of probate made to him would stand revoked. The matter was mentioned several times thereafter to confirm whether the said order had been complied with by the appellant. When it became apparent to the court that there was no compliance with the order, the court revoked the grant made to the appellant and directed parties to agree on fresh executors to be appointed by the court.

In that regard, the respondents filed an application dated 13th January in which they sought to be appointed executors of the estate of the deceased with a view to completing the administration of the

estate in accordance with the certificate of confirmation of grant of probate already issued. The application was opposed by the appellant. He stated that he had the support of his siblings who had signed a consent to support his continued administration of the estate. He stated that the 1st respondent had intermeddled with the estate property by selling a portion thereof to a third party and was therefore unfit for appointment as an executor. He argued that it would be against the wishes of the family to have her appointed as an executor.

The application was however supported by **Katilo Kyuli**, a daughter of the deceased to the extent of appointment of new executors excluding the appellant, and proposed the appointment of administrators from other surviving children of the deceased. She did not propose anyone in particular but complained that she was the only child of the deceased not in possession of any of the assets that were bequeathed to her by the deceased according to his will.

The learned Judge in his Ruling made the following observations:

*“Let me start with the proposal that the executor be reappointed. The court has in two rulings made a finding that the executor had failed in his duties as administrator, and it was on that account that his grant was revoked. His reappointment cannot in the circumstances be feasible, even if he has support of some of the survivors of the deceased.*

*Regarding the applicants, I note that there are two objections to the applicants. The first is that they are not children of the deceased, and it is argued that the estate ought to be administered by any of the surviving children of the deceased. Most of the children of the deceased propose the reappointment of executor whom the court has decreed as having failed in his duties as administrator; while one proposes that any child be appointed save for the executor.*

*Ideally, appointment of administrators should be of persons who are willing to act as such. None of the surviving children of the deceased have indicated express willingness to act as administrators, apart from the one the court has adjudged to have failed in the past to act as such. One has stated that it is children of the deceased who ought to be appointed, although I note that she does not expressly avail herself for such a role. I shall presume that she is willing to act as such should she be appointed.*

*As the other children have not offered themselves, I am left with only one child to appoint as such. In view of the vastness of the estate and the contests within it, I am inclined to appoint more than one administrator. The appointment of the first applicant is contested on grounds that she intermeddled with the estate property. There is matter pending before another court on that score so I shall not comment on the issue, save to say that I have not been given copy of any decision where it has been pronounced that she did interfere with such property. I do not think the first applicant should be barred merely because of a pending suit. A suit amounts to nothing more than allegations until the court makes a pronouncement on the matter. There is nothing on the second applicant. The applicants are from the family of one of the sons of the deceased. They have a stake in the estate.*

*Having taken everything into account I shall dispose of the said application in the terms that I do hereby appoint Katilo Kyuli, Ann Amanga Nthale and David Kyuli Nthale administrators of the estate of the deceased to complete administration thereof. A grant of letters of administration with will annexed shall be issued to them accordingly.”*

Dissatisfied with the Ruling, the appellant preferred this appeal in which he raised seven grounds, to wit, that the learned Judge erred in fact and in law in; failing to appoint the appellant as the administrator contrary to the wishes of the widow and children of the deceased; finding that the appellant as the executor had failed in his statutory duty of completing administration of the estate as per the provisions of section 83 (g) of the Act; appointing the respondents as some of the administrators of the estate on grounds of vastness of estate and contests within it; failing to find that the respondents were not fit to be appointed as administrators of the estate on grounds of intermeddling with the estate by selling property known as **LR No. 209/136/13** when they did not have authority in law; failing to find that the respondents were vendors in the sale agreement dated 18th November, 2013 in which they purported to sell the said property which amounted to intermeddling with the estate of the deceased; finding that Katilo Kyuli could not be appointed as the sole executor due to the vastness of the estate and the contests within it and; finally, failing to take into account the order of preference of the survivors of the deceased while appointing the respondents who are daughter in-law and grandson, respectively, to the deceased whereas there was a surviving widow and children of the deceased.

At the plenary hearing of the appeal, **Mr. Uvyu**, learned counsel appeared for the appellant whereas **Mrs. Kingoo** and **Mr. Maingi**, learned counsel represented the 1st and 2nd respondents, respectively. Parties had already filed written submissions which they briefly highlighted.

Mr. Uvyu merely rehashed his written submissions in his oral highlights. However, his main contention

was that the respondents had intermeddled with the estate of the deceased and were therefore not fit to be appointed as the executors of the estate of the deceased. The respondents had sold a portion of land belonging to the deceased to one **Stanley Maina Mugetha Gathuita** at a time when they did not have a grant of probate and in contravention of section 79 of the Act. The act amounted to intermeddling with the deceased's estate which is not allowed. In support of this submission counsel referred the court to the persuasive authority of **David Julius Nturibi M'Ithinji (Deceased) [2012] eKLR** where the learned Judge stated:

**“The respondent is not authorized by the law of Succession Act or grant of representation under the law of Succession Act to take possession or dispose of or otherwise intermeddle with the free property of the deceased David Julius Nturibi”.**

He further submitted that the respondent did not have priority in order of preference to the surviving spouse and children of the deceased so as to be appointed as an executor.

In opposing the appeal, **Mrs. Kingoo** submitted that grant was confirmed on 14<sup>th</sup> February, 2011 and the property was sold after the said date. Therefore, there was no intermeddling. That before grant was revoked, the appellant had been given 90 days to finalize administration of the estate but the appellant failed to do so hence the appointment of the respondents as executors. She observed that there was no error in what the judge did. Counsel further submitted that the appellant too had sold motor vehicles registration numbers KNX 534 and KAH 733H belonging to the estate long before the grant of probate was confirmed. Therefore if there was any intermeddling with the estate of the deceased, the appellant was equally guilty. As to the order of priority or preference, counsel submitted that **neither the widow nor the other children of the deceased had expressed their desire or interest to be appointed as such executors.**

Mr. Maingi associated himself fully with the 1<sup>st</sup> respondent's submissions. He went on to submit that the antecedent conduct of the appellant disentitled him to be the executor and the findings by the Judge on the moral conduct of the appellant cannot therefore be faulted. That the Judge did not misapprehend the evidence or facts presented before him and, if anything, the appellant had failed to advance the administration of the estate for 11 years.

We have carefully perused the record of appeal, the written and oral submissions by counsel and the law. The issue for determination is whether the learned Judge erred in appointing the respondents as executors of the estate of the deceased.

It is not in dispute that the appellant was appointed the executor of the Will of the deceased. Indeed the appellant embarked on his duties and applied for grant of probate which was later confirmed on 14<sup>th</sup> February, 2011. However, for some reasons not readily apparent, the appellant was unable to complete administration of the estate and so his grant of probate was revoked. We believe the learned Judge exercised discretion when he revoked the appellant's grant and gave good reason(s) for his decision; the appellant had failed to abide by court directions to complete the administration of the estate within 90 days thus necessitating the action of the court. The appellant had breached his statutory duty. Further, obedience of court orders is not optional, it is meant to ensure good order, rule of law and due administration of justice as was held in **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**. Romer, L.J. in the case of **Hadkinson vs. Hadkinson [1952] ALL ER 567** in reinforcing the concept expressed himself as follows:

***“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”***

The appellant having failed to adhere to the court directives with regard to the administration of the estate cannot blame the court for not re-appointing him or appointing the respondents as the executors of the estate. The appellant's previous or antecedent conduct obviously denied him the re-appointment and the court was right in considering that fact in exercising its discretion. Based on that conduct, no court or tribunal properly directing itself to the matter at hand would have considered re-appointing the appellant as the executor.

As regards preference or order of priority, we think that this was an irrelevant consideration and the court rightly failed and or ignored to consider it. The court was dealing with the executorship of a Will in which the appellant had been appointed as the executor by the deceased. He failed to carry through his duties. What was the court to do? The court had been moved by the respondents to be appointed as executors. The choice for the court was cut out; either allow or refuse the application. It chose the latter, and rightly so, in our view. In any event, the appointment of administrators by the court was discretionary. The court also found that the other beneficiaries, including the deceased's widow and children other than the appellant, were not willing to take up the challenge of becoming executors. The appellant having failed in his duties and none of the deceased's children and even his widow not expressing their desire to be appointed as executors, what again was the court to do? And the respondents were the only ones keen to execute the Will to completion. The court rightly therefore appointed them to execute the remainder of the Will. In any event just like the appellant, they are also members of the deceased's family with a stake in the estate.

In appointing the three as executors, the court took into account the vastness of the estate as well as ongoing litigation over the same. To our mind, this was a consideration worth taking into account when the Judge was exercising his unfettered discretion and cannot therefore be faulted.

With regard to intermeddling, we note the observations by the Judge that the suit on intermeddling amounted to nothing more than allegations until the court makes a decision on the same. We also note that the allegations are yet to be proved as none of the parties to this appeal brought to our attention a determination of the said case. The less said on this the better, as we think that the matter is still pending hearing. We do not wish to embarrass the court that may be seized of the matter by making determinations on the question of intermeddling.

From the foregoing, we are satisfied that the respondents were properly appointed as the executors of the estate of the deceased. Accordingly, we find no reason to interfere with the discretion exercised by the trial court in that regard.

The upshot is that, we find no merit in the appeal and the same is accordingly dismissed. This being a family dispute, we make no order as to costs.

**DATED and delivered at Nairobi this 27<sup>th</sup> day of September, 2019.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**