



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Njogu Murathi (Deceased) (Succession Cause
428 of 2012) [2025] KEHC 1729 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 428 OF 2012**

RM MWONGO, J

FEBRUARY 20, 2025

(FORMERLY EMBU HC SUCCESSION CAUSE NO. 124 OF 2009)

IN THE MATTER OF THE ESTATE OF NJOGU MURATHI (DECEASED)

BETWEEN

**REGINA NJOGU (DECEASED) PETITIONER
SUBSTITUTED BY LUCY NJERI NJOGU**

AND

**JUSTINE MURIITHI NJOGU 1ST PROTESTOR
MUNENE NJOGU 2ND PROTESTOR
MARTHA RUGURU 3RD PROTESTOR**

RULING

The application

1. The applicant filed summons dated 26th May 2022 seeking the following orders:
 1. That the honourable court be pleased to extend time and allow the applicant to file the instant application out of time; and to order that the application herein be deemed as duly filed;
 2. That the honourable court be pleased to allow the applicants to reopen their case and tender further evidence;
 3. That the honourable court be pleased to visit L.R. Kabare/Njiku/5 and L.R. Kabare/Nyangati/3467 in the presence of both parties so as to independently ascertain the developments made by each party thereon; and
 4. That the costs of this application be in the cause.



2. Both parties had called witnesses and closed their cases. The applicants herein deposed that they have acquired crucial evidence that was not tendered and would aid in the fair determination of the dispute. According to the applicants, this evidence will even help in determining the contentious issue of occupation and development of the land, which is why the applicants pray that the court visits the property. They stated that if the court grants the orders prayed, no prejudice will be occasioned upon the respondent since she will have a chance to cross-examine.
3. In their supporting affidavit to the application, the applicants listed the further evidence they wished to produce, which include statements from Kimunye Tea Factory and mutation forms, whose copies were produced through the affidavit. They stated that it is important that the court visits the suit land to ascertain the status and developments thereon. Regarding the delay, they stated that the application was filed late because of an error of misfiling at their advocate's office. They sought the court's indulgence to deem the application as properly filed though late.
4. In response, the respondent filed a replying affidavit stating that the matter is very old, the petitioner having petitioned in 2001. The grant was issued and confirmed and the estate of the deceased was distributed to her late mother and 2 brothers, excluding the 4 daughters of the deceased. This was the reason for revoking the grant, and another grant was issued to the respondent herein. Regarding the new evidence, she stated that there is nothing new that would warrant reopening of the case.
5. She termed the application herein as a delaying tactic because any further delay in the matter works to the advantage of the applicants who are occupying the land. That it is time-wasting for the court to visit the land as it will only find out that the applicants are occupying the land pursuant to the revoked grant, which position is prejudicial to the respondent. That the land had already been surveyed and a site visit will not add value to the case. She urged the court to dismiss the application and give its judgment.

Parties Submissions

6. The application was canvassed by way of written submissions.
7. In their submissions, the applicants relied on the case of Nakuru Automobile House Ltd v Lawrence Maina Mwangi & District Land Registrar Nakuru [2017] KEELC 711 (KLR) and discussed the law governing re-opening of a case. They cited Article 159 of *the Constitution* and Rule 73 of the Probate and Administration Rules and urged that the court is vested with power to determine the application herein. They also relied on the case of Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] KEHC 3930 (KLR). It was their argument that they have a right to access to justice and to a fair hearing which include being allowed to re-open their case. They urged that the additional evidence will not be used to fill gaps in their case.
8. On her part, the respondent submitted that the applicants are attempting to have a second bite at the cherry, which amounts to filling gaps in their case. She relied on the case of Hannah Wairimu Ngethe v Francis Mungai Ng'ang'a & Jane Wambura Bisley [2016] KEHC 7330 (KLR) where the court declined to re-open the case as the applicant had been represented throughout the case. She also relied on the cases of Baber Alibhai Mawji v. Sultan Hasham Lalji and Others [1995] KECA 108 (KLR) and Kettleman v Hansel Properties Ltd [1988] 1 ALL ER. She stated that from a perusal of the intended new evidence, nothing new stands out that would warrant re-opening the case. That the site visit will pose a further delay of the matter, which has already tarried in the courts for too long.
9. In their response to the respondent's submissions, the applicants filed further submissions and urged the court to allow the application since the new evidence will help the court to distribute the estate; and that it is not for the benefit of the applicants. They relied on section 42 of the *Law of Succession*



Act and the cases of Joseph Wairuga Migwi v Mikielina Ngina Munga [2016] KEHC 6110 (KLR) and Faith Wanjiru Makenda, Pauline Wanjiku, Susan Wambui Kababa & Irene Waweru Mwea v Charles Gachoki Mwea [2022] KEHC 1599 (KLR).

Issue for Determination

10. The issue for determination is whether the application has merit.

Analysis and Determination

11. The application was indisputably filed out of time. The applicants seek that leave be granted and that the application be deemed as properly on record. The explanation given for the delay is that the advocate misfiled the file at his office, and by the time the applicants were signing the documents for filing purposes, time had already lapsed. There was no rebuttal to this argument by the respondent.
12. In the case of Edith Nantumbwe Kizito & 3 O'rs v. Mariam Kutesa, CA Civ. Ref. No. 98 of 2008, the Ugandan Court of Appeal held, inter alia, that mistake of counsel should not be visited on an innocent litigant.
13. The application appeals to the discretion of the court. The court is subject to Article 165 of the Constitution which gives power to this court to adjudicate the matter at hand including the option to exercise its vast discretion. Further, Section 47 of the Law of Succession Act states:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”
14. Rule 73 of Probate and Administration Rules states:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
15. What the applicants are seeking is, inter alia, that the court allows them to re-open their case for purposes of producing new evidence. They annexed the documents constituting the new evidence to the application thus allowing the court to examine them. These documents are statements from Kirinyaga Tea Growers sacco for the
16. 1st and 2nd applicants and a mutation form for L.R. Kabare/Njiku/5 together with an official search indicating that the land belonged to the deceased petitioner and 1st and 2nd applicants.
17. The distribution of L.R. Kabare/Njiku/5 was completed but the respondent herein filed summons for revocation of grant, and succeeded. The distribution was set aside and the process began afresh. A fresh grant was issued to the respondent and she filed summons for confirmation of grant, which was met with a protest by the applicants. The protest was heard and is pending determination.
18. As correctly submitted by the respondent, the intended new evidence regarding the mutation is not new as it was appearing in the previous proceedings before the grant was revoked. As such, I find that the alleged new evidence does not fit into the threshold of evidence that can be considered to be “new evidence”.



19. The applicants also prayed that the court visits the suit land to determine actual ownership and development before determining the protest. The Tea growers reports are also a part of the evidence they would like the court to consider. In considering whether or not to re-open a case, the court should consider the effect of granting the order. In the case of Joseph Ndungu Kamau v John Njihia [2017] eKLR the court stated:

“Needless to state, the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously.....The Ugandan Court in the case Simba Telecom v Karuhanga & Anor (2014) UGHC 98 the court held: The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay...”

20. The respondent is apprehensive that the applicants have been employing delay tactics in this old case because they are benefiting from the matter remaining in court for a long time. She stated that as the case progresses, the applicants remain in occupation of the land. It is evident from the testimonies of the witnesses that the land is developed and there are cash crops on it. In my view, the evidence adduced creates a clear picture of the situation on the ground. The case is very old and it should be completed so that the rightful beneficiaries can finally have the opportunity to inherit their rightful portions.

Conclusions and Disposition

21. Looking at the intended new evidence, it is not a given that value will be added without unnecessarily costing the court a lot of judicial time. It is my view that the court is able to make a fair determination with the evidence already before it, without a site visit or additional evidence.
22. In conclusion, it appears that prayer (1) has merit but the remaining prayers do not. Ultimately, therefore, the prudent position to take in the interests of justice, is to dismiss the entire application, which I hereby do.
23. Each party to bear its own costs.
24. Orders accordingly.

DELIVERED VIRTUALLY AT KERUGOYA HIGH COURT THIS 20TH DAY OF FEBRUARY, 2025

R. MWONGO

JUDGE

Delivered in the presence of:

1. Ndwiga holding brief for Magee for Protestors
2. Mwagiru holding brief for Kagio for Petitioner/Respondent
3. Francis Munyao - Court Assistant

