



**In re Estate of Mathayo Arwa (Deceased) (Succession Cause
101 of 2009) [2025] KEHC 2899 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2899 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 101 OF 2009
MS SHARIFF, J
FEBRUARY 27, 2025
IN THE MATTER OF THE ESTATE OF MATHAYO ARWA (DECEASED)**

BETWEEN

JAMES ARAO ARWA PETITIONER

AND

TOM MBOYA ARWA OBJECTOR

RULING

1. Pursuant to Section 80 of Cap 21, Order 51 Rule 1 of the Civil Procedure Rules 2010 and all the enabling provisions of the law, the Objector vide a Motion application dated 14th July 2023, seeks orders that this Honourable Court be pleased to review by vacating order number (a) of the orders issued by this Court on 26th June 2023, and the costs of this application.
2. He premised the Motion application on the grounds as preferred on the face of it and the Affidavit sworn by Tom Mboya Arwa, Objector herein, in support of the same. According to the Objector, the orders as issued by this Court on 26th June 2023, classified him and all other residents on parcel no. Kisumu/Karateng/497 as intermeddlers and stopped them from continuing with any form of use or construction works on the said parcel of land.
3. He avers that he is the biological son of the deceased herein and a lawful beneficiary with beneficial interest, as such, should not be classified as an intermeddler.
4. He avers that the other residents are on the said parcel of land based on his invitation and permission and that they are all residents on the same parcel of land that the deceased herein allocated to him during his lifetime. Furthermore, the Petitioner herein and other residents have ongoing construction activities on land parcels no. Kisumu/Karateng/480/1235/437 & 450.



5. He avers that the orders of the Court as issued on 26th June 2023, are discriminatory in nature and violate the affected parties' rights to equal treatment.
6. The Petitioner filed his submissions in response to the Motion dated 14th July 2023. According to him George Omesa is not a beneficiary to the estate of the deceased herein and was the one estopped by this Court from conducting further construction activities on the land parcel no. Kisumu/Karateng/497.
7. Further, the Petitioner herein swore an Affidavit in Support of his submissions on 5th December 2023, wherein he avers that the Objector is his step-brother and that he is the Administrator of the estate of the deceased herein. According to him, prior to the demise of the deceased, the deceased owned 5 parcels of land: land parcels no. Kisumu/Karateng/497, 1235,450, 473 and 480. He told the Court that the deceased did not distribute his parcels of land during his lifetime and that this Court should uphold it's orders as issued on 26th June 2023.
8. The judgment containing the order in question was delivered on 26th June 2023. The specific order subject of review application reads as follows;

- “ 1. An injunction order is hereby issued restraining all intermeddlers including but not limited to George Omesa, Tom Mboya and any other persons purporting to have purchased any of the deceased assets, pending the Confirmation of the Grant herein. For avoidance of doubt one George Omesa is restrained from continuing with any construction works on parcel no. Kisumu/Karateng/497 until the Grant herein is confirmed.
2. The Objector to ensure that the orders made herein on 23rd February 2023 are effected.
3. The Applicant is grant leave to file supplementary affidavit to his summons dated 19th November 2021 within 14 days from the date hereof to include all beneficiaries (female/male) in the proposed mode of distribution.
4. The summons for Confirmation of Grant shall be heard inter-partes on 31st July 2023. All beneficiaries to attend Court”

9. Review of decisions of a probate Court is governed by Rule 63 of the Probate and Administration Rules, which provides as follows: -

- “63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules
 - (1) Save as is 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 Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
 - (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons



shall be those existing and in force immediately prior to the coming into operation of these Rules.”

10. In *John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another* [2016] eKLR, the court cited Rule 63 of the Probate and Administration Rules, and then stated as follows:

“As stated above, the only provisions of the Civil Procedure Rules imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.”

11. It is, therefore, clear that any party seeking review of orders, in a probate and succession matter, is bound by the provisions of Order 45 of the Civil Procedure Rules.

12. The substantive provisions of Order 45, state as follows:

“1.

(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (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.

(2) ...”

13. Order 45 provides for three circumstances under which an order for review can be made. To be successful, the Applicant must demonstrate to the Court that there has been 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. A party may successfully apply for review, secondly, if he can demonstrate to the Court that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.



14. The Objector herein alludes that the orders of the Court were discriminatory and that George Omesa was a resident in land parcel no. Kisumu/Karateng/497 and he was on that parcel on land based on his permission.
15. Pursuant to Section 45 of the *Law of Succession Act* provide as follows:
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
16. I associate myself with the opinion of Musyoka, J in Veronica Njoki Wakagoto (Deceased) [2013] eKLR that:
- “The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”
17. I also agree with the position in Benson Mutuma Muriungi vs. C.E.O Kenya Police Sacco & Anor (2016) eKLR and re Estate of M’Ngarithi M’Miriti [2017] eKLR that:
- “Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”
18. From the foregoing and the proceedings of the Court dated 26th June 2023, the Objector herein is indeed an intermeddler of the estate of the deceased. It is clear from the Court proceedings that the Objector proceeded, without a Certificate of Confirmed Grant, to sell off part of the estate of the deceased to one George Omesa and other purchasers.



19. Accordingly, the order that commends itself to me and which I hereby granted was an order restraining all intermeddlers including but not limited to George Omesa, Tom Mboya (Objector herein) and any other persons purporting to have purchased any of the deceased assets from taking any further action geared towards the wastage or alienation of the suit property pending the Confirmation of the Grant or further orders of the Court.
20. In the upshot, the Objector has utterly failed to provide sufficient grounds to justify grant of the orders sought in the Motion application, dated July 14, 2023, and the same is hereby dismissed. This being a family matter, there shall be no order on costs. It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF FEBRUARY 2025.

Shariff Mwanaisha Saida

Judge

In the presence of :

..... for Petitioner

..... for Objector

..... Court Assistant

