



**In re Estate of Mbogho Muthage (Deceased) (Succession Cause
1190 of 2002) [2024] KEHC 10473 (KLR) (27 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 1190 OF 2002
LM NJUGUNA, J
AUGUST 27, 2024**

**IN THE MATTER OF THE ESTATE OF MBOGHO MUTHAGE
(DECEASED)**

BETWEEN

RICHARD MBOGHO MUTHAGE APPLICANT

AND

GRACE MABUTI MURIUKI RESPONDENT

RULING

1. The applicant filed the summons dated 25th April 2024 seeking the following orders:
 - a. That this honourable court be pleased to review the orders issued vide its ruling delivered on 24th April 2024 on the summons for revocation dated 24th April 2016 and do consider to issue an order in terms of prayer 2 thereof; and
 - b. That costs be provided for.
2. The applicant stated that the court, in its decision to revoke the grant and set aside the certificate of confirmation of grant, omitted to determine the second prayer of the summons dated 24th April 2016, despite stating that the application had merit. That the said prayer sought an order to the land registrar to revoke transmission and cancel titles which had already been transmitted to the respondent following revocation of the grant. It was his case that there is an error apparent on the face of the record being that the court failed to determine the issue raised and he urged the court to review its judgment.
3. The respondent filed grounds of opposition to the application, stating that the court made a final determination with all factors in mind. That the application is not ripe for review since no new evidence has been placed before the court and that the appellant should have filed an appeal and not a review application.



4. The court directed the parties to file their written submissions but only the applicant complied.
5. The applicant filed his written submissions in which he stated that following revocation of the grant, the court should have made an order for cancellation of titles in order to give effect to the orders it gave. He submitted that review is provided for Under Rule 63 of the Probate and Administration Rules which allows the court sitting as a Succession Court to apply Order 45 Rule(1)(b) of the Civil Procedure Rules on the factors to be considered by the court in review.
6. He relied on the case of *Josiah v. Nyaga (Civil Appeal 34 of 2021)* [2023] KEHC 2054 (KLR) and stated that failure by the court to determine and/or issue prayer 2 of the summons for revocation is an error apparent on the face of the record and that the same can be remedied through the review application herein. That since the summons had been found to be entirely meritorious, it is prudent for the court to review its orders and determine the said prayer which will not require elaborate argument on substantive issues. He further relied on the Court of Appeal decision in the case of *Shanzu Investments Ltd v. Commissioner of Lands (1993)* eKLR and stated that the court may review its findings on any other sufficient reason not necessarily comparable to Order 45 Rule 1 of the Civil Procedure Rules.
7. Further reliance was placed on Article 165(3)(a) of *the Constitution* and he urged that this court is bestowed with jurisdiction to exercise its discretion accordingly. He argued that this court, though sitting as a family court, has authority to issue an order for cancellation of titles as was reasoned in the cases of *Santuzza Bilioti Alias Mei Santuzza (Deceased) v. Giancarlo Falasconi* [2014] eKLR, *In Re Estate of Leah Wanguii Nding'uri (Deceased)* [2020] eKLR, *Salome Wambui Njau (Suing As The Administratrix Of The Estate Of Peter Kiguru Njuguna (Deceased) v. Caroline Wangui Kiguru, Elc* (2013) eKLR, *Estate Of Moffat Mariga Ng'ethe (deceased)* HCSC No. 1665 of 2008, *Munyasya Mulili & 3 Others v. Sammy Muteti Mulili* [2017] eKLR among others. He urged the court to order cancellation of the titles to enable the estate to be distributed since the grant issued to the respondent was already revoked and the certificate of confirmation set aside.
8. The issue for determination is whether or not the court should grant the orders sought.
9. A party may seek for review of a finding of the court on the strength of section 80 of the *Civil Procedure Act* and Order 45(1) of the Civil Procedure Rules, which applies in succession cases. The latter provides:
 - (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.”
10. That is to say, there are only 3 factors for the court to consider before reviewing its findings, these are:
 - a. 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; or



- b. That there has been some mistake or error apparent on the face of the record; or
 - c. Any other sufficient reason.
11. The applicant has argued that the court, in its ruling delivered on 24th April 2024, failed to determine the 2nd prayer of the summons for revocation, even though it found the application to be meritorious. The respondent opposed the application stating that the applicant has not found new evidence warranting review of the findings of the court. It is my view that the applicant makes a valid case because the judgment of the court did not include an order with regards to prayer 2 of the summons for revocation. In as much as there is no new evidence, this is a slip by the court, which may be cured through review of the judgment.
12. Through the said summons for revocation, the applicant sought for orders that:
- 1. The grant issued to the respondent be revoked;
 - 2. The resultant registration of L.R. Ngariama/Thirikwa/642 arising from the said grant be revoked; and
 - 3. Costs of the application be provided for.
13. After the court gave its reasons for the decision, it ordered thus:
- a. The grant issued to the respondent on 23rd January 2006 is hereby revoked;
 - b. The certificate of confirmation issued on 13th October 2006 is hereby set aside; and
 - c. There shall be no order as to costs considering the relationship between the parties
14. From a look at the judgment and the orders therein, it is evident that prayer 2 is directly linked to prayer 1 of the summons and it should have been granted through the judgment. In my view, the parties need not make elaborate arguments on the issue because the property was already found to be a gift inter vivos and was excluded from the estate of the deceased. This means that the orders for cancellation of registration should have followed the order for revocation of the grant.
15. Therefore, for the foregoing reasons, I find that the application has merit. Prayer 2 of the summons for revocation is hereby granted and the following orders shall issue:
- a. Following revocation of the grant issued to the respondent, the Land Registrar is hereby ordered to cancel and/or revoke resultant registration of L.R. Ngariama/Thirikwa/642 resulting from the now revoked grant and the same reverted to the name of the Applicant; and
 - b. Each party to bear its own costs of the application.
16. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF AUGUST, 2024.

L. NJUGUNA

JUDGE

..... **for the Applicant**

..... **for the Respondent**

