



**In re Estate of Stephen Marete M'Mugwika (Deceased) (Succession Cause 692 of 2013) [2023] KEHC 2554 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2554 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 692 OF 2013  
EM MURIITHI, J  
MARCH 28, 2023**

**IN THE MATTER OF THE ESTATE OF STEPHEN MARETE M'MUGWIKI (DECEASED)**

**BETWEEN**

**ANASTACIA BK ANAMPIU ..... PETITIONER**

**AND**

**MARY GACHERI MARETE ..... 1<sup>ST</sup> PROTESTOR**

**SUSAN KANANU MARETE ..... 2<sup>ND</sup> PROTESTOR**

**SERAH KAIRUTHI MARETE ..... 3<sup>RD</sup> PROTESTOR**

**RULING**

1. By Summons under certificate of urgency dated February 9, 2022 pursuant to sections 45(1) and (2) and 83 (H) of the *Law of Succession Act* and rules 49 & 73 of the *Probate and Administration Rules*, the protestors seek that:
  1. Pending the hearing and determination of this application interpartes, this Honorable Court be pleased to issue a temporary injunction restraining the petitioner whether by herself, servants, agents, servants, nominees or otherwise howsoever from carrying out any works, developments transferring or otherwise alienating or disposing or in any manner interfering with the protestor's quiet occupation and possession of the property comprised land parcel No Kiirua/Ruiri/284 pending the hearing and determination of this application.
  2. Pending the hearing and determination of this application interpartes, this Honorable Court be pleased to issue a temporary injunction restraining the petitioner whether by herself, servants, agents, servants, nominees or



otherwise howsoever from carrying out any works, developments transferring or otherwise alienating or disposing or in any manner interfering with the protestor's quiet occupation and possession of the property comprised land parcel No Kiirua/Ruiri/284 pending the hearing and determination of this summons.

3. The Honorable Court be pleased to review its judgment of November 29, 2018 and substitute the administratrix herein with Susan Kananu Marete and Mary Gacheri Marete.
  4. The Honorable Court be pleased to review its judgment of 29<sup>th</sup> November 2018 and remove from the distribution Sarah Ntinyari Marete, Isabella Mwendwa Marete and Susan Kananu Marete having already been provided for.
  5. The Honorable Court be pleased to order for any other and better relief for protection of the estate.
  6. Costs of this application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Susan Kananu Marete, the 2<sup>nd</sup> objector herein, sworn on even date. She avers that the deceased herein had 2 wives namely Elizabeth Mukomeru and Anastacia B.K Anampiu. The 1<sup>st</sup> house comprised of Elizabeth Mukomeru - (widow-deceased), James Muriuki Marete - (Son-deceased), Serah Kairuthi Marete - daughter, Mary Gacheri Marete -daughter, Solomon Muriungi Marete - (Son-deceased) and Susan Kananu Marete - daughter while the 2<sup>nd</sup> house comprised of Sarah Ntinyari Marete - daughter, Isabella Mwendwa M'Marete - daughter, Susan Kananu Marete - daughter and Anastacia B.K Anampiu - widow. The deceased intended to settle his 2<sup>nd</sup> wife, the petitioner herein on Land Parcel No 122 Ruiri/Rwarera Adjudication Section, which became Land Parcel No 1494 Ruiri/Rwarera Adjudication Section measuring 5 acres, but he died before he could bring his said intentions into fruition. Upon the death of the deceased herein, Elizabeth Mukomeru, James Muriuki and Solomon Muriungi Marete, the petitioner entered into land parcel No Kiirua/Ruiri/284 despite protests by the protestors and forcefully put up a house there. The petitioner left the 5 acres at Tutua to be occupied by her sons who are not children of the deceased. The deceased had during his lifetime taken up his brother namely Isaac Maingi whom he gave a portion of land parcel No Kiirua/Ruiri/284 and the family of Isaac Maingi comprising of Mutuma, Mwongera and Ntinyari still uses that land. The deceased further gave his brother namely Henry Mungatia a portion of land parcel No Kiirua/Ruiri/284 who built a house for his children namely Muriungi, Penina, Mary Karamuta and his wife Josphine Mungatia there. She avers that the petitioner and her children were provided for by the deceased, and the petitioner should give the children of the deceased 1 acre of the land at Tutua, as she holds the same in trust for them. She accuses the petitioner of intending to sell land parcel No Kiirua/Ruiri/284 to potential buyers yet distribution is yet to happen. She also accuses the petitioner of failing to take out a grant since 2018 thus she lacks the zeal to administer the estate, because she was not provided for in the distribution of the court of 29/11/2018. According to her, the court failed to consider that there were 2 households of the deceased, hence Serah Ntinyari Marete, Isabella Mwendwa and Susan Kananu Marete will have benefitted twice by virtue of the gift inter vivos to the petitioner on L.R No 1494 Ruiri/Rwarera Adjudication Section. She urges that the application has merit and the orders sought are of extreme importance to preserve the estate, and has been brought without unreasonable delay.



3. The petitioner opposed the application vide her replying affidavit sworn on 15/03/2022. She avers that she is the administrator of the estate of the deceased herein. She avers that although the application is disguised as a summons for protection of the estate, it is actually an application for review and re-distribution of the estate of the deceased. In her view, the issues raised herein have already been exhaustively and conclusively litigated in the protest and a judgment passed. She avers that the protestors have not disclosed any error apparent on the face of the record or discovery of new evidence which after the exercise of due diligence was not within their knowledge. She terms the application as a frivolity, a gross abuse of the court process and an afterthought which is only meant to unsettle matters further, as it has been brought 3 years after the judgment was delivered. She accuses the protestors of being uncooperative and taking her before the Njuri Ncheke council of elders, which claim was dismissed as being frivolous. She avers that the reason why the estate property being L.R No Kiirua/Ruiri/284 remains un-administered is because it is encumbered. She avers that the other beneficiaries will be highly prejudiced if the application is allowed.
4. On May 10, 2022, the court issued an order for the status quo to be maintained.
5. The 2<sup>nd</sup> protestor swore a further supporting affidavit on 26/5/2022 in support of the application.

### **Analysis and Determination**

6. The court has analyzed the application, the replying affidavit and the further supporting affidavit, and considers the issue for determination to be whether sufficient cause has been shown to warrant review of the impugned judgment of November 29, 2018.
7. A court can only review its decision upon proof of any of the conditions as listed under Order 45 of the *Civil Procedure Rules* as follows
  - “i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or
  - ii. That there was a mistake or error apparent on the face of the record; or
  - iii. That sufficient reasons exist to warrant the review sought. In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.”
8. On November 29, 2018, the court (A Mabeya J) rendered itself thus:

“In the premises, I hold that Parcel No 1494 Ruiri/Rwarera Adjudication Section was acquired by the deceased for the benefit of the petitioner during his lifetime.....Having come to the conclusion that the deceased had acquired and settled the petitioner on Parcel No 1494 Ruiri/Rwarera Adjudication Section, measuring 5 acres, I find the suggestion of the distribution by the protestor fair and equitable. However, I will distribute the estate taking onto consideration the dependents whom the deceased left behind, his children from both the 1<sup>st</sup> and 2<sup>nd</sup> house who have equal rights to inherit him.”
9. The protestors want the said decision reviewed because the court allegedly failed to consider that the deceased herein had 2 houses, and the children of the petitioner benefitted twice. That issue was already



determined by the court vide its impugned judgment. It is also hardly an issue suitable for review but for appeal on the merits. See *National Bank of Kenya Limited vs Ndungu Njau* [1997] eKLR that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

10. This court further finds that the issues raised herein by the protestors were conclusively addressed by the court in its judgment of November 29, 2018, and, therefore, this court is functus officio, as no valid grounds for review exist. This court is satisfied that no justifiable cause has been shown to justify the review sought.
11. The said judgment of November 29, 2018 may only be challenged through an appeal. As a consequence of denial of the orders of review, the other orders cannot issue.

### **Orders**

12. Accordingly, for the reasons set out above, this court finds that the application dated February 9, 2022 is not well founded and it is dismissed.
13. There shall be no order as to costs.

**DATED AND DELIVERED ON THIS 28<sup>TH</sup> DAY OF MARCH, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

Mr. Kiruai Advocate for the Petitioner.

Mr. Mutuma J. Advocate for the Protestor.

