



REPUBLIC OF KENYA



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In re Estate of Onesmus Kibira Wanjohi (Deceased) (Succession Cause 110 of 2002) [2025] KEHC 4079 (KLR) (25 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 110 OF 2002
DKN MAGARE, J
MARCH 25, 2025**

IN THE MATTER OF THE ESTATE OF ONESMUS KIBIRA WANJOHI (DECEASED)

BETWEEN

LUCY GATHONI WAMBUGU PETITIONER

AND

JOSEPH KAMAU KIBIRA PROTESTOR

RULING

1. This ruling is pursuant to the directions of this court given on 8.3.2023 requiring the parties to file submissions on the contentious property, being LR No. Laikipia/Tigithi/Matanya Block 3 (Matanya Centre)/638. The directions were premised on the order of the court dated 10.2.2020 for parties to file skeleton submissions on this aspect. The dispute is on the issue of whether the said property was included in the Summons for Confirmation of Grant but omitted in the Judgment and decree of court dated 7.10.2008.
2. The position of the Petitioner is that the said property was erroneously omitted in the Judgment when it was in the summons for confirmation of the grant. On the other hand, the Respondent maintains that there was no error in the judgment and the said property was well considered and included by this court.

Submissions

3. Both parties filed factual submissions. Submissions do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of



submissions. As was held by Mwera, J (as he then was) in *Erastus Wade Opande v Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007:

“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

4. Due to the *sui generis* nature of the succession proceedings, the court will interrogate the submissions against the applicable law and decide on the basis of the allegation leveled on an error in the dealing by the court with property LR No. Laikipia/Tigithi/Matanya Block 3 (Matanya Centre)/638 in the judgment dated 7.10.2008. In *Ngang’a & Another v Owiti & Another* [2008] 1KLR (EP) 749, the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

5. Therefore, this court will proceed limited to an issue of the law that arises as no evidence can derive from the submissions. As stated by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

6. The Applicant is the Petitioner. She is the mother of the Respondent who is also a Protestor in these proceedings. Judgment was delivered on 7.10.2008. The judgment related to the protest proceedings filed by the Respondent. The protest proceedings sought to challenge the application for confirmation of grant. A cursory perusal of the judgment of Kasango J dated 7.10.2008 shows that the subject property was not mentioned at all. The Petitioner appealed against this judgment and the appeal was dismissed. I gather these to be key undisputed facts as between the parties.
7. The certificate of confirmation of grant is dated 7.10.2008, the date of the judgment. It displayed the bequest to the beneficiaries of the deceased and one of them was LR No. Laikipia/Tigithi/Matanya Block 3 (Matanya Centre)/638 given to the Respondent.
8. There must be basis to interfere with a judgment. The basis herein appears to be review. Review in Law of Succession Act is guided by Order 45 of the *Civil Procedure Rules*. It is premised on a mistake or error apparent on the face of the record or discovery of a new matter of fact or evidence that could not have been, with due diligence, discovered at the time of the proceedings. In re estate of *Charles Kibe*



Karanja (deceased) [2015] eKLR where Musyoka J. stated the following on Section 74 of the Law of Succession Act and discovery of new assets:

“If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of Court orders is not directly provided for in the Law of Succession Act and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure Rules.....

Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the Court has confirmed the grant or a heir or survivor of the deceased who had previously been unheard of materializes after distribution, the Court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.....

New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November, 2006 so as to include the discovered assets and to distribute them. It is only after review or revision of the said orders that an altered certificate of confirmation of grant can issue.”

9. Before this court is a disguised plea for review. When the Petitioner chose to appeal, she lost the chance to review. One can only either review or appeal. This is supported by Order 45 of the Civil Procedure Rules which provides for Review and it states as follows:

- “(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) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

10. The facts also do not support review. Either, there is no direct challenge on the Certificate of Confirmation of Grant before this court as to cause justification for interfering with the bequeathal on LR No. Laikipia/Tigithi/Matanya Block 3 (Matanya Centre)/638 within the meaning of Section 76 of the *Law of Succession Act*. Litigation must come to an end. That is the foundation, that settled matters should remain as settled and so the basis for res judicata. In the Indian Supreme Court case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789 it was stated;

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue”.

11. The above position was informed by the principle of finality which is hinged on the public interest policy that litigation must come to an end. Bosire, J.A in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2007] eKLR succinctly described the principle as follows:

“This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down.

12. Further, the finality principle dealt with the all-too human predilection to keep trying until something gives. This was stated by the Court of Appeal in *William Koross v Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR as follows:

The philosophy behind the principle of res judicata is that there has to be finality; Litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

13. The Petitioner is therefore trying to re-litigate, re-agitate and re-cavass matters that were settled with finality in respect of the Certificate of Confirmation of Grant, having appealed and lost in the appeal. There is no formal application challenging the impugned Grant herein and I have no authority to interfere with it. The lamentations by the Petitioner are steered towards urging me to set aside the judgment simply because she disagrees with it. Clearly that would amount to me sitting on an appeal against my own judgment and the Court of Appeal decision which is beyond my mandate, and an adventure so repulsive and precarious to law and justice as not to be countenanced or even imagined. In that regard, the Court of Appeal in *Daniel Lago Okomo v Safari Park Hotel Ltd & Another* [2018] eKLR expressed as doth:

“We do not review judgments just because a losing litigant is unhappy and despondent. We have no jurisdiction to do so.”



14. The parties herein display the reality that family rivalry and distrust is a normal trend among families in the quest to establish their boundaries to their inheritance following the demise of deceased property holder. Factions grow among families with antagonistic forces among members of the same family and which are manifest in the thirst for keeping certain members of the family out of inheritance or within dismal ranges of mounts on the bounds of the estate. What such parties forget is that inheritance is a matter of right and one cannot exclude the other. Even a parent cannot exclude their most detested child from inheritance as a matter of law unless all indications justify such exclusion. See *Re Sigsworth* (1935) in which the *English Administration of Justice Act 1925* was interpreted using the wider approach to not allow a son who murdered his own mother to inherit where no will was established as this would bring the absurd result for rewarding homicide.

15. I have said enough to rest this case. The Petitioner's application is dismissed in limine.

16. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

17. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

18. Due to the litigious conduct of the Petitioner, the Petitioner will meet the costs of these proceedings assessed at Ksh. 35,000/= payable to the Respondent within 30 days and in default execution do issue.

Determination

19. In the upshot, I make the following orders:

- a. The Petitioner's attempt to review the Judgment of the court dated 7.10.2008 is hereby dismissed.



- b. Due to the Petitioner's litigious conduct, the Petitioner will meet the costs of these proceedings of Ksh. 35,000/= payable to the Respondent within 30 days, and in default execution do issue.
- c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF MARCH, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Mwai for Mr. Gori for the Applicant

Mr. Kiminda for the Respondent

Court Assistant – Michael

