



REPUBLIC OF KENYA



KENYA LAW
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**Ali & another v Mohamed & another (Family Appeal 012 of 2021)
[2025] KEHC 1194 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY APPEAL 012 OF 2021
HI ONG'UDI, J
FEBRUARY 28, 2025**

BETWEEN

KHALID SAID AHMED ALI 1ST APPELLANT

HAWA SAID AHMED 2ND APPELLANT

AND

FAUZI SAID AHMED 1ST RESPONDENT

ILHAM ABDALLAH MOHAMED 2ND RESPONDENT

RULING

1. This ruling is in respect of two (2) applications. The first one is the summons dated 14th October 2022 filed by the appellants while the second one is dated 19th June 2023 filed by the 2nd respondent.
2. In the summons dated 14th October, 2022 the appellants pray for the following orders;
 - i. -ii- spent.
 - iii. That the honourable court be pleased to issue an order directing the rendering of accounts of the estate and a status report with regard to assets and liabilities from the year 2008 by the said Ilham Abdala Mohamed pending the hearing and determination of the appeal.
 - iv. That the costs of the application be in the cause.
3. The said application is premised on the grounds on its face as well as the lengthy affidavit of the 2nd appellant sworn on the even date. She deponed among other things that it was in the interest of justice that their application be allowed as prayed.
4. The respondents filed a replying affidavit dated 13th February, 2023 sworn by the 2nd respondent. He averred among other things that the application was baseless, frivolous and unmerited meant to delay the hearing of the Appeal. He urged the court to dismiss the same with costs.



5. In the Notice of Motion dated 19th June, 2023 the 2nd respondent prays for the following orders;
 - i. That the appellant's Appeal dated 8th November 2021 be dismissed for want of prosecution.
 - ii. That the costs of the application be provided for.
6. The said application is premised on the grounds on its face as well as the affidavit of the 2nd respondent. He deponed that the appellants' failure to set the appeal for hearing could only be explained in terms of the stay orders they are enjoying at the detriment of other beneficiaries of the deceased's estate. Further, that no party would suffer any prejudice if the appeal was dismissed since the distribution has been done according to the law and all parties got their share. He urged the court to grant the orders in his application.
7. Both applications were canvassed by way of written submissions.
Submissions to the application dated 14th October, 2022 The appellants/applicants submissions
8. It is noted that the firm of Odhiambo and Odhiambo advocates filed submissions dated 9th January, 2024. The said submissions referred to two applications dated 8th June, 2023 and 19th June, 2023. No submissions were filed in respect of the application dated 14th October, 2022 which was their application.

2nd Respondents submissions

9. These were filed by Ali by Ali & company advocates and are dated 13th February, 2024. Counsel identified two issues for determination.
10. The first one is whether the 2nd respondent is illegally collecting rent from L.R No. South Teso Angoroni/1148. Counsel submitted that the decision to allow the 2nd respondent to collect rent from this particular property emanated from a consent adopted by the court and cannot be overturned by the parties herein. He placed reliance on Windsor Commercial & Company Ltd & others v Century National Merchant Bank Trust Ltd SCCA 114/2005 where it was held that:

“The court will not interfere or disturb a consent order between the parties other than on those grounds in which it would interfere with any other contract. These would include mistake, misrepresentation, duress, and undue influence”.
11. The second issue is whether the 2nd respondent is a compellable party to render accounts in, respect of the deceased's estate. Counsel urged the court to find that the accounts of the estate were duly rendered during the trial and that any attempt to re-open that door was a waste of time and an abuse of the court process.

Submissions to the application dated 19th June, 2023

The 2nd respondent's submissions

12. The said submissions were filed by Ali & company advocates and are dated 13th February, 2024. Counsel identified two issues for determination.
13. The first issue is whether the appeal can be dismissed as per order 42 rule 35(2) of the Civil Procedure Rules. Counsel submitted that failure to take any action to prosecute that appeal necessitated the applicant's application to have the same dismissed as provided under Order 42 rule 35 (1). He urged that the court finds the appeal worthy of dismissal for want of prosecution and proceed to dismiss it.



14. On the second issue, whether the conduct of the appellant warrants this court to exercise its discretion in their favour. Counsel submitted that the appellants had failed and/or refused to file a record of appeal and if they had filed the same had not been served upon the respondents. That the out of court settlement has never materialized hence showing that the appellants' intentions to delay the matter rather than have it heard and determined. He urged the court to dismiss the said appeal for want of prosecution.

Appellants submissions

15. These were filed by Odhiambo & Odhianbo advocates dated 9th January, 2024. Counsel submitted that the said application was premature and the claim that there was a delay of nineteen (19) months was unfounded. Further that the 2nd respondent was well aware that the lower court record was missing and had only been availed in November, 2023. He added that the said application had not been brought in good faith since the 2nd respondent largely benefitted from the estate. He urged them to disallow the said application.

Analysis and determination

16. I have considered the two (2) applications together with the affidavits sworn in support, the replying affidavit and the submissions by the respective parties. I opine that the issue for determination by this court is whether both applications or either of them is merited.
17. I will first deal with the application dated 19th June 2023 since its outcome will have an implication on the one 14th October 2022. The application seeks to have the appeal dismissed for want of prosecution. The 2nd respondent contends that failure to take any action to prosecute the appeal necessitated his application to have the same dismissed as provided under Order 42 rule 35 (1), of the Civil Procedure Rules. On their part the appellants argued that the 2nd respondent's application was premature and the claim that there was a delay of nineteen (19) months was unfounded. Further, that the 2nd respondent was well aware that the lower court record was missing and had only been availed in November, 2023.
18. Order 42 Rule 35 (1) & (2) of the Civil Procedure Rules provides: -
- i. Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.
 - ii. If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.
19. In Pinpoint Solutions Limited & another vs Lucy Waithegeni Wanderi (as the legal administrator of the Estate of James Nyanga Muchangi) [2020] eKLR the court elaborated on the procedure relating to dismissal of appeals for want of prosecution, saying: -
- a. "The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per Order 42 Rule 11 and Rule 13 of the Civil Procedure Rules, 2010.
 - b. This Court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35(1) of the Civil Procedure Rules. In any event, there was



also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of the Civil Procedure Rules. There was also no indication that the lower Court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.”

20. After carefully going through the court’s record I note that this court on 17th March 2022 issued directions that the appeal be prosecuted within 60 days. However, there was a delay in availing the lower court file plus proceedings thereafter. On the other hand the parties herein were considering an out of court settlement and recording a consent to settle of the matter. The matter was mentioned before the deputy registrar on several occasions and the issue of availing the lower court file kept coming up. In my view the delay by the appellants to prosecute the appeal was inadvertent and beyond their control. The justification of the delay has adequately been explained in their response to the application.
21. For the said reasons and in exercise of my discretion and in the interests of justice, I find that the notice of motion application dated 19th June 2023 is not merited. I however order the appellants to fast track the hearing of the appeal since the lower court file is now available together with proceedings. The Appellants to prepare and serve the record of appeal within thirty (30) days and have the appeal admitted for hearing.
22. The next application is the one dated 14th October, 2022 which seeks the rendering of accounts of the estate and a status report with regard to assets and liabilities from the year 2008 by the 2nd respondent pending hearing and determination of the appeal.
23. The duty to account for the assets, liabilities and dealings of any estate purely lies on the Administrators. There is no short cut about it. It is a statutory obligation to which the administrators of an estate must adhere without any discretion. Rule 73 of the Probate and Administration Rules enshrines the inherent power of the court as follows:

“Nothing in this rule 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 court”.
24. Section 83(e) requires an administrator to within six months from the date of the grant, 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 the account. Under Section 83(g) an administrator is obligated to complete the administration of the estate in respect of all matters within six months from the date of confirmation of the grant and to produce to the court a full and accurate account of the complete administration.
25. There is no evidence that the 2nd respondent or the other two administrators have failed to complete the administration of the estate within the period specified by law. In fact, it is not in dispute that the estate has already been distributed. From the foregoing, I am satisfied that the 2nd respondent is not liable to render accounts of the estate or a status report of the assets and liabilities of the estate, at the moment.
26. In the end, I do not find any merit in the applications dated 14th October 2022 and 19th June 2023, which I dismiss.
27. Being a family matter, I shall make no order as to costs.
28. Orders accordingly

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 28TH DAY OF FEBRUARY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI



JUDGE

