



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Mbau Kinyuru (Deceased) (Succession Cause
144 of 2017) [2022] KEHC 16509 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 144 OF 2017
CM KARIUKI, J
DECEMBER 20, 2022**

**IN THE MATTER OF THE ESTATE OF MBAU KINYURU
ALIAS MBAU KINYURU NJUGUNA (DECEASED)**

BETWEEN

JONATHAN NJUGUNA MBAU ADMINISTRATOR

AND

RACHAEL NJOKI MBAU RESPONDENT

AND

GRACE WANJIKU BENEFICIARY

JANE NJERI BENEFICIARY

TERESIA WAIRIMU BENEFICIARY

RAHAB MUTHONI BENEFICIARY

LILIAN WAMBUI BENEFICIARY

RUTH WANJIRU BENEFICIARY

FRANCIS MUCHIRI BENEFICIARY

MARY NJOKI BENEFICIARY



RULING

1. The matter before court is an application by applicant herein brought through the summons dated September 14, 2022, seeking the following orders: -
 - a) That the honourable court be pleased to review and/or set aside its judgment delivered on July 28, 2022 and make a determination on prayer no 5 of the summons dated December 6, 2021.
 - b) That the honourable court does give applicable directions/orders on prayer no 5 of the summons dated December 6, 2021.
 - c) That the costs of his application be costs in the cause.

2. The application is premised on the grounds set forth in the affidavit of Jonathan Njuguna Mbau as follows: -
 - (i) That he was the applicant in the summons dated December 6, 2021, which application addressed the following two issues being: -
 - (ii) Validity of the consent recorded on September 24, 2019.
 - (iii) The setting aside of the *ex parte* proceedings of February 8, 2021 where a summons for confirmation of grant dated August 27, 2020 was allowed unopposed, and an order for leave was sought to file an affidavit of protest.
 - (iv) That the respondent responded to both issues in her replying affidavit sworn on March 11, 2022.
 - (v) That the parties had attempted to settle the application dated December 6, 2021 out of court by addressing the two issues raised in the application separately.
 - (vi) That in the judgment delivered on July 28, 2022, the honorable court only addressed the issue on the validity of the consent recorded on September 24, 2019, and it left out the issue on the setting aside of the *ex parte* proceedings of February 8, 2021 and leave to file an affidavit of protest.
 - (vii) That the parties had in their written submissions filed in court addressed themselves to the two issues, which issues were for determination by the court.
 - (viii) That there is an error apparent on the face of the record, which needs to be rectified by delivery of a ruling on the second issue, which was left out in the judgment.
 - (ix) That the court did not address itself on whether the *ex parte* proceedings of February 8, 2021 affected the 1st-7th beneficiaries and whether they were duly served.



3. In response, the respondent filed a replying affidavit deposed by Rachael Njoki Mbau, stating as follows
- a) That the court having pronounced itself in finality with regard to the summons dated December 6, 2021, it is *functus officio*. It thus lacks the jurisdiction to sit on appeal of its own findings.
 - b) That on the onset of its ruling dated July 28, 2022, this court ably appreciated the prayers sought in the summons dated December 6, 2021. It proceeded to consider them on merits and its conclusion, and the court dismissed the summons in its entirety.
 - c) That the parties substantively addressed by way of written submissions the issues raised in prayer 5 of the summons dated December 6, 2021, and upon considering the entire summons, the court did not find merit in any of the prayers sought, and as such there is no error apparent on the face of the record as alleged by the applicant.
 - d) That the wording in prayer 5 of the summons dated December 6, 2021 invited the court to consider it if prayer no 3 was not granted, and in view of the fact that prayer no 3 was spent at the time of determination of the summons, the court was justified by not making any findings on prayer 5.
 - e) That the foregoing, notwithstanding the said prayer 5 of the summons dated December 6, 2021, lacked merits as demonstrated in the respondent's replying affidavit and submissions to the summons.
 - f) That the proposal that the respondent's advocate made in the letter dated January 3, 2022 was made before the summons dated December 6, 2021 was heard and determined, and the said proposal was flatly ignored by the applicant as there was no response to it.
 - g) That this court cannot be bound by proposals made by parties while attempting settlement if the proposals do not materialize to consent.
 - h) That in view of the foregoing, the current summons is an abuse of the court process and has been brought by a dishonest person in bad faith, and the same should be dismissed with costs.
4. Parties were directed to canvass applications via submissions, but only the respondent filed the same, but applicant's submissions were not filed at the time of preparing the instant ruling.
5. Respondent's submissions
6. The respondent reiterated that this court dismissed the summons dated December 6, 2021, and in the circumstances, prayer no 5 of the summons was directly in issue. The court, having rendered its decision, did not reserve prayer 5 for ruling on another date; therefore, thus court lacks jurisdiction to sit on appeal of its own decision.
7. Reliance was placed on *Osman Erdinc Elsek v Inspector General of National Police Service & 3 others* [2016] eKLR, *Nandlal Jivraj Shah & 2 others v Kingfisher Agencies* [2018] eKLR, *Mary Njeri Gakunga & 2 others v Middle East Bank Kenya* [2021] eKLR, *Sylas Njeru M'ritbaa Thaara* [2019]



Analysis And Determination

8. From the record, the court considered and determined the application dated December 6, 2021 *vide* the ruling dated July 28, 2022. The application therein was found to be lacking in merit and was therefore dismissed in totality. Consequently, I find it peculiar that the applicant contends that there is an error apparent of the face of the record.
9. In addition, I agree with the respondent that the parties substantively addressed by way of written submissions the issues raised in prayer 5 of the summons dated December 6, 2021, which was reliant upon prayer no 3, which was spent at the time of delivery of the ruling. Upon considering the entire summons, the court did not find merit in any of the prayers sought, and as such, there is no error apparent on the face of the record as alleged by the applicant.
10. I find that if the respondents were unhappy with the court's finding, they should have lodged an appeal instead of hoodwinking the court into appealing its own decision by alleging that the same was not considered. The doctrine of *functus officio* prevents this court from revisiting the matter, which is the basis of their instant application on a merit-based engagement, considering that it had already issued a ruling. In [Menginya Salim Murgani v Kenya Revenue Authority](#) [2014] eKLR, the Supreme Court held that:

“It is a general principle of law that a court, after passing judgment, becomes *functus officio* and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”

11. That being the case, I find this application lacks merit and make the orders;
 - (i) The instant application is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20TH DAY OF DECEMBER 2022.

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CHARLES KARIUKI

JUDGE

