



**In re Estate of Yawana Shitanda Nyatiti (Deceased) (Succession Cause 88 of 2002) [2023] KEHC 24638 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24638 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 88 OF 2002  
SC CHIRCHIR, J  
OCTOBER 26, 2023**

**IN THE MATTER THE ESTATE OF YAWANA SHITANDA NYATITI (DECEASED)**

**BETWEEN**

**DORCAS ANDEKA SHITANDA ..... 1<sup>ST</sup> PETITIONER**

**ANNA KHASIALA SHITANDA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ISAAC MAJONI SHITANDA ..... 1<sup>ST</sup> RESPONDENT**

**ANNA KHASIALA SHITANDA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SOLOMON ONZERE TSISAGA ..... INTERESTED PARTY**

**RULING**

1. The Applicant's Notice of Motion dated 21<sup>st</sup> March 2023 seeks for the following orders;
  - a. That this court be pleased to review the orders of the court dated 8<sup>th</sup> July 2022
  - b. That the orders reverting title already distributed to the applicant be set aside or be cancelled.
  - c. The applicant be allowed to be heard in opposition to the order seeking to revoke his title.
2. The application is supported by the grounds appearing on the face of it, as well as an affidavit sworn by the interested party dated 21<sup>st</sup> March 2023. He depones that he is the registered proprietor of land parcel S/Kabras/Chemuche/3845 and he has the Title Deed.
3. He further states that the title was transferred to him by a person who had a valid title and there was no indication that the land was encumbered.



4. He asserts that the court order directing for the cancellation of the Title, infringes his right to land, and without the benefit of being heard. He prays that the order dated 8<sup>th</sup> July 2022 be set aside or reviewed and that he be given a chance to be heard.
5. The Application is opposed. In his replying affidavit dated 25<sup>th</sup> April 2023, states that the application is defective as it was brought upon the wrong principle of law , as it ought to have been by way chamber summons.
6. The respondent further asserts that the application was an afterthought and bought in bad faith as the counsel representing the applicant represented the petitioner/respondent in the review Application. The counsel was therefore aware of the proceedings, and that if at all the applicant had any interest, he should placed it before court then.
7. The petitioner further contend that the applicant is not a beneficiary to the deceased and thus he cannot claim under this cause since he never purchased the land from the deceased.
8. It is further argued that the court under paragraph 18 of the ruling delivered on 8/7/2022 had already addressed the issue of innocent purchasers like the Applicant herein.

#### **Applicant's submissions.**

9. It is the Applicant's submissions that pursuant to Article 25 of the constitution , his right to be heard is unlimited.
10. He further submits that his right of Title to parcel No. kakamega/ chemuche /690 was indefeasible, under the provisions of 26(1) of the Land Registration Act.
11. It is further contended that pursuant to section 93 of the Law of succession Act, his right to title can not be defeated by any subsequent revocation of the Grant.
12. It is the Applicant's final submission that the court violated his rights under Article 47 , by not giving him a chance to be heard before cancelling his Title.

#### **Respondent's submissions**

13. It is the Respondent's submission that the Applicant does not have the right to bring the Present Application as he has never been made a party to the suit.
14. It is further submitted that the Applicant is not beneficiary of the Estate and not a child of the deceased and as such, has no right to be engaged in the succession proceedings. If he has any claim, the Respondent further contends, then he should follow the beneficiary who gave him his share.
15. The respondent further submits that any review, even if allowed, will not cure the illegality, as the beneficiary who sold the land had no capacity to do so, and that the court, in any event, cannot uphold an illegality. It is further pointed out that the case of third-party purchasers was addressed in the judgment, and therefore the issue is not legible for a review.
16. It is further submitted that the Applicant was aware about the ese proceedings all along but opted to sleep on his rights. The Respondent argues that Equity cannot aid the indolent.
17. It is finally submitted that the Title in question was cancelled on February 16, 2023 and therefore the Application has been overtaken by Events.



## Determination

18. On 11<sup>th</sup> June 2012, this court ( Chitembwe J), made orders of confirmation of Grant to the Deceased Estate and consequently a certificate of confirmation was issued on 6<sup>th</sup> July 2012.
19. On 14<sup>th</sup> December 2017, the respondents herein filed an Application for review of the orders of 6<sup>th</sup> July 2012. The Application sought for the cancellation of the Titles that had been issued as a result of the sub- division of Title No. Kakamega/ Chemuche/670 and for redistribution of the same property.
20. In a Ruling delivered on 8<sup>th</sup> July 2022, the court allowed the Respondents Application and cancelled all the transmissions that had arisen out of the certificate of confirmation of Grant issued on 6<sup>th</sup> July 2012. It is this ruling that forms the subject matter of review.
21. The *Law of succession Act* does not provide for review of orders or Judgments. However the courts have traditionally borrowed from the civil procedure Rules when the need to review arises.
22. First let me deal with preliminary issues.
23. The Applicant, who describes himself as an interested party is joining these proceedings at this stage. I have perused the record and I have not seen an Application seeking to be enjoined in the cause. In the case of *Francis Karioki Muruatetu & Ano v Republic & 5 others* ( 2016) eKLR the Supreme court had this to say in respect to a party who wants to take part in proceedings: “ One must move the court by way of a formal Application . Enjoinment is not as of right but is at the discretion of the court.”. The interested party herein is an intruder who has just walked in, without knocking the door.
24. I have taken note of the Applicant’s assertion to the effect that he should not carry blame, as the Respondent failed to enjoin him , in the first place, he filed he filed his own Application for review . However, the Applicant ought to have cured this, by seeking to be enjoined, before seeking to table his claim. At the minimum he ought to lay a basis for his claim. When the respondent filed his Application for review he took care of his own interest and had no obligation, at all, to protect the Applicant.
25. The Applicant has sought to redeem himself by invoking Article 159 (2) (d) of the *constitution*. There are certain procedural violations that Article 159 (2) (d) of the *constitution* cannot simply cure. In *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR Justice P. Kiage had this to say about the Attempts to take cover under Article 159 (2) (d) “ .... Iam not in the least persuaded that Article 159 of the *constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient , proportionate and cost- effective manner and to eschew defeatist technicalities were ever meant to aid in in the overthrow or destruction of rules of procedure and to create an anarchical free- for -all in the administration of justice. This court and indeed all courts , must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those Rules and timelines serve to make the process of judicial adjudication and determination fair , just, certain and even- handed”
26. Secondly Order 45 Rule 6 of the *Civil procedure Rules* provide as follows: “No Application to review an order made on an Application for review of a decree or order passed or made on a review shall be entertained”. The Application dated 1<sup>st</sup> December 2017 was an Application for review of some earlier orders of this court. That Review Application gave rise to the ruling which the interested party again wants to review. That is not tenable in law.
27. In short, the Ruling of 8<sup>th</sup> July 2022 is not legible for review otherwise the courts would be reviewing their orders ad infinitum



28. Finally, on substance: As pointed out by the Respondents the Hon . Judge was alive to, and did address himself to the provisions of section 93 of the *Law of succession Act*, namely the rights of the third-party purchasers. This is evident from paragraph 18 of the Ruling. Review Applications concerns new and important facts that were not available then, or Error on the face of the record. To the extent that the rights of third parties like the Applicant herein had been adjudicated upon and a determination made, there is no new matter to warrant a review. The interested parties remedy if any, would lie in an Appeal, not a review.
29. In *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, the court of Appeal held as follows; “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.”
30. The Application is without merit. The same is dismissed with costs to the Respondents.

**DATED , SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023**

**S.CHIRCHIR**

**JUDGE.**

In the presence of :

E.Zalo- Court Assistant

