



REPUBLIC OF KENYA



KENYA LAW

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**In re Estate of Jonathan Muia Mumo (Deceased) (Succession Cause
151 of 2006) [2022] KEHC 3355 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 3355 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 151 OF 2006**

MW MUIGAI, J

MAY 31, 2022

IN THE MATTER OF THE ESTATE OF JONATHAN MUIA MUMO (DECEASED)

BETWEEN

PIUS KATEETI MUIA PETITIONER

AND

DAVID MUTUKU MUIA 1ST OBJECTOR

PAULINE MUMBUA 2ND OBJECTOR

RULING

1. This matter relates to the estate of Jonathan Muia Mumo (deceased) who died intestate on 23rd November 1993. The Petitioner herein applied for letters of administration intestate in the estate of the deceased. The grant was issued on 13.7.2006 and confirmed on 23rd January, 2020.
2. On 6/11/2019, the Court Hon. D. K. Kemei J delivered Ruling where the Objector's Protest was upheld and the estate was to be distributed as per Objector's proposed mode of distribution.
3. On 24/9/2020, the Court, Hon. D. K. Kemei J delivered Ruling to the effect that the Objector's Counsel was to hand over the original copy of the Certificate of confirmation of grant to Administrator's Counsel. The Administrator was granted 45 days to finalize the exercise of sub division and transfer of the properties and in default hands over titles to Court for onward transmission to the Surveyor for purposes of subdivision and further in default the DR MHC to sign the relevant documents to effect transfer of the properties to the beneficiaries.
4. On 10/6/2021, the Court Hon. D. K. Kemei J delivered Ruling on 2 Applications; the Objector sought the Administrator hands over original title for purposes of survey and the Administrator's Application that the County Surveyor Machakos undertakes mutation and sub division of the Land Parcel Machakos/Matuu/1103.



5. The Court granted orders, the Objectors to regularize sketch maps and mutation forms and to be signed and stamped by John Mutua C/o Landscape Surveyors& Consultants and thereafter to be presented to Land Registrar Machakos County. The Administrator was/is to cooperate with the said surveyor and hand over documents to Land Registrar Machakos. In default the DR MHC was authorized to sign the relevant documents to effect transfer of the properties to the beneficiaries.
6. This Ruling relates to two applications dated 17/08/2021 and 08/09/2021 filed by the Objectors and Administrator respectively. I will analyze them chronologically.

Application Dated 17/08/2021

7. The Objectors/applicants filed this application seeking the following prayers:-
 - (1) Spent
 - (2) Spent
 - (3) That the Court do rectify the confirmed grant to include the following portions of Land No. Machakos/Matuu/1103:-
 - a) Plot No. D in the objectors map adopted by the Court
 - b) Plot No. J in the objectors map adopted by the Court
 - c) Plot No. K in the objectors map adopted by the Court
 - (4) That the said Plots distributed as follows:-
 - a) Plot No. D be registered in the name of Pius Kateeti Muia to hold in trust and transfer to the purchasers.
 - b) Plot No. J be registered in the names of Richard Mumo Muia and Pricilla Mutio Muasa to hold in trust and transfer to the purchasers.
 - c) Plot No. K be registered in the names of David Mutuku Muia and Pauline Wambua to hold in trust and transfer to the purchasers.
 - (5) That the acreage of the portion marked M given to the church be rectified to read 0.19 Ha instead of 0.10 Ha.
 - (6) The name of Muasa Muia who is deceased be replaced with Pricillar Mutio Muasa who is his wife.
 - (7) That the names of rose Mwanzia who is deceased be replaced with Meshack Muia Job who is her son.
 - (8) That the costs of this application be in cause.
8. The application is supported by grounds on the face thereof and by the affidavit of David Mutuku Muia the 1st Objector herein sworn on even date stating as follows; that the Applicant's case is that the plots marked D, J & K in the objectors map as adopted by the Court with respect to Land No. Machakos/Matuu/1103 were inadvertently left out during the contested hearing; that the said plots were held jointly by beneficiaries and this is not in dispute; that Plot No, M in the map of the objectors as adopted by the court was given to ACK Church but the size is indicated as 0.10 Ha instead of 0.19 Ha; that Muasa Muia and Rose Mwanzia who are beneficiaries are now deceased and their names should be removed and replaced as proposed; that the grant be rectified in the following terms as per the



attached schedule of distribution and finally that the objectors have no objection to the rectification and it is in the interest of justice.

Application Dated 08/09/2021

9. The Administrator herein filed this application seeking the following prayers:-
- (1) Spent
 - (2) Spent
 - (3) That pending the hearing and determination of this application this Court's orders as contained in the Ruling dated and delivered on 10/06/2021 as well as all consequential orders be stayed.
 - (4) That this Court's Ruling dated 6/11/2019 be reviewed (to the exclusion of the consent orders dated 23/01/2020) and the Machakos County Surveyor do carry out a fresh survey of the deceased's Land Parcel Number Machakos/Matuu/1103.
 - (5) That this Court's ruling dated 10/06/2021 be Reviewed and the following order(s) regarding the deceased's land parcel No. Machakos/Matuu/1103 be made:-
 - (a) That the Machakos County Surveyor to visit the deceased's land parcel No. Machakos/Matuu/1103 in the presence of all the parties and/or beneficiaries as well as all interested parties; for the purposes of establishing whether the objector's sketch map (on the basis of which the grant herein was confirmed) reflects the true position on the ground regarding occupation and use by the parties, beneficiaries and interested parties and that the Machakos County Surveyor to file a report in court to that effect, within a period to be directed by the Court.
 - (b) That this Court's Deputy Registrar be present during the above – pleaded exercise (prayer 5a above) and that this Court's Deputy Registrar do file a report in Court on the above pleaded exercise.
 - (6) That subject to prayers 1,2,3 and 4 herein above, the certificate of confirmation of Grant dated 23/01/2020 and issued on 30/01/2020 be rectified to reflect the true position on the ground in regard to the deceased's land parcel Number Machakos/Matuu/1103.
 - (7) That costs so this application.
10. The application is supported by grounds on the face thereof and by the affidavit of Pius Kateeti Muia the Administrator herein sworn on even date stating as follows; that the Objectors herein in an application dated 10/03/2020 sought the court to order the administrator to hand over the original titles for Machakos/Matuu/1103, Machakos/Matuu/472, Machakos/Matuu/491 and Machakos/Matuu/656 to the Court for the same to be forwarded to the surveyor for purposes of subdivision and for an order that the Deputy Registrar signs all the relevant documents to effect subdivision, transfer and transmission of the properties of the estate and the prayer sought allowed on 10/06/2021; that the Administrator filed an application dated 11/03/2021 seeking to have Machakos County Surveyor undertake a survey of the property taking into consideration and use by the parties, beneficiaries and any interested party but the Court dismissed the application; that the only property in dispute is Machakos/Matuu/1103 and the mutation forms presented by the Objectors do not conform the said sketch map; that upon the dismissal of the Administrator's application situation on the ground is volatile owing to the discrepancies between the purported mutations and the actual position on the ground; that the mutation forms failed take into account development by the stakeholders; that the



best way to reconcile the content of the sketch maps with the actual situation on the ground is for a surveyor neutral to all parties be allowed to undertake a survey of parcel No. Machakos/Matuu/1103; and finally that the estate of the deceased will suffer irreparable loss if the said orders are not set aside as the distribution of this estate will be highly prejudiced.

Grounds of Opposition to the Application Dated 17/08/2021

11. The Administrator/Respondent herein filed his grounds of opposition based on the grounds that:-
 - (1) That the application proposes purported rectification of the size of the land parcel number Machakos/Matuu/1103 apportioned to bona-fide beneficiaries of the estate which by and large affects distribution of the estate.
 - (2) That the sketch maps which formed the basis on which the grant was confirmed, adopted and issued on 30/01/2020 was provided by the Applicants herein and it was not in conformity with the situation on the grounds in the first place.
 - (3) That the application dated 17/08/2021 is incompetent, misconceived, bad in law and contains prayers that are not capable of being granted.
12. Further affidavit by the Administrator sworn on 19th November, 2021 stating that; that the position regarding distribution of Land Parcel No. Machakos/Matuu/1103 among the beneficiaries of the deceased has been sufficiently problematic; that having an independent surveyor neutral to both parties to undertake survey of the disputed property will ensure each beneficiary gets their deserved portion; that this Court on its Ruling dated 10/06/2021 directed the objectors to regularize the sketch maps and mutation forms by having them signed and stamped by the surveyor they commissioned to carry out the survey; that the objectors herein confirm that the position on the ground is non-conforming with what was represented in their sketch map however they purport to include an additional beneficiary as well as redistribute the contested property.
13. In his replying affidavit also sworn on even date the administrator herein stated that: that the estate of the deceased was distributed pursuant to the Court's Ruling dated 6/11/2019 relying on the sketch maps provided by the Objectors; that the grant was confirmed in respect of the said ruling; that the sketch maps purportedly signed and stamped by the said surveyor are considerably different to the ones forwarded by the Administrator to the objectors; that the objectors are seeking a redistribution of the disputed parcel Machakos/Matuu/1103 by introducing a new beneficiary to that parcel being Pricillar Mutio Muasa and finally in view of the fact that the objectors are now desirous that this Court re-distribute the said property, the Administrator propose that they agree to have a neutral independent surveyor to undertake the survey of the disputed property taking into account the interest of all beneficiaries.

Objectors Submissions on the two Applications Dated 17/08/2021 & 8/09/2021

14. On the issue whether the failure by the Administrator/Respondent to file a replying affidavit renders the application dated 17/08/2021 unopposed the objectors submitted that the facts of the affidavit in support are thus not controverted and they are deemed to be admitted. In the Court of Appeal case of *Daniel Kibet Mutai & 9 Others v Attorney General* [2019] eKLR the Court held that:-

“Pertinent legal issue therefore arises as to what is the effect of the respondent's failure to file a replying affidavit? This is a question that has previously been addressed by the High Court severally. Two examples will suffice.



(1) In *Phillip Tirop Kitur v Attorney General* [2018]eKLR the Court held that:

In the absence of a replying affidavit or oral evidence from the Attorney General the Petitioners' evidence stood unchallenged."

(2) In the case of *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of planning, Ministry of Devolution and Planning & Anor* [2016] eKLR – the Court held that:

filing of Grounds of Opposition only deemed to address issues of law and general averments that cannot amount to a proper of valid denial of allegations made on oath."

15. On the issue of whether the Court has jurisdiction to rectify grant it was submitted that this Court has jurisdiction as provided for in Section 74 of the Law of Succession Act, Cap 160 Laws of Kenya.
16. On whether plot Nos. D, J & K in the objectors map adopted by the court should be included in the confirmed grant it was submitted that it is not in dispute that the objectors map was the one adopted by the Court during confirmation of the grant and after hearing and a Ruling delivered on 6/11/2019 the Administrator did not appeal the Ruling to the Court or successfully review the same so it remains the only valid ruling on distribution.
17. On the issue of how should plot Nos D, J & K be distributed it was submitted that the three plots were sold by the deceased and the beneficiaries in unison, the administrator has not disputed this therefore that remains the correct position and the same should be distributed as proposed in the application.
18. On the issue of whether the acreage of the portion marked M given to the church should be rectified to read 0.19 Ha instead of 0.10 Ha it was submitted that the confirmed grant erroneously captured the acreage as 0.10 Ha instead of 0.19Ha therefore the same should be rectified to reflect the proper acreage.
19. On the issue of whether the names of Muasa Muia (deceased) be replaced with Priscilla Mutio Muasa who is his wife and the name of Rose Mwanzia (deceased) be replaced with Meshack Muia Job who is her son the objectors submitted that Muasa Muia and Rose Mwanzia are already deceased and their certificates are attached therefore they should be substituted by the proposed person s to that their share can be dealt with as required upon implementation of the grant.
20. On the application dated 8/09/2021 the objectors are strenuously opposing the said application seeking review of Court orders of the Court's Ruling dated 6/11/2019; that the Administrator had filed a similar application dated 11/03/2021 seeking review and for the county surveyor to undertake survey of land No. Machakos/Matuu/1103 but the said application was heard and dismissed on 10/06/2021 therefore this application is thus res judicata and cannot be entertained; that the application is also defective in that under rules governing application for review no 2nd application can be brought under order 45 rule 6 CPR 2010 which provides that:-

“No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.”
21. That the administrator is disputing the mode of distribution as ordered by the Court by using the fresh survey to allocate himself portion which he had grabbed and he is not willing to respect the Ruling of the court stating that since he is the first born he cannot share the property equally.



22. On the issue of the acreage given to the church there is no dispute the discrepancy was a typo error which needs to be rectified.
23. The objectors finally submit that this application is a delaying tactic by the Administrator and it should be dismissed with costs and administrator be ordered to comply fully in administration as already confirmed by the Court.

Administrator/respondent Submissions on the 2 Applications Dated 17/08/2021 & 8/09/2021

24. On the application dated 17/08/2021 the Administrator submitted that the administrator had opposed the said application vide his grounds of opposition dated 08/09/2021; that the objectors seek to have this court include properties they purport have been excluded in the grant, redistribute the same among the beneficiaries, add new beneficiaries to the grant and alter the acreage of a property listed in the grant and it is submitted that the orders sought are not capable of being granted; that the objectors are stretching the definition of error and/or mistake to justify the necessity for the orders sought in their said application.
25. The prayer in the application seeking to have new proposed beneficiaries added to the grant pursuant to the demise of two beneficiaries already named in the grant it was submitted that no letter of administration have been attached regarding the estates of the two deceased beneficiaries.
26. In the case of *Kambora Mamau v Esther Nyambura Kirima* [2002] eKLR the Court stated that:

“As I said in this Court’s Succession Cause No 1086 of 1995, *in the matter of the estate of Ndungu Kariuki* (unreported); a certificate of confirmation of grant confers upon a beneficiary under it a beneficial interest. I stated:

“As a certificate of confirmation of grant, also referred to as a certificate of confirmation, confers upon a beneficiary under it a beneficial interest in the estate of the deceased person, where such a beneficiary subsequently dies before the executor or administrator of the estate for which the certificate of confirmation was issued transfers the resultant legal interest or title to the aforesaid beneficiary, it is not proper and lawful to proceed under rectification of that certificate of confirmation to replace the deceased beneficiary with a person other than a confirmed executor or administrator of the estate of the deceased beneficiary.”

....To get to be a confirmed executor or administrator of the estate of a deceased beneficiary, the proper procedure would be for the person aspiring to replace the deceased beneficiary to start the ball rolling in separate proceedings being a petition for the grant of probate or letters of administration in the estate of the deceased beneficiary. The aspirant will start those proceedings either as a petitioner as well as a beneficiary or as a purely beneficiary influencing others interested to have the petition filed.”
27. The Administrator submits that there will be no prejudice occasioned to the estate of the deceased beneficiaries if their share of the property in the matter is held in trust for them by the Administrator as by law provided.
28. On the application dated 8th September, 2021 it was submitted that the allegations by the objectors that the administrator herein has grabbed land and intends to undertake his pleaded exercise of calling an neutral surveyor so as to allegedly validate his actions are not backed by any evidence whatsoever.



29. On the issue of allegation that the administrator’s application is res judicata section 1A, 1B and 3A of the *Civil Procedure Act* empowers this Court to make any necessary orders forth ends of justice to be met. The Court in the case of *Githere v Kimungu* [1976 – 1985] EA 101 held that:-

“... the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case.”

30. Further in the case of *Stephen Boro Gitiba v Family Finance Building Society & 3 Others* – Civil application No. Nai 263 of 2009 the court expressed itself on the pedestalization of the overriding objection inter alia as follows;

“These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective...The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible”.

31. The Administrator finally submitted that it is only proper that a surveyor, neutral to both parties undertake a fresh survey of the disputed property taking into account the provisions of the grant and situation on the ground and the same to be undertaken in the presence of ALL parties including this Court’s Deputy Registrar and the grant be amended to reflect the true position on the ground.

Determination

32. The Court considered the applications in question, the pleadings and submissions by the parties respective Counsel.

The issue(s) for determination are;

- (1) Whether the Court should rectify the confirmed grant of 30/1/2020 to include the proposed distribution of Land No. Machakos/Matuu/1103.
- (2) Whether this Court’s orders as contained in the Ruling dated and delivered on 10/06/2021 as well as all consequential orders be stayed.
- (3) Whether this Court’s Ruling dated 6/11/2019 should be reviewed (to the exclusion of the consent orders dated 23/01/2020) and the Machakos County Surveyor to carry out a fresh survey of the deceased’s Land Parcel Number Machakos/Matuu/1103.



Rectification of Confirmed Grant

33. The beneficiaries of deceased's estate as listed in the Petition filed on 27/6/2008 are;
- (1) Pius Kateeti Muia - Administrator
 - (2) Muasa Muia
 - (3) Richard Mumo
 - (4) Pauline Wambua Muia-Objector
 - (5) Rose Mwanzia Muia
 - (6) David Mutuku Muia- Objector
 - (7) Elizabeth Muthoka Muia
34. The properties listed as assets that comprise of the deceased's estate and available for distribution are as per confirmed grant of 30/1/2020 as follows;
- 1) LR Machakos/Matuu/1103 distributed 1.73 ha each to Rose Mwanzia, Pius Kateeti Muia, Muasa Muia, David Mutuku, Pauline Wambua and Richard Mumo. Elizabeth Muthoki Muia was allotted 0.54 ha and 0.10 ha to be given to the Church.
 - 2) LR Machakos /Matuu/656 (1.9 ha) to be shared equally among Richard Mumo `Muia, Pauline Wambua, Muasa Muia & David Mutuku Muia.
 - 3) LR Machakos /Matuu/472 & Machakos /Matuu/491 to be shared equally amongst Richard Mumo Muia, Pauline Wambua, Muasa Muia & David Mutuku Muia and Pius Kateeti Muia.
 - 4) LR Machakos /Matuu/3520 to be transferred to Pius Kateeti Muia.
 - 5) LR Machakos/Matuu/786 to be transferred to Dorothy Ndinda Kyove
 - 6) LR Machakos /Matuu/3524 to be transferred to Abednego Kyalo
 - 7) LR Machakos/Matuu/3523 to be transferred to Abednego Kyalo.
35. The certificate of confirmed grant of 30/1/2020 was as a result of the Ruling by the Court of 6/11/2019 where the Court upheld the Objectors/Protestors Proposed mode of distribution.
36. There is on record a Consent by parties through respective Counsel for Administrator/Petitioner/Applicant & Protestors Respondents filed on 6/9 2021 that parties by Consent varied the mode of distribution as in the Confirmed Grant.
37. Section 74 of LSA provides;

Errors may be rectified by Court

Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.



38. In *Re Estate of Charles Kibe Karanja (Deceased)* [2015] eKLR the Court Hon. W. Musyoka J stated as follows;

It goes without saying that the provisions in Section 74 are on alteration of grants of representation, not certificates of confirmation of grant. A certificate of confirmation of grant is not a grant of representation The certificate issued upon a grant being confirmed does alter the grant of representation made in the matter. It does not replace the grant of representation, and it is not the confirmed grant. It is an instrument to certify that the grant made in the matter has been confirmed. In short it is the evidence of the confirmation of the grant. From the wording of Section 74, it is plain that the same was not tailored to [or] for amendment of such documents as certificates of confirmation of grant, but rather of grants of representation themselves, be they full or limited, confirmed or not.

A party wishing to have rectified or altered or amended a certificates of confirmation of grant, ... rather they ought to apply for review of the orders made upon the application for confirmation of grant, where the alterations sought are fundamental; or for amendment of the certificate under Rule 73 of the *Probate and Administration Rules* to address minor errors or mistakes in the body of the certificate.

A certificate of confirmation of grant is by its nature a formal order extracted from the orders made by the court on the application for confirmation of grant. If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be effected without touching the orders made by the court at the distribution of the estate. Consequently, such changes cannot and should [not] be effected through a mere amendment of the certificate of confirmation of grant.

The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of court orders is not directly provided for in the *Law of Succession Act* and the *Probate and Administration Rules*, but it is imported into probate practice by Rule 63 of *Probate and Administration Rules*, which has adopted a number of procedures from the *Civil Procedure rules*. Among the imported procedures is the device of review under the *Civil Procedure Rules*.

39. The rectification of confirmed grant that is proposed is to include Objectors map to be adopted by the Court and Plots to be held by Administrator on behalf of Purchasers.
40. Ideally, after the certificate of confirmation of grant is issued, the Administrators and beneficiaries are to obtain services of a Surveyor so as to demarcate the suit properties to each beneficiary as agreed by beneficiaries with their consents to the confirmed grant and/or order of the Court after hearing any dispute regarding the proposed distribution of the estate.
41. The Surveyor has to determine each beneficiary's interest or portion according to confirmed grant. The survey is conducted in the presence of beneficiaries or their representatives and it should be without interfering or demolishing permanent structures and/or development.
42. It is the Surveyor's Report map and mutation form that shall be subject of a review if need be and not a rectification of the confirmed grant. During the review proceedings any aggrieved party may take issue with the proposed distribution of the estate of the deceased on any ground and including that it is contrary to the certificate of confirmed grant.



43. For these reasons, the rectification of confirmed grant applied for in this case is denied as it is not provided for by the law. The rectification of confirmed grant would be contrary to Section 71 [LSA](#) where the Court is not satisfied of identities and shares of the beneficiaries of the deceased's estate. Secondly, the rectification amounts to a redistribution of the estate in the absence of and without knowledge and consents of all other beneficiaries. The rectification would amount to substantially altering the Court Rulings and certificate of confirmation of grant on distribution of the estate of the deceased.

Stay of Court's orders as contained in the Ruling dated and delivered on 10/06/2021

44. On 6/11/2019, the Court Hon. D.K. Kemei J delivered Ruling where the Objector's Protest was upheld and the estate was to be distributed as per Objector's proposed mode of distribution as contained in certificate of confirmed grant of 30/1/2020.

45. The Administrator submitted that the Confirmed grant was pursuant to the sketch maps and mutation forms provided by Objectors herein and the proposed mode of distribution appeared to be fair. However, on keen observation the Administrator noted the sketch plan and maps were non-conforming to the situation on the ground. Hence, the Administrator sought a review of the said Court orders.

46. With respect to the request for stay of the Rulings delivered by this Court cannot legally be granted based on the circumstances enumerated by the Administrator. The Rulings are on resolution of disputes surrounding distribution of the deceased's estate especially with regard to LR Machakos/Matuu/1103. The Court confirmed the grant and distributed the estate of the deceased as required under Section 38 [LSA](#);

Where an intestate has left a surviving child or children but no spouse Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

47. All that is going on now is that the Administrator and beneficiaries are not in tandem/agreement on enforcement and/or implementation of the distribution of the estate of the deceased in terms of the Certificate of confirmed grant. If the certificate of confirmed grant was challenged in its content; any party taking issue with either the list of beneficiaries, the list of assets or mode of distribution or all of the above then, the proper avenue is to have an application for revocation or annulment of confirmed grant under Section 76 [LSA](#) that provides;

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

48. The Applicants have no issue with the Certificate of confirmation of grant but on enforcement and /or implementation of the mode of distribution as per the confirmed grant. Therefore, there is nothing to stay as there is no pending dispute on the mode of distribution of the deceased's estate but only completion of administration and distribution of the deceased's estate in accordance with the confirmed grant. The application for stay is denied.



Whether this Court’s Ruling dated 6/11/2019 should be reviewed (to the exclusion of the consent orders dated 23/01/2020) and the Machakos County Surveyor do carry out a fresh survey of the deceased’s Land Parcel Number Machakos/Matuu/1103.

49. The Objectors objected to another sub division and/or survey on the grounds that a similar application dated 11/3/2021 was filed seeking review and for the County Surveyor to undertake survey of Land Parcel Number Machakos/Matuu/1103. The Application was heard and dismissed vide Ruling of 10/6/2021. The Application for review is res judicata and cannot be entertained by this Court and that this Court is functus officio with regard to distribution of the deceased’s estate. The Administrator has not preferred an appeal to the Court of Appeal.
50. *Re Estate of Charles Kibe Karanja (Deceased)* [2015] eKLR (*supra*). The remedy of review of court orders is not directly provided for in the *Law of Succession Act* and the *Probate and Administration Rules*, but it is imported into probate practice by Rule 63 of *Probate and Administration Rules*, which has adopted a number of procedures from the *Civil Procedure rules*. Among the imported procedures is the device of review under the *Civil Procedure Rules*.
51. Order 45 rule 1 (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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”
52. This Court finds that there no sufficient reason to form the basis of a review based on the explained circumstances. The Administrator has not clearly set out the discrepancies between the sketch plan and mutation forms provided by Objectors vis a vis the situation on the ground to warrant another survey for distribution of the estate.
53. I also perused the Court file and confirmed a previous similar application was made before this Court on similar grounds and was dismissed vide Ruling of 10/6/2021.
54. In Civil Appeal No. 105 of 2017 *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, Makhandia, Ouko, Kiage, M’inoti & Murgor, JJA described res judicata as follows;
- “(a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.



(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

55. The Court finds that from the totality of the evidence on record, the parties, Administrator, Beneficiaries, objectors/Protestors have failed to adhere to and comply with the Court orders from Rulings of 6/11/2019, 24/9/2020 & 10/6/2021 on enforcement/ implementation of the confirmed grant of 30/01/2020 and the Consent of 23/01/2020.
56. The only valid rectification granted in the confirmed grant is in terms of Section 74 LSA is with regard to;

Muasa Muia (deceased) son of the deceased to be substituted with Priscilla Mutio Muasa his widow & Rose Mwanzia (deceased) daughter of the deceased to be substituted by Meshack Muia Job Her son.

Disposition

1. The Applications of 17/8/2021 & 8/9/2021 are dismissed as there no legal basis for rectification of confirmed grant, stay of Court Rulings and Orders and review of the said Court Rulings and Orders.
2. The Applicants to comply with orders of Court Rulings of 6/11/2019, 24/9/2020 & 10/6/2021 on enforcement/ implementation of the confirmed grant and the Consent.
3. On 24/9/2020, The Administrator was granted 45 days to finalize the exercise of sub division and transfer of the properties and in default hands over titles to Court for onward transmission to the Surveyor for purposes of subdivision and further in default the DR MHC to sign the relevant documents to effect transfer of the properties to the beneficiaries.
4. On 10/6/2021, the Objectors were to regularize sketch maps and mutation forms and to be signed and stamped by John Mutua C/o Landscape Surveyors& Consultants and thereafter to be presented to Land Registrar Machakos County. The Administrator was/is to cooperate with the said surveyor and hand over documents to Land Registrar Machakos. In default the DR MHC is authorized to sign the relevant documents to effect transfer of the properties to the beneficiaries.
5. Muasa Muia (deceased) to be substituted with Priscilla Mutio Muasa his widow & Rose Mwanzia (deceased) to be substituted by Meshack Muia Job Her son.

Each party to bear own Costs.

DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 31ST MAY 2022 (VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

