



In re Estate of Josphat Githutha Mutua alias Josphat Githutha alias Josphat Githutha Mutua Kungu (Succession Cause 18 of 2016) [2025] KEHC 1394 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 18 OF 2016**

A MSHILA, J

FEBRUARY 14, 2025

**IN THE MATTER OF THE ESTATE OF JOSPHAT GITHUTHA MUTUA ALIAS
JOSPHAT GITHUTHA ALIAS JOSPHAT GITHUTHA MUTUA KUNGU**

BETWEEN

FELIX NGURE WANJIRU APPLICANT

AND

MARGARET NJOKI GITHUTHA 1ST RESPONDENT

MAGDALENE NYAMBURA CHEGE 2ND RESPONDENT

RULING

1. Before court is the Notice of Motion application dated 20th December, 2024 brought under Order 45 rule 2 of the Civil Procedure Rules, Section 47 of the [Law of Succession Act](#) Section 1A, 1B and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law. The Applicant sought for orders:-
 - a. Spent
 - b. That this Honourable Court be pleased to review the stay of execution orders issued on 22nd September, 2023 to allow Kimama Githutha Kungu (deceased) to be buried on Land Reference Number Ng'enda/Nyamang'ara 1419.
 - c. That in the alternative to prayer (b) this Honourable Court be pleased to review the stay of execution orders issued on 22nd September, 2023 to allow Kimama Githutha Kungu (deceased) to be buried on Ng'enda/Nyamang'ara 289.
 - d. That this Honourable Court be pleased to issue such orders as it may deem fit on the burial place of Kimama Githutha Kungu (deceased).



2. The application is premised on the grounds that the children of Kimama Githutha-deceased who is a son of the deceased herein Josphat Githutha have no place to bury him other than his father's parcels of land constituting the properties for distribution in this cause as he owned land. That the Respondents are adamant on the issue insisting that the matter is in court. The Applicant therefore, prays that this court reviews its order for stay issued on 22/9/2023 to the extent of allowing Kimama Githutha-deceased to be buried on LR NO. Ng'enda/Nyamang'ara 1419 allocated to Kimama before the stay orders and/or 289 where there is a family burial place.
3. The application is supported by the affidavit of Felix Ngure Wanjiru sworn on even date. He deposed that he is the eldest son of Kimama Githutha-deceased, the 1st administrator herein and the son of the deceased in this cause. He has the consent of his siblings to swear this affidavit who are from the first house while the Respondents are from the 2nd house. Kimama Githutha was said to have died on 10/12/2024 at Nyamang'ara and having no land of his own, the children have no place to bury him other than on his father's parcels of land which is family land constituting the properties for distribution in this cause. He has tried to engage the Respondents and the village elders on a burial place for Kimama but the Respondents insist that the matter is in court. The body of Kimama Githutha-deceased is preserved at General Kago Funeral Home and continues to accrue mortuary charges. He contended that this court vide its Ruling of 24/3/2022 confirmed the grant in this cause and subsequently stay orders were issued on 22/9/2023 pending appeal by the Respondents. He sought the court to review the stay of execution to the extent of allowing Kimama Githutha-deceased to be buried on Ng'enda/Nyamang'ara 289 on which parcel of land there is a family burial place where Josphat Githutha-deceased herein has been buried as well as several people from the 2nd house of the Respondents. Kimama Githutha-deceased has a right to be buried on Ng'enda/Nyamang'ara 1419 and /or 289 being parcels of land left behind by Josphat Githutha-deceased herein.
4. Margaret Njoki Githutha and Magdalene Nyambura Chege filed their Grounds of Opposition dated 10th January 2025 brought under Order 51 Rule 14 of the Civil Procedure Rules being as follows;-
 - a. That the court having granted stay of execution of the confirmed grant pending the hearing and determination of the appeal by the Court of Appeal being Civil Appeal No. E129 OF 2024, does not have any residual power to hear and determine any other application as long as the appeal has not been heard and determined by the Appellate court.
 - b. That review is only available as an alternative to or where there has been no appeal preferred against the decision of the trial court. Since there is an appeal before the Court of Appeal there can be no application for review before the trial court.
 - c. That the matter before this Honourable Court is the determination of the beneficiaries of Josphat Githutha Mutua (deceased) and the distribution of the estate and not a burial dispute and the court would not have any basis upon which it can make an order on who is to be buried where.
 - d. That the application is incompetent as not all the administrators have been joined to the application and Margaret Njoki Githutha is herself not an administrator.
 - e. That in any case the parcels of land the Applicant has proposed to be the burial site constitutes the matrimonial home occupied by the widow, the 1st Respondent or parcels that have been developed by other beneficiaries.
 - f. That the application is otherwise an abuse of the process of the court.



5. Felix Ngure Wanjiru filed his supplementary affidavit dated 14/1/2025 where he deposed that the court has the power to hear his application as the appeal was only filed by the Respondents. It is not in contest that Kimama Githutha-deceased was the son of the deceased herein as such he is entitled to be buried on any of the parcels of land comprising the estate herein.
6. The parties were directed to canvass the application by filing and exchanging written submissions.

Applicant's Submissions

7. The Applicant submits that the court is clothed with jurisdiction to hear and determine the instant application as the issues in the appeal are different from the issues raised herein. It was submitted that the estate of the deceased herein is yet to be distributed. The Applicant submitted that the late Kimama being a beneficiary of the deceased's estate is entitled to be buried on any piece of land comprising the deceased's estate as such he proposed that the late Kimama be buried on parcel 1419 as none of the beneficiaries of Josphat Githutha-deceased are in occupation of Ng'enda/Nyamang'ara 1419 and/or Ngenda/Nyamang'ara 289 where the deceased in this cause was buried and several other beneficiaries from the second house. Reliance was made in the case of Kirimi Solomon Magambo & 2 others vs Mutuma Solomon Mugambo (2015) eKLR. It was submitted that no prejudice will be suffered by the Respondents if the late Kimama is buried on either parcels of land. The 1st Respondent being the surviving spouse was said to be in control of the estate as such had the mandate to guide the Applicant on the burial place for the late Kimama Githutha. Reliance was placed on the case of Benson Wambua Musau & 2 others vs Christopher Musyoka Musau & 8 others (2006) eKLR. They sought for costs of the application and half of the costs incurred by the Applicant in conducting the site visit due to the unco-operative conduct of the Respondents.

Respondent's Submissions

8. The Respondents submit that the Applicant is not a party to the proceedings as he does not have the requisite grant of representation to step in his father's shoe. Reliance was placed in the case of Josephat Gacheru Rugiri vs Loise Gachiku Kinuthia & 3 others. It was submitted that the Applicant lacks locus to review the ruling which is the subject of the appeal in the Court of Appeal. The court was urged to dismiss the instant application to avoid a scenario of exhumation. Reliance was placed in the case of Benson Wambua Musau & 2 others vs Christopher Musyoka Musau & 8 others (2006) eKLR. The instant court was also said to lack the requisite jurisdiction as the matter was now before the Court of Appeal. Reliance was placed in the case of Samuel Kamau Macharia & another vs Kenya Commercial Bank Ltd. & 2 others (2012) eKLR. The instant application was said to be res judicata as the late Kimama prior to his death had made an application for review of the same order the Applicant seeks to review which the court declined as the matter is now before the Court of Appeal. The court was urged to dismiss the application with costs.

Issues for Determination

9. Having considered the application, the main issue for determination is whether the Applicant is deserving of the order for review as sought.



Analysis

10. The relevant provisions in relation to the question of review are provided under Order 45, Rule 1(1) of the Civil Procedure Rules, 2010 as well as Section 80 of the Civil Procedure Act Cap. 21 Laws of Kenya, thus:
 - “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 unreasonable delay.”
11. From the foregoing provisions and especially Order 45, Rule 1(1) of the Civil Procedure Rules the following are the grounds upon which an order for review can be granted:
 - a) the discovery of new and important matter or evidence, or
 - b) some mistake or error apparent on the face of the record, or
 - c) any other sufficient reason.
12. In *Republic v Public Procurement Administrative Review Board & 2 others* (2018) eKLR it was held: -
 - “Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;
 - (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - (b) on account of some mistake or error apparent on the face of the record, or
 - (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
13. The Applicant has approached this court seeking for this court to review its orders issued on 22nd September, 2023 staying the execution of the confirmed grant issued on 24th March, 2022 pending an appeal by the Respondents herein.
14. It is noteworthy that the application has been made without unreasonable delay as the deceased died on 10th December, 2024 and the application was filed on 20th December, 2024 ten days later.
15. The Applicant avers that Kimama Githutha Kungu (deceased) the 1st administrator and a son to Josphat Githutha Mutua (deceased) died on 10th December, 2024 and has no place to be buried as the



family land consists of properties which are subject to distribution which has been affected by the order for stay of execution issued by this court.

16. The court was urged to review its orders to the extent of allowing Kimama Githutha Kungu (deceased) to be buried on Ng'enda/Nyamang'ara 289 on which parcel of land there is a family burial place as the deceased in this cause Josphat Githutha was buried there as well as several people from the 2nd house of the Respondents.
17. The Respondents contend that the court lacks jurisdiction to determine this application as the matter is now before the Court of Appeal. They also argued that the Applicant lacks locus standi as he has not applied for and has not been granted letters of administration to represent the estate of Kimama Githutha Mutua (deceased).
18. Jurisdiction is everything and without it a court must down its tools. To this end, this court relies on Section 47 of the *Law of Succession Act* which provides thus;-

“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 maybe expedient”
19. The court in exercise of its inherent discretionary powers has the power to vary an order in the interests of justice.
20. Rule 73 of the *Law of Succession Act* provides thus;

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of justice or to prevent abuse of the process of the court”
21. The party seeking the variation of the order must demonstrate that there has been substantial change in circumstances that justifies the modification.
22. From the material placed by the Applicant this court is satisfied that the Applicant has demonstrated that there are sufficient reasons that justify variation of the Order;
23. This court is satisfied that this is a suitable case in which it can exercise its discretion.

Findings and Determination

- i. This Court finds the application for variation of the order for stay of execution has merit and it is hereby allowed.
- ii. The stay of execution order granted on 22nd September, 2023 be and is hereby varied by discharging only the premises Ng'enda/Nyamang'ara 289 where the gravesite of Josphat Githutha Mutua (deceased) is situate to facilitate Kimama Githutha Kungu (deceased) to be buried thereon pending the determination of the Appeal at the Court of Appeal.
- iii. Each party to bear their own costs.

Orders Accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 14TH DAY OF FEBRUARY, 2025

A.MSHILA



JUDGE

In the presence of;

Sanja – Court Assistant

Gathoni for the applicant

Masore for the respondent

