



REPUBLIC OF KENYA



**Kinyua v Kuthua & 4 others (Miscellaneous Succession Application
6 of 2014) [2025] KEHC 4572 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4572 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS SUCCESSION APPLICATION 6 OF 2014
RM MWONGO, J
APRIL 8, 2025**

BETWEEN

DOMITIRIA WANGUI KINYUA APPLICANT

AND

MARGARET WAMBERE KUTHUA 1ST RESPONDENT

TERESIA WANJIRU 2ND RESPONDENT

JAMES NJIRU KUTHUA 3RD RESPONDENT

CATHERINE MUTHONI 4TH RESPONDENT

ESTHER MICERE 5TH RESPONDENT

RULING

The Application

1. Before this court is a notice of motion dated 05th February 2020, pursuant to Rule 63 Probate and Administration Rules and order 45 Rule 1 of the Civil Procedure Rules. Through it the 3rd respondent/applicant seeks the following orders:
 - a. That this honorable court be pleased to review/ set aside the ruling and consequential orders emanating from the ruling dated 20th December 2019;
 - b. That the cost of this application be borne by the 1st, 2nd, 4th and 5th respondents.
2. The 3rd respondent/applicant bases his prayers on the grounds that:
 - a) The 3rd respondent/applicant neither acted fraudulently nor failed to disclose material facts that would warrant him to be punished by revoking the grant and having the estate redistributed;



- b) No plausible explanation has been tendered by the applicant on why she had not participated in the proceedings especially considering that she had all along been resident in the country and even worse lived in the same village;
- c) The affidavits sworn by Margaret Wambere Kuthua, Teresiah Wanjiru, Catherine Muthoni and Esther Michere dated 28th January 2015 point at deliberate attempt to hood wink the honourable court that all except the first born knew of the proceedings of Succession Cause Number 237 of 1998;
- d) That the 3rd respondent/applicant having inherited four acres of Title Number Mutira/Kanyei/283 has since conferred beneficial interests to his children. The applicant is therefore estopped from claiming any interest belatedly to the detriment of the 3rd respondent/applicant and his children; and
- e) That in any case the 1st respondent has a life interest in the two acres given to her which she can pass to the applicant as it is abundantly clear that save for her claim of one acre, no other beneficiary is laying a claim.

Background

- 3. The 3rd respondent/applicant is aggrieved by the ruling of this court delivered on 20th December 2019 in which the grant issued to the 1st respondent was revoked. The court found that the proceedings to obtain the grant were defective and were obtained through concealment from the court of something material to the case. The concealed matter was found to be that the applicant/respondent was not involved in the proceedings.
- 4. The 3rd respondent/applicant's case now is that following the 1st respondent's petition for the grant, there was no objection filed even though the matter was gazetted. That the applicant/respondent, who is the 1st respondent's first-born daughter was not involved in the proceedings, something that the 1st respondent and all her other children stated in a strange turn of events during revocation proceedings which were conducted 26 years after death of the deceased.

Responses to the application

- 5. In their separate replying affidavits, the 1st, 2nd and 5th respondents deposed identical facts. They stated that the findings of the court in the ruling delivered on 20th December 2019 should be left to rest because when the matter was ongoing, the 3rd respondent/applicant had the chance to cross-examine all the witnesses. They supported the revocation findings because it is true that the applicant/respondent did not participate in the proceedings for obtaining the grant, neither did she inherit any part of the estate. They urged the court to dismiss the application herein stating that it is now functus officio. The court cannot review its findings in the manner presented by the 3rd respondent/applicant which they termed as a 'backdoor appeal'.
- 6. The applicant/respondent deposed a replying affidavit on similar terms as those deposed by the 1st, 2nd and 5th respondents. She added that in paragraph 11 of the supporting affidavit to the application, the 3rd respondent/applicant stated that there was an error apparent on the face of the record, yet no such error is evident. She denied any knowledge of the succession proceedings leading to issuance of the grant to the 1st respondent. She urged the court to dismiss the application since the grant was correctly revoked.



7. The 3rd respondent/applicant filed a supplementary affidavit in which he stated that the applicant/respondent knew about the proceedings to obtain the grant. He referred to the proceedings therein and noted that the court recorded that all the parties to the suit were present. In any event, he disclosed to the court that the applicant/respondent was one of the beneficiaries of the estate but she was married and living with her husband. She knew that she ought not to benefit from the estate while she is still married. He stated that whatever concealment was found, was also supported by the other respondents since they did not tell the court that the applicant/respondent was their sibling. He urged the court to review the ruling.

Parties Submissions

8. The application was canvassed by way of written submissions.
 - a. The 3rd respondent/applicant's submissions.
9. In his written submissions, the 3rd respondent/applicant argued that the application satisfies the principles governing review of rulings and judgments. He relied on section 80 of the *Civil Procedure Act* and Order 45(1) of the Civil Procedure Rules 2010 and the cases of *Pancras T. Swai v Kenya Breweries Limited* [2005] KEHC 1832 (KLR) and *National Bank of Kenya Limited v Ndungu Njau* [1997] KECA 71 (KLR). He argued that the evidence relied on by the court in reaching its decision was evidence that should have been brought up before the grant was issued as an objection. Since the issues did not come up at the correct time, it should be held that the applicant/respondent slept on her rights to the estate and, in any event, she knew that because she was married, she did not have any claim to the estate of her father.

b. The Applicant/Respondent's submissions

10. The applicant relied on the case of *Odinga v Independent Electoral and Boundaries Commission & 3 others* [2013] KESC 2 (KLR). She argued that since its delivery of the ruling on 20th December 2019, the court had become *functus officio*, and had no capacity to revisit the issues raised. It was her argument that if the application is entertained, the court will be purporting to sit on appeal in its own decision. She urged that no error is apparent on the face of the record that needs to be reviewed by the court. She urged the court to dismiss the application since the ruling was correct.

c. The 1st, 2nd, 4th and 5th Respondents' Submissions

11. They jointly submitted that the court's ruling is based on the correct fact that the applicant/respondent did not participate in the proceedings. Therefore, it was correct to revoke the grant based on the provisions of section 76 of the *Law of Succession Act*. They urged that the finding of the court should be held as final since the High Court is the Highest appellate court in succession causes.

Issues for determination

12. The core issue for determination is whether the court should review/ set aside the ruling and consequential orders emanating from the ruling delivered on 20th December 2019.
13. Rules 49 and 63(1) of the Probate & Administration Rules make way for the application of the Civil Procedure Rules. Here, Order 45 Rule (1) of the Civil Procedure Rules was invoked, pursuant to which a court may review its orders on the following grounds:



- a. Where there is 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
 - b. Where there has been some mistake or error apparent on the face of the record; or
 - c. Where there is any other sufficient reason.
14. In *In re Estate of Saverio Ruri Njuiri (Deceased)* [2021] KEHC 3851 (KLR) the court stated as follows:
- “25. Review of decisions of a probate court is governed by Rule 63 of the Probate and Administration Rules, which imports Order 45 of the Civil Procedure Rules in probate matters. 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 the said Order 45 of the Civil Procedure Rules (See *John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another* [2016] eKLR).
 26. The requirements under Order 45 are to the effects that, to be successful, the applicant must demonstrate to the court that; -
 - i. 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; or
 - ii. That there has been some mistake or error apparent on the face of the record; or
 - iii. That there is any other sufficient reason.”
15. The 3rd respondent/applicant stated that there is an error apparent on the face of the record, in that the court should have noted that the applicant/respondent knew about the proceedings culminating into the impugned ruling. He stated that the grant was revoked in error and that this order should be set aside. In the case of *In re Estate of Simoto Omwenje Isaka (Deceased)* [2020] KEHC 1641 (KLR) the learned judge held that an error apparent on the face of the record is determined judicially on the facts of each case. The error must be self-evident. It was held thus:
- “From the above, it is clear that the error the subject of the application ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long-drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.”[Emphasis added]
16. The position of 3rd respondent/applicant was rebutted by the respondent whose arguments were that the court has now become *functus officio*, thus lacking capacity to entertain an application for review in the manner presented herein. That the application intends to have this court sit on appeal in its own decision. The revoked grant was issued through Kerugoya SRM Succession Cause No.237 of 1998. The revocation proceedings were conducted in the High Court being instituted *vide* summons for revocation of grant dated 06th March 2014. The court took *viva voce* evidence and considered it. It found that the grounds under section 76 of the *Law of Succession Act* had been met.



17. The grounds for the application herein demand that the court should re-open that evidence adduced at the revocation hearing and reevaluate the same. Needless to say, to do such a thing makes this an appellate court where re-examination of evidence is demanded. If the court should review its ruling, it cannot take an in-depth look at the arguments made and the evidence adduced; rather, there should be an error apparent on the face of the record. A glaring error that the court can see at a glance.
18. The doctrine of *functus officio* allows for litigation to come to an end. It was discussed in the case of *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] KEHC 7107 (KLR) where the court stated:

“The doctrine of *functus officio* was considered by the Court of Appeal in *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] KECA 600 (KLR), where the court held that -

“*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in *re-St Nazaire Co*, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions.””
19. Further, in the case of *Odinga v Independent Electoral & Boundaries Commission & 3 others* [2013] KESC 8 (KLR), the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 which reads: -

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

Conclusions and Disposition

20. In conclusion, it has not been shown by the applicant that either; there has been discovered new and important matters or evidence not previously available; nor that there is a glaring mistake or error apparent on the face of the record. The third ground for review that there is any other sufficient reason - was not propositioned. What the applicant seeks herein is a deep re-hashing or re-looking at the evidence and arguments, which is not the domain of review.
21. Whilst the 3rd respondent/applicant remains aggrieved by the ruling of the court revoking the grant, this court cannot grant him recourse through review proceedings as filed herein. He should file a proper appeal and have it prosecuted so that he can ventilate his grievance before an appellate court. The [*Law of Succession Act*](#) makes provision for this and it outlines the procedure for appealing.
22. In the result, the application does not meet the requirements for review, and is therefore dismissed in its entirety.
23. Costs to be borne by each party.
24. Orders accordingly.



DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 8TH DAY OF APRIL, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Ms. Thungu for Respondent
2. No Representation for Applicant (Rachier & Omollo)
3. Francis Munyao - Court Assistant

