



REPUBLIC OF KENYA



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In re Estate of Kimani Gathu alias Gathu Kimani (Deceased) (Succession Cause 4 of 2019) [2025] KEHC 2894 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 4 OF 2019**

JK SERGON, J

MARCH 13, 2025

**IN THE MATTER OF THE ESTATE OF THE LATE
KIMANI GATHU ALIAS GATHU KIMANI (DECEASED)**

BETWEEN

JANE WAKANYI NDUNGU APPLICANT

AND

MARTHA NJOKI NJENGA RESPONDENT

RULING

1. The application coming up for determination is a chambers summons dated 25th June, 2024 seeking the following orders;
 - (i) Spent
 - (ii) That there be a stay of execution of orders of this honourable court dated 6th May, 2022 wherein the grant was confirmed and a certificate of confirmation of grant (rectified) was issued.
 - (iii) That this honourable court be pleased to review and/or aside its orders dated 6th May, 2022 wherein the grant was confirmed and certificate of confirmation of grant (rectified) was issued.
 - (iii) That further and necessary directions be given.
 - (iv) That the costs of this application be provided for.
2. The application is supported by grounds on the face of it and the supporting affidavit of Jane Wakanyi Ndungu the applicant herein.



3. The applicant avers that she is the daughter-in-law of the deceased herein whereas the petitioner is her sister-in-law and further that their deceased father-in-law died sometime on 23rd January, 2011 and left behind several dependents.
4. The applicant avers that this court issued a confirmation of grant (rectified) on 6th May, 2022 inter alia that the parcel of land known as L.R No. Kericho/Chilchila/Kunyak/Block2 (Urafiki)/306 measuring 3.72 Acres be distributed between her and one Francis Kimani Mwangi and that the 0.72 acres was given to the said Francis Kimani Mwangi who is holding it in trust for the named beneficiaries herself included and that the same is erroneous.
5. The applicant avers that the said distribution was ordered despite the fact that the said property namely parcel L.R No. Kericho/Chilchila/Kunyak/Block2 (Urafiki)/306 measuring 3.72 Acres was to be wholly given to her as she has always been in occupation of the same, as the deceased had already gifted the land during his lifetime to one Peter Mwangi (now deceased), who was her husband.
6. The applicant avers that she is the widow to the above mentioned eldest deceased son to the deceased and the administrator of the estate herein without her consent and with the collusion of one Francis Kimani Mwangi, not a direct beneficiary of the estate, unlawfully removed her from being the administrator.
7. The applicant avers that on 6th October, 2022 she made an application seeking this court to be pleased to review and/or set aside the orders dated 6th May, 2022 wherein the grant was confirmed and a certificate of confirmation of grant (rectified) was issued, yet, the petitioner/respondent had misinformed court with the intent to lock her out of the instant succession proceedings stating that she had been served when the matter came up for confirmation and rectification of grant.
8. The applicant avers that there is an error apparent on the face of record being that the estate was distributed in the absence of some beneficiaries whose presence was necessary and neither did they sign the consent on the mode of distribution.
9. The applicant avers that the petitioner/respondent together with one Francis Kimani Mwangi not a direct beneficiary but a grandson is in the process of subdividing the estate of the deceased with a view to dispose the same, she is therefore apprehensive that unless stay is granted and ruling herein reviewed she will suffer irreparable loss and harm.
10. The matter came up for inter partes hearing, the learned counsel for the applicant/objector stated that there was no response to the instant application and therefore the application remains unopposed.
11. At the time of writing this ruling the petitioner/respondent had not filed a replying affidavit in response to the application, hence the application is unopposed.
12. Having considered the instant application, the issue (s) for determination by this court is whether to stay the execution of the orders of this court dated 6th May, 2022 and whether to review and/or set aside the certificate of confirmation of grant (rectified) dated 6th May, 2022.
13. On the issue as to whether to stay the execution of the orders of this court resulting in the certificate of confirmation of grant (rectified) dated 6th May, 2022. The applicant maintains that the grant was confirmed in the absence of some beneficiaries whose presence was necessary and neither did they sign the consent on the mode of distribution. The petitioner/respondent had not filed a response to the application at the time of the writing this ruling. However, it is clear that the applicant is contesting distribution of the estate of the deceased in particular L.R No. Kericho/Chilchila/Kunyak/Block2 (Urafiki)/306 measuring 3.72 Acres. According to the applicant, the petitioner/respondent has dealt with the estate of the deceased in a manner adverse to the interests of the beneficiaries and inimical



to her interests in L.R No. Kericho/Chilchila/Kunyak/Block2 (Urafiki)/306 measuring 3.72 Acres. However, I find the applicant had the opportunity to lodge a protest or objection against the succession proceedings before the grant was confirmed. In any event this court upon confirmation of grant dated 6th May, 2022 is largely functus officio. In re Estate of Juma Shitseswa Linani (Deceased) [2021] eKLR the court held that where a person is unhappy with the process of confirmation of grant, such a person ought not to move the court under section 76 for revocation of grant. Instead, the person should file an appeal against the orders made by the court on distribution or apply for review of the said orders. This is because the court confirming a grant largely becomes functus officio so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review. It is also this court's observation that it is not clear whether the applicant being aggrieved with the distribution of the estate is intent on lodging an appeal. In the absence of an appeal or the intention to appeal it is not certain what purpose a stay of execution of the orders of this court resulting in the certificate of confirmation of grant (rectified) dated 6th May, 2022 will serve.

14. On the issue as to whether to review and/or aside its orders dated 6th May, 2022 wherein the grant was confirmed and certificate of confirmation of grant (rectified) was issued, the law on review is codified in order 45 of the Civil Procedure Rules and section 80 of the *Civil Procedure Act*. Under Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

- (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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review." Under Section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such an order as it thinks fit on sufficient reason being given for review of its decision. However this discretion should be exercised judiciously and not capriciously. The upshot of the above is that the applicant has failed to demonstrate that there is mistake or error apparent on the face of record and/or any sufficient reason to enable this court to review and/or set aside its decision. The application is hereby dismissed with each party bearing their own costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 13TH DAY OF MARCH, 2025.

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J.K. SERGON

JUDGE

In the presence of:-



C/Assistant – Rutoh

Miss Kitur for the Objector

No Appearance for the Petitioner

