In re Estate of Yunis Ali (Succession Cause 1362 of 2006)
[2025] KEHC 9306 (KLR) (Family) (27 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9306 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 1362 OF 2006

PM NYAUNDI, J

JUNE 27, 2025

IN THE MATTER OF THE ESTATE OF YUNIS ALI

RULING

Introduction

1. By application dated March 12, 2025, the Applicant herein seeks that the Court review and set aside its orders of 12th February 2025, referring the matter to the Kadhi's Court for hearing and determination. It is submitted that pursuant to the ruling of Hon Kimaru J (as he then was) delivered on 28th October 2015, it is the High Court that should dispense with the Summons for confirmation.

2. The Application is brought pursuant to Order 45 Rule 1, Order 51 Rule 1, Order 9 Rule 9 & 10 of the Civil Procedure Rules, Sections 1A,1B,3A & 63 (e) of the *Civil Procedure Act* Chapter 21 of the Laws of Kenya, and all the other enabling provisions of the law and was supported by a sworn affidavit by the 3rd Respondent of even date. He filed a further affidavit sworn on 14th April 2025.

3. The 1st and 4th Respondents opposed the application vide a replying affidavit dated 22nd April 2025. The Applicant, Abdi Kadir Yunis filed a Replying Affidavit dated 9th April 2025.

Analysis And Determination

4. 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."

5. 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."

6. 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. 5. 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) ..."

7. Order 45 provides for three circumstances under which an order for review can be made. These are, 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.

8. The 2nd and 3rd Respondents argue that the court made an error apparent on the face of the record by referring the matter back to the Kadhi's Court instead of proceeding with the matter as directed by Honourable Justice Kimaru J (as he then was).

9. An error apparent on the face of the record was defined in Batuk K. Vyas v Surat Municipality AIR (1953) Bom 133 thus:

> No error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it...

10. In making an examination as to whether there is an error apparent on the face of the record, the court must be quick to draw a parallel between a decision that is merely erroneous in nature and an error that is self-evident on the face of it. A review application must confine itself to the scope and ambit of Order 45 rule 1 lest it mutates into an appeal. A misdirection by a judicial officer on a matter of law cannot be said to be an error apparent on the face of the record.

11. In the case of Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173 the court defined an error apparent on the face record, thus:

> An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

12. In the instant case I found that the applicable law in the administration of the Estate of the deceased would be Islamic law, this is in line with Section 2 (3) and (4) of the *Law of Succession Act*, which provides-

Section 2 Application of the Act

(1) .....

(2) .....

(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.

13. I considered the will of the deceased, in my view there is nothing to suggest that by setting up the trust the deceased intended to remove himself from the application of Islamic Law. The issue

for determination is whether or not the Estate is to be distributed in accordance with Islamic Law. In referring the matter to the Kadhi's Court, I sought their Counsel on how the Estate would be distributed in accordance with Islamic Law. Having received the direction of the Kadhi, I am now in a position to decide on the distribution of the Estate. I take the view that the Hon. Judge in his ruling did not oust the application of Islamic Law to the determination on how the estate would be distributed.

14. For this reason, therefore, I am not convinced that there is an error apparent on the face of the record in this case. What is being raised by learned counsel for the applicant touches on the decision made by this court based on the MY interpretation of the law. The decision to refer the matter to the Kadhi's Court was to expedite this matter which has been sitting in court for almost 19 years.

15. In light of the foregoing the Application dated March 12, 2025 is dismissed.

16. There shall be no order as to costs.

It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 27th DAY OF JUNE, 2025.

P .M NYAUNDI

HIGH COURT JUDGE

In the presence of:

Mrs. Owino for Applicant

Ms. Said for 1st & 4th Respondent

Ms. Khadija for Applicant/Respondent

Fardosa Court Assistant