



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Elisha Nabwayo Inyende (Deceased) (Succession Cause
410 of 1994) [2023] KEHC 2696 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 410 OF 1994
WM MUSYOKA, J
MARCH 24, 2023**

RULING

1. On May 28, 2021, I delivered a ruling herein, where I confirmed the grant. Thereafter, an application was filed dated July 6, 2021, seeking rectification of the certificate of confirmation of grant issued following the orders of May 28, 2021. I heard 13 of the beneficiaries, before I allowed the rectification application of July 6, 2021.
2. The applications that I am called upon to determine are dated September 7, 2021 and September 29, 2021.
3. The application, dated September 7, 2021, is at the instance of Abneri Moses Atwenje Nabwayo. It seeks review of the orders of May 28, 2021, to pave way for distribution of Butso/79, on the basis that the distribution of May 28, 2021 was unfair to him, and that the surrenders were based on malice, with intention to injure his feelings. He avers that he was not aware of the affidavits filed by the daughters. He further avers that the distribution would interfere with the occupation of the land on the ground.
4. The application dated, September 29, 2021, is also by Abneri Moses Atwenje Nabwayo, he seeks that the administrator be enjoined from interfering with his interest in Butso/79. He avers that he has sought leave to appeal out of time in his application of September 7, 2021. He complains that the administrator had brought a surveyor to the ground, without involving him, and that some of his property was destroyed.
5. There is a response to the application, by Charles Otweri Nabwayo, vide an affidavit, sworn on February 26, 2022. He says that the ruling of the May 21, 2021 was after the court had heard the parties, and the applicant herein was one of the applicants in the application which led up to those orders. It is averred that he fully participated in the proceedings, and if he was not satisfied he should have appealed. It is argued that he has not demonstrated an error on the face of the record, nor discovery of new important matter that could not be procured during the hearing. He further avers that the rectification of July 13, 2021 did not alter the ruling of May 28, 2021.



6. The principal application is that dated September 7, 2021, which is for review of the orders of May 21, 2022. The second application is for preservatory orders pending appeal. Review of court orders is sought on the grounds set out in order 45 of the Civil Procedure Rules, which is one of the processes imported into probate practice by Rule 63 of the Probate and Administration Rules. The grounds are error on the face of the record and discovery of new and important evidence.
7. The application of September 7, 2021 is not founded on either of the 2 grounds. There is no allegation that there was an error on the face of the record, which the court is being invited to correct, nor that the applicant has come by important evidence that was not available when the impugned orders were made. Consequently, the application has not been brought within the purview for review of court orders under order 45.
8. The orders sought in the second application are predicated on the orders sought in the application dated September 7, 2021 being granted. I have said above, that a case for review has not been made out. The preservatory orders are, therefore, not available.
9. I do not find merit in both applications, and I do hereby dismiss the both of them. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 24th DAY OF March 2023

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Mr. Munyendo, instructed by Ananda & Company, Advocates for the administrator.

Abner Moses Atswenje Nabwayo, the applicant, in person.

