



In re Estate of Alfred Kamure Mbindu (Deceased) (Succession Cause 158 of 2014) [2022] KEHC 14513 (KLR) (26 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 158 OF 2014
LM NJUGUNA, J
OCTOBER 26, 2022**

IN THE MATTER OF THE ESTATE OF ALFRED KAMURE MBINDU (DECEASED)

BETWEEN

VERONICA KERE MBINDU 1ST ADMINISTRATOR

JANICA WANJIRU KAMURE 2ND ADMINISTRATOR

AND

CECILIA MUTHONI KAMURE RESPONDENT

RULING

1. The application for determination before this court is an application dated 03.05.2021 and wherein the applicants seek for an order that:
 - i) The Honourable Court be pleased to review and set aside the orders dated October 15, 2019 confirming the grant dated July 10, 2019 and issued on October 31, 2019.
2. The court gave directions that the determination of prayer one of the application dated May 3, 2021 be disposed off by way of written submissions and wherein the applicants submitted that the main reason the parties are seeking to review the confirmed grant is because the beneficiaries have since met and agreed to alter the mode of distribution of the estate. That some of the beneficiaries of the deceased and especially the deceased's daughters had been left out on the basis that their mother, the 1st administrator would hold the portion that she was to inherit out of EVURORE/NGUTHI/226 in trust for herself as well as the said daughters that is Amyfrida Wawira Njeru and Loise Wanja Kamure. Additionally, it was submitted that the applicants would wish to separate the portions to be inherited by the 2 minors namely Sera Njeri Kamura and Vincent Gitonga Njeru since the minors will not have achieved adulthood at the same time. Reliance was placed on the case of *Re estate of Makokha Nyilisi Musa (Deceased)* 2020 eKLR. The respondent opted not to file any submissions.



3. This court via a ruling dated October 21, 2021, made a determination in regards to the application dated May 3, 2021, the court had identified several loose strings which the applicant herein ought to have tied before approaching this court. I will proceed to mention some of them as: providing evidence to the fact that indeed David Nthiga Njeru and Robert Muriithi Njeru are deceased; and that the application be served upon all the persons interested in the estate as already noted in the said ruling. From the pleadings filed, I have noted that indeed, the applicant filed a death certificate and permit for burial for David Nthiga and Robert Muriithi Njeru respectively.
4. The question therefore is whether the orders sought herein can issue.
5. In considering instances of review, a probate court is governed by Rule 63 of the *Probate and Administration Rules*, which provides that:

“63. Application of *Civil Procedure Rules* and *High Court (Practice and Procedure) Rules*

- (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the *Civil Procedure Rules*, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the *High Court (Practice and Procedure) Rules* (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
- (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

6. In John Mundia Njoroge (*supra*) the court cited Rule 63 of the Probate and Administration Rules, and stated as follows:

“As stated above, the only provisions of the *Civil Procedure Rules* imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the *Civil Procedure Rules* imported into succession practice by rule 63 of the *Probate and Administration Rules*. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the *Civil Procedure Rules*.”

7. From the above, it follows that any party seeking review of orders in a probate and succession matter, is bound by the provisions of Order 45 of the *Civil Procedure Rules*.
8. The remedy of review is provided for under Order 45 Rule 1 of the *Civil Procedure Rules* which states;

“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 a review of judgment to the court which passed the decree or made the order, without reasonable delay”.
9. The provisions of Order 45 of the [Civil Procedure Rules](#) gives three circumstances under which an order for review can be made. In such instances, an applicant must demonstrate to the court that there has been 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. Secondly, a party will succeed in an application for review where he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is that an applicant must demonstrate that he has any other sufficient reason for seeking such review.
10. As indicated above, a review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed; the underlying object of this provision is neither to enable the court to write a second judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.
11. Of importance to note is that this court *vide* a ruling dated October 21, 2021 had previously addressed itself to the said prayer one (1) that this court has a duty to ensure that the estate of the deceased is distributed to the rightful beneficiaries. This court had previously demanded to know by way of evidence that David Nthiga Njeru and one Robert Muriithi Njeru are indeed deceased. That the same application was to be served upon all the persons interested in the estate and further that the deaths of the beneficiaries be produced by way of a further affidavit.
12. From the record, I have noted that indeed there exist a death certificate and a permit for burial of David Nthiga Njeru and Robert Muriithi Njeru respectively, further, the affidavit of service was filed showing that the respondent was served and that there has not been any response filed in opposition of the said prayers. Infact, the record shows that she attended court on the November 21, 2022.
13. The applicant seeks that the court reviews the orders dated October 15, 2019 confirming the grant dated July 10, 2019 and issued on October 31, 2019 to reflect or accord with their proposed mode of distribution, which introduces two new beneficiaries, who were initially not part of the proceedings. That the applicants wish to redistribute the estate of the deceased to fit in the wishes of all the beneficiaries given that the daughters of the deceased had been left out on the basis that the 1st administrator would hold the portion that she was to inherit out of EVURORE/NGUTHI/ 226 in trust for herself as well as the said daughters that is Amyfrida Wawira Njeru and Loise Wanja Kamure. Additionally, that the applicants would wish to separate the portions to be inherited by the 2 minors namely Sera Njeri Kamura and Vincent Gitonga Njeru since the minors will not have achieved adulthood at the same time. As stated above, such an amendment goes to the core of the



distribution, and completely affects or alters the distribution of the estate ordered by the court, but since the respondent has not opposed the application, prayer (1) of the same is allowed.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF OCTOBER, 2022.

L. NJUGUNA

JUDGE

.....for the Applicants

.....for the Respondent

