



**In re Estate of Mutisya Mwia (Deceased) (Succession Cause 778 of 2010)  
[2024] KEHC 15198 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15198 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 778 OF 2010**

**MW MUIGAI, J**

**NOVEMBER 28, 2024**

**IN THE MATTER OF THE ESTATE OF MUTISYA MWIA (DECEASED)**

**BETWEEN**

**MANTHI MUTISYA ..... PETITIONER**

**AND**

**IKANZA MUTISYA ..... RESPONDENT**

**RULING**

1. This Court by Ruling delivered on 22/11/2023 considered pleadings filed by parties, the Witness Statements and written Submissions and the issue before the Court was mainly just and equitable distribution of the deceased’s estate.

2. The Court orders were as follows;

Applying Section 40 LSA; that the 1<sup>st</sup> house consists of 1 son and 2<sup>nd</sup> house 6 children (2 deceased) therefore 7 units; equal/equitable sharing of the properties that comprise of the estate of the deceased.

Therefore, wherever each of the beneficiaries reside have developed and have permanent structures each shall remain on their spot and possibly be added cumulatively ½ acre.

The sold properties shall be taken into account in the distribution as part of each seller’s beneficial interest.

Each Party to bear own Costs

Any Aggrieved Party may apply

**Chamber Summons Dated 11<sup>th</sup> December 2023**

3. Vide chamber summons date 11.12.23 the applicant sought orders as follows



- a. Spent
  - b. That the court be pleased to grant stay of execution of the judgement/ruling entered herein on 22.11.2023 as against the petitioners/ applicants pending the hearing and determination of the application
  - c. That the ruling/judgement delivered by the Justice M.W.Muigai LJ on 22.11.23 be reviewed and or set aside
  - d. That the grant of letters of administration intestate made to the petitioners and issued on 30<sup>th</sup> March 2011 in respect of the estate of the deceased be revoked and or annulled
  - e. That the petitioners herein be granted leave to file petition for grant of probate administration testate.
  - f. Any other orders as the honourable court may deem fit
  - g. The cost of the application be provided for
4. The application was supported by the affidavit sworn on 11<sup>th</sup> December 2023 by Manthi Mutisya who stated that among the documents they had, three were actually Wills hence the deceased died intestate and that they erroneously filed for petition for grant of letters of administration intestate instead of petition for grant of probate administration testate.
  5. That it was true that according to the wills, it was the deceased's wishes for his estate to be distributed among his two wives namely Kaswii Mutisya and Nzula Mutisya (both deceased) and that they have been dealing with the deceased estate as per his wishes in to units before his demise, after his demise and up to date.
  6. That some of the properties have been sold to 3<sup>rd</sup> parties by individual family unit in agreement and in line with the deceased's wills and that in the circumstances it will be difficult to enforce.
  7. That the court allows them to introduce the new evidence(wills) review and or set aside the ruling or judgement, revoke/ annul the grants of letters of administration intestate and grant leave to file grant of probate administration testate

#### **Grounds Of Opposition Dated 22.06.2024**

8. The respondent filed his grounds of opposition on 28.06.24 where he stated that the applicant's chamber summon does not meet the legal threshold in order 45 Rule 1 of the Civil Procedure Rules to warrant review and setting aside of the ruling and that the purported new evidence offends section 86 of the *Civil procedure Act* and is not admissible in evidence.
9. That the annexure marked MM1 is strange to the beneficiaries of the estate and the same doesn't constitute the last will or will of Mutisya Mwia (deceased). that the application is a desperate U turn made by the applicant 14 years later simply to run away from the provisions of section 40 of the *law of succession act*. He urged the court that the application was unmerited and thus be dismissed with costs.

#### **Applicant's Submissions Dated 20.08.2024**

10. The applicant submitted that the issues for determination were whether the orders sought and the grounds outlined by the petitioner/applicant had met the threshold for review, whether the court should revoke /annul the grant of letters administration intestate and instead grant the applicant leave to file grant of probate testate and who should bear the cost of the application.



11. On review reliance was placed on section 80 of the *Civil Procedure Act* Cap 21 and order 45 of the Civil procedure Rules 2010 and the case of Republic vs Public Procurement Administrative Review Board & 2 others [2018]
12. It was submitted that the applicant is in possession of wills which he didn't produce due to lack of familiarity with the legal instruments which resulted to petition for grant of letters of administration intestate instead of grant of probate testate and that this realization amounts to a discovery of new evidence which was not within the knowledge of the applicant and thus qualifies for review under Order 45.
13. Reliance was placed in the case of Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited [2014]
14. It was submitted that the oversight by the petitioner /applicant to produce the wills in question and filing for grant of administration instead of grant probate should not be visited upon the innocent applicant since the inadvertent mistake is fit for purpose of correction by review.
15. The wills produced by the applicant are very detailed and satisfy all the requirements of validity contemplated under LSA where the testator has age, capacity, was mentally sound and was not in any way coerced as the will was made before multiple witnesses who also witnessed the testator's compilation and signing of the will. It was further stated that the wills being in kikamba they do not negate the validity.
16. Reliance was placed on the case of Pancras T. Swai vs Kenya Breweries Limited [2014] eKLR
17. It was submitted that in reviewing the judgement the court should revoke/annul the grants of letters of administration intestate in favour of the applicant and relied on Section 76 of the LSA and the case of Re Estate of Prisca Ong'ayo Nande (deceased) [2020] e KLR.
18. It was submitted that the relevant grounds warranting revocation of the grant of letters of administration intestate are that the proceedings to obtain the grant were defective in substance and the said grant was obtained by means of an untrue allegation of fact essential in point of law
19. On cost reliance was placed on section 27 of the *Civil Procedure Act* and the case of Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] Eklr

#### **Respondent's Submissions Dated 22.06.2024**

20. It was submitted that the issues for determination were whether the ruling delivered on 22.11.23 should be reviewed and or set aside and whether the grants for letters of administration intestate made on 30<sup>th</sup> March 2011 should be revoked and or annulled.
21. Reliance was made of section 80 of the *Civil procedure Act* and Order 45 of the civil procedure rules 2010 which provides grounds for review.
22. It was submitted that the applicant had failed to discharge the burden of proof and had not adduced any new or important evidence. The documents marked as MM1 are not admissible in evidence
23. Secondly the applicant doesn't plead that he did not have the custody and knowledge of the alleged documents. He relied on the case of Turbo Highway Eldoret Limited vs Synergy Industrial Credit Limited [2016] and the case of D.J.Lowe & Company Ltd v Bonguo Indosuez, .
24. It was submitted that the application had not disclosed any new and important evidence to warrant the review of the ruling of the court



25. On revocation of the grant, reliance was placed on section 76 of the LSA and the case of Re Estate of Prisca Ong'ayo (deceased) [2020]
26. It was submitted that the documents marked as MM1 do not constitute a will in accordance with the LSA and that the applicant had not discharged his burden of proof to establish that the documents constitute of a will.

### **Analysis and Determination**

27. I have considered the pleadings and submissions placed in court and the issue that arises for determination is whether the application for review is merited

28. Order 45 rule 1(b) of the Civil Procedure Rules, provides 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 appellants, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

29. The foregoing provisions are based on section 80 of the *Civil Procedure Act* Cap 21 Laws of Kenya which states as follows:

“Any person who considers himself aggrieved—

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

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

30. The applicant in his application stated that among the documents they had, three were actually wills hence the deceased died intestate and that they erroneously filed for petition for grant of letters of administration intestate instead of petition for grant of probate administration testate.



31. That the court allows them to introduce the new evidence(wills) review and or set aside the ruling or judgment, revoke/ annul the grants of letters of administration intestate and grant leave to file grant of probate administration testate
32. Section 11 of the *Law of Succession Act* sets out the requirements for the validity of a written will as follows:
  - a. the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
  - b. the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
  - c. the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."
33. Without thoroughly interrogating the contents of the document marked MM1 which is allegedly a will according the applicant, too many questions arise as to the timing of this discovery of this document not to mention that it is the same applicant who petitioned for grant of letters of administration intestate on 3<sup>rd</sup> November 2010.
34. From my reading of Order 45 review can only be allowed 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. It is obvious that there is unreasonable delay in bringing the application to review and even the new discovery as alleged by the applicant is questionable. The deceased died on 20/6/2005.
35. The Applicant herein Manthi Mutisya is one of Administrators who filed Petition for letters of Administration intestate on 3/11/2010 and attached copy of Death Certificate and Chief's letter setting out the beneficiaries of estate of the deceased. On 18/11/2021 the Applicant filed Amended Summons for Confirmation of Grant and Protests were filed against the Proposed mode of distribution of deceased's estate culminating with the impugned Ruling of 22/11/2023.
36. It is worth noting with respect there can only be 1 valid Will of the deceased and not 3 as proposed hereinabove and the Applicant did not clarify if the instant application was a review and/or revocation of grant.

## **Disposition**

1. From the above reasons, the Application is dismissed



2. Each party to bear own Costs as it is a family matter.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 28/11/2024 AT MACHAKOS  
HIGH COURT. (VIRTUAL/ PHYSICAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

