



REPUBLIC OF KENYA



**In re Estate of Samuel Michael Ndirango (Deceased) (Succession Cause 65 of 2018) [2024] KEHC 8095 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8095 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE 65 OF 2018**

**A MSHILA, J**

**JUNE 28, 2024**

**IN THE MATTER OF THE ESTATE OF SAMUEL MICHAEL NDIRANGO (DECEASED)**

**RULING**

1. Before court are two applications. The Summons dated 8<sup>th</sup> December, 2022 and brought under Article 159(2) (d) of *the Constitution* of Kenya; Sections 1A, 1B and 3A of the *Civil Procedure Act*; Section 35 of the *Law of Succession Act* Cap. 160; Rules 49 & 63 of the *Probate and Administration Rules* and Rule 40 of the *Civil Procedure Rules* and all other enabling provisions and the Notice of Motion dated 17<sup>th</sup> January, 2023 and brought under Section 80, 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, Order 12 Rule 7 and Order 45 Rules 1,2 and 3 of the *Civil Procedure Rules*.
2. In the first application, the Applicant sought for orders that this Honourable Court be pleased to order that the funds held in Equity Bank Account No. 1080279250835 in account name Sylvester, George, Martin and Grace Ndirango be released to account no. 108029607725 in the name of Grace Njeri Ndirango also held at Equity Bank.
3. The application is premised on the grounds that the Applicant seeks release of funds held at Equity bank account number 1080279250835 in the name of Sylvester, George, Martin and Grace Ndirango to her account number being 108029607725 in the name of Grace Njeri Ndirango for her family and personal use as per the directions and orders of the judgment of the court delivered on 5<sup>th</sup> August, 2022.
4. The application is supported by the affidavit of GRACE NJERI NDIRANGO the applicant herein. She deposed that she is entitled to the net interest of the estate which includes the rental income of the deceased's properties as per the judgment delivered on 5/8/2022. That due to the said judgment, the beneficiaries opened a joint account to deposit the rent collected from LR 209/3299/2 being account number 1080279250835 at Equity bank in the names of the administrators. She deposed that due to the financial burden she seeks release of the said funds to her personal account being account number 108029607725 in the name of Grace Njeri Ndirango.
5. In his replying affidavit sworn on 14<sup>th</sup> April, 2023, GEORGE GATHU NDIRANGO objected to the prayers sought by the Applicant. He deposed that the funds contained in Equity bank account number 1080279250835 were never distributed by this court as such the Applicant is not entitled to the same.



Further, he deposed that there was no proof that the Applicant is the guardian to the grandchildren who are now adults as such entitled to the share of their deceased parents who were beneficiaries.

6. In the second application, the Protestors/Objectors sought for orders that:-
  - a. The partial Judgment of this Honourable Court made on 5<sup>th</sup> August 2022 be reviewed, varied and/or set aside as the same is necessitated by information that the Honourable Court was not privy to at the time of pronouncing the partial judgment.
  - b. The partial Judgment of this Honourable Court made on 5<sup>th</sup> August, 2022 be reviewed, varied and/or set aside were necessary before the same is confirmed as being final.
  - c. The reviewed partial Judgment be adopted as a final Judgment of this Honourable Court upon compliance with directions given therein.
7. The application is based on the grounds that at the time of the judgment, the Court as well as the counsel for the Objectors, were not aware of pertinent information that would impact the pronouncement of the final judgment herein. That counsel for the Applicants failed to provide all the information in their possession as such the judgment could be lacking for want of sufficient information being availed to it as such a review is necessary.
8. MWANIKI NJUGUNA an advocate in conduct of this matter deposed that as the Protestors endeavoured to fulfil the conditions set forth in the partial grant, GRACE NJERI NDIRANGO vide a letter was demanding monies held at Equity bank to her personal account. That he was not aware of the said account and the Applicants did not disclose the same to the court thereby misleading the court. He sought for clarification of the partial judgment as the 2<sup>nd</sup> wife was demanding for interest not awarded to her to the detriment of the Protestors.
9. GRACE NJERI NDIRANGO the Petitioner herein in her replying affidavit filed on 29<sup>th</sup> May, 2023 deposed that the Protestors have not clearly stated what new information they were not aware of at the time of filing the objection. That the court considered all the evidence before making its determination as such the issues raised herein are issues for consideration in an appeal.
10. The applications were canvassed by way of written submissions.

#### **PETITIONER'S WRITTEN SUBMISSIONS**

11. The Petitioner submits that the Objectors were aware of the joint account at Equity bank for deposit of rental income as the same is in the names of the administrators herein. The Petitioner, prays that the funds be released to her in conformity with the court's judgment as she is currently burdened with bills and additional expenses of catering for her grandchildren. In regard to review, it was submitted that no new evidence has been raised in the Objector's application. The said joint account is registered in the names of all the administrators including the Objectors as such the Objectors cannot claim that they are unaware of the said account. Further, the Petitioner submitted that the Objectors have not established any error apparent on the face of the record to cause the court to review its judgment. In any case, the Objectors were said to have filed their Notice of Appeal as such the instant application was said to be forum shopping. Reliance was placed in the case of In Evan Bwire vs Andrew Nginda Civil Appeal No. 103 of 2000 Kisumu.

#### **OBJECTORS' WRITTEN SUBMISSIONS**

12. The Objectors submit that the court was not aware of the funds in the joint account when it pronounced its judgment. The amounts being claimed were said to form part of the deceased's estate



and the same is yet to be adjudicated as such the court should not condone the intermeddling. It was submitted that the applicant cannot lay claim to the entire amount and that she has not shown a prima facie case with a probability of success. That no harm has been shown that will be suffered by the applicant and/or prejudice that cannot be compensated by way of damages. The court was urged to dismiss the application dated 8<sup>th</sup> December, 2022 with costs.

13. In regard to the Objectors' application dated 17<sup>th</sup> January, 2023, the court was urged to first adjudicate on the funds held in the joint account as the partial judgment did not extinguish and/or terminate rights accruing to the deceased's first wife as such the same should be reviewed.

### **Issues for determination**

14. Having considered the two applications, the responses thereto and the respective submissions, the issues arising for determination are;-
  - a. Whether the funds contained in Equity Bank account No. 1080279250835 were considered in the partial judgment; and whether the funds should be released to the Applicant.
  - b. Whether the partial judgment should be reviewed.

### **ANALYSIS**

15. The Applicant herein sought for orders that this Honourable court be pleased to order that the funds held in Equity Bank ACCOUNT NO. 1080279250835 in account name Sylvester, George, Martin and Grace Ndirango be released to account no. 108029607725 in the name of Grace Njeri Ndirango also held at Equity Bank for her family and personal use as per the directions and orders of the judgment of the court delivered on 5<sup>th</sup> August, 2022.
16. The application is opposed by one of the administrators in that the funds contained in Equity bank account number 1080279250835 were never distributed by this court as such the applicant is not entitled to the same.
17. The applicant submits that a joint account was opened at Equity bank to deposit the rent collected from LR. 209/3299/2. The said account is in the names of all the administrators. The applicant seeks the release of funds in conformity with the judgment of the court.
18. A perusal of the court's judgment dated 5<sup>th</sup> August, 2022, shows that the court carried out partial distribution of the estate. In regard to Title no. LR. 209/3299/2, the court directed that the same should be sold and the proceeds shared at the ratio of 20:80 as between Grace Njeri Ndirango and the other beneficiaries respectively. However, the court did not adjudicate on the funds held in Equity Bank account no. 1080279250835 in the name of Sylvester, George, Martin and Grace Ndirango which account was opened during the subsistence of the matter herein for the deposit of the rent collected from Title no. LR. 209/3299/2.
19. Grace Njeri Ndirango seeks for the release of the said funds to her personal account on the strength of the said court's judgment where it was held that she is entitled to the net estate of the estate and that the net estate includes the rental income of the deceased's properties.
20. Be that as it may, this court finds that the prayer for release of funds is premature given that the judgment of the court only partially distributed the estate of the deceased. Any asset left out during the partial distribution should await the final distribution of the estate.
21. In regard to review as sought by the Objectors, the applicant submits that there is no discovery of new evidence and/or error apparent on the face of the record.



22. The Objectors on the other hand submit that the court was not aware of the funds in the joint account as such the applicant cannot lay claim on the entire amount. The applicant's claim of being a guardian was dismissed as the grandchildren were said to be adults who will share in their deceased's parents share. The court was urged to review the partial judgment and adjudicate on the funds held in the joint account.
23. The relevant provisions in relation to the question of review are provided under Order 45, Rule 1(1) of the [Civil Procedure Rules](#), 2010 as well as Section 80 of the [Civil Procedure Act](#) Cap. 21 Laws of Kenya, thus:
- “ 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.”
24. From the foregoing provisions and especially Order 45, Rule 1(1) of the [Civil Procedure Rules](#) the following are the grounds upon which an order for review can be granted:
- a) the discovery of new and important matter or evidence, or
- b) some mistake or error apparent on the face of the record, or
- c) any other sufficient reason.
25. Having perused the judgment of the court delivered on 5<sup>th</sup> August, 2022, this court is satisfied that the trial court was not made aware of the funds contained in the joint account at Equity Bank account no. 1080279250835 and is satisfied that the trial court did not consider it when it pronounced its partial judgment; and this court finds that there is discovery of new material in satisfaction of the grounds for review of the partial judgment.
26. The upshot, therefore, is that the Applicants application is found to be premature and the funds cannot be released at this stage. Whereas the Objectors application is found to have merit.

## **FINDINGS AND DETERMINATION**

27. This court makes the following findings and determinations;
- SUBPARA i.
- This Court finds the Applicant's application dated 8<sup>th</sup> December, 2022 to be premature and it is hereby struck out;
- ii. This Court finds the Objectors' Notice of Motion dated 17<sup>th</sup> January, 2023 to have merit and it is hereby allowed.



- iii. The administrators are hereby directed to apply for confirmation of the FULL Grant and to include the funds deposited in Equity Bank account no. 1080279250835 and to also include the proposed mode of distribution of these funds.
- iv. Each party to bear their own costs
- v. Mention on 1<sup>st</sup> October, 2024 to fix a date for Confirmation of Grant

Orders Accordingly.

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 28<sup>TH</sup> DAY OF JUNE, 2024**

**A. MSHILA**

**JUDGE**

In the presence of;

Mourice – Court Assistant

For Applicants Mugure h/b for Muriithi for the Petitioner

Objectors – Mwaniki for the Objectors

