



**In re Estate of Sawe Maina (Deceased) (Succession Cause  
350 of 2015) [2023] KEHC 307 (KLR) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 307 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 350 OF 2015  
RN NYAKUNDI, J  
JANUARY 27, 2023**

**BETWEEN**

**PAUL MAINA ..... 1<sup>ST</sup> APPLICANT  
GILBERT KIPLIMO ..... 2<sup>ND</sup> APPLICANT  
ISAAC MAINA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**ESTHER JEPSONGOK TOO ..... 1<sup>ST</sup> RESPONDENT  
SUSAN JEPTEKENY MAINA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant approached this court under certificate of urgency vide summons dated November 152022 seeking the following orders;
  1. That this application be certified urgent and directions be given in the first instance.
  2. That in the interim the court pleased be stay of further proceedings and in particular arrest the delivery of ruling and or judgement scheduled for December 13, 2022 in this matter pending hearing and determination of this application *interpartes*.
  3. That the court do make a visit to the *locus in quo* being as L R 8518/5 before I delivering its judgement.
  4. That the court do give and or make directions that the parties be allowed to make oral and or highlight submissions.
  5. That costs of application be provided for.



2. The application is premised on the grounds set out therein and the contents of the supporting affidavit sworn in support of said application.

### **Resolution**

3. In short this matter has suffered the fate of some delay in delivering the outcome of the material placed before me by the parties. This gave rise to the disruption by the applicant as a mover of the motion to arrest the judgement and have the proceedings reopened as canvassed in the application. The jurisdiction of the court on such matters is exercisable pursuant to the provisions of section 1(A) 1(B), 3, 3(A) of the Civil Procedure Act as read in conjunction with rule 73(i) of the Probate and Administration Rules.
4. The keystone principle in determining whether the applicant should be allowed to reopen the case has always been whether the respondent will suffer prejudice in the legal sense. A session judge's exercise of discretion to permit the applicants case to be reopened must be exercised judicially and should be based on ensuring that the interests of justice are served. It is settled law that a courts discretion to allow a party to re open his or her case must be compelling and such discretion ought to be exercised in favour of a party where through inadvertency the aggrieved party failed to adduce essential elements of the subject matter in dispute. This is what the court in *R vs Huluszkiw (1962)*, 37 C R 386 (Ont C A). In which it was observed as follows that: ".....It would be unfortunate if the ends of justice were defeated by the inadvertence of counsel in failing to prove what is essentially a matter of form in relation to procedure and provided always that the calling of further evidence, whatever its character, is for an honest purpose and that there are no unfair consequences to the opposite party so far as the presentation of that case is concerned. [Emphasis added.]
5. In short the obligations arising from the courts final judgement or ruling fall under three main categories: just satisfaction, individual measures and general measures as a public policy guideline. So in my view it is not done until it is done. Therefore, the re-examination or re-opening of proceedings represents a manifestation of the classical principle of restitution in integrum, which aims at correcting and error or violation likely to occasion prejudice or injustice in the category of individual rights.
6. In the light of the information summarised in the application of the applicant I am persuaded to grant the orders by inviting the parties to re-canvass the justiciable issues raised by the applicant. In that framework the application by the applicant be brought to the attention of the respondents and other beneficiaries to file respective rejoinders according to the law. Meanwhile the decision of the court stands arrested awaiting further orders and directions from this court during the status conference involving all the disputant to this succession claim. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 27<sup>TH</sup> DAY OF JANUARY 2022.**

**R NYAKUNDI**

**JUDGE**

