



REPUBLIC OF KENYA



**In re Estate of the Late Mbithi Muu Engoli (Deceased) (Succession Cause 167 of 2008) [2024] KEHC 5775 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5775 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 167 OF 2008**

**MW MUIGAI, J**

**MAY 16, 2024**

**BETWEEN**

**ONESMUS MUTUKU MUNYAO ..... 1<sup>ST</sup> RESPONDENT  
DAVID KIOKO NDIWA ..... 2<sup>ND</sup> RESPONDENT  
FRANCIS MUTHOKA MBITHI ..... 3<sup>RD</sup> RESPONDENT  
HARRISON NZIOKI KATUU ..... 4<sup>TH</sup> RESPONDENT  
ANTONY MUTUKU MUNYAO ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**BONIFACE MUU SAMUEL ..... 1<sup>ST</sup> OBJECTOR  
PATRICK MULE SAMUEL ..... 2<sup>ND</sup> OBJECTOR  
MUTHAMA SAMUEL ..... 3<sup>RD</sup> OBJECTOR**

**RULING**

1. By a petition received on 3<sup>rd</sup> April, 2008, the petitioner Francis Muthoka Mbithi petitioned this Court for grant of Letters of Administration intestate of the estate of Mbithi Muu Engoli (deceased) who died on 4<sup>th</sup> May, 1990 domiciled in Kenya at Kiandani sub-location.
2. Pursuant to the Affidavit in support of Petition for Letters of Administration Intestate, the deceased died intestate and left the following surviving him; -
  - a. Alice Mukonyo Mbithi.... (wife)
  - b. Samuel Mbithi..... (deceased)
  - c. Titus Kasema Mbithi..... (deceased)



- d. Francis Muthoka Mbithi.... (son)
3. The Affidavit in Support of Petition for Letters of Administration Intestate further mentioned full inventory of all assets left by the deceased at the date of his death to be:
  - a. Machakos/Kiandani/1750 (2.47 Ha)
4. By Assistant Chief's letter dated 31<sup>st</sup> March,2008 confirmed that the deceased hailed from lower Kiandani in Mumbuni location. The said letter gave the following as heirs of the deceased.
  1. Francis Muthoka Mbithi.... Son
  2. Samuel Mbithi..... Son (deceased)
  3. Titus Kasema Mbithi..... Son (deceased)
5. By the Kenya Gazette notice dated 2<sup>nd</sup> May,2008, Francis Muthoka Mbithi of P.O Box 105 Makueni in Kenya the deceased's son was gazetted for grant of Letters of Administration Intestate to the Estate of Mbithi Muu Engoli, late of Mumbuni Location who died at Kiandani sub-location on 4<sup>th</sup> May,1990.
6. Grant for Letters of Administration was issued on 12<sup>th</sup> August, 2008 and dated on 20<sup>th</sup> August,2008 to Francis Muthoka Mbithi as personal representative of the deceased's estate to render a just and true account thereof as required by law.
7. Subsequently, Summons for Confirmation of Grant dated 9<sup>th</sup> February,2009 was filed in court, wherein the Applicant sought orders inter alia for the grant of letters of administration made and issued to Francis Muthoka Mbithi be confirmed.
8. Grant for letters of Administration intestate was confirmed by this Court vide a certificate confirmation of grant on 6<sup>th</sup> April,2009 to the said Francis Muthoka Mbithi.

#### **Summons For Revocation Of Grant**

9. Summons for revocation of grant dated 29<sup>th</sup> June,2009 was filed, wherein the applicants specifically sought that Grant of Letters of Administration made to Francis Muthoka Mbithi on 20<sup>th</sup> August,2008 and confirmed on 6<sup>th</sup> April,2009 be revoked on grounds inter alia; that the grant was obtained fraudulently by making false statement and concealment from court of material facts, and that the proceedings in which the grant was obtained were contrary to Sections 39,57 and 72 of the [\*Law of Succession Act\*](#) as read with Rules 7, 25, 26 and 40 of the Probate and Administration Rules and further that the grant was obtained by untrue allegation in law and in fact, finally that some properties belonging to the deceased were left out.
10. The Court in its ruling dated 8<sup>th</sup> February,2021 by Hon. D.K Kemei J found as follows: -
  - a. The Certificate of Confirmation of Grant issued on 6/4/2009 hereby cancelled.
  - b. The Petitioner is directed to apply afresh for the distribution of the asset of the deceased namely parcel Machakos/Kiandani/1750 equally between himself and his late brothers Samuel Muu Mbithi and Titus Mbithi and or their family representatives within the next thirty (30) days from the date hereof.
  - c. Title L.R Machakos/kiandani/1750 now in the name of Francis Muthoka Mbithi be and is hereby cancelled and that the same do revert in the name of the deceased Mbithi Muu Engoli.



- d. The orders regarding the status quo made on 14/6/2016 shall remain in force until the final confirmation of grant.
  - e. As parties are members of the same family, each party to bear their own costs”.
11. Orders regarding the status quo made on 14/6/2016 until the final confirmation of grant.

### **Summons For Confirmation Of Grant**

12. By summons for confirmation of grant dated 18<sup>th</sup> February, 2021 and filed in court on 17<sup>th</sup> March, 2021, the Applicant specifically sought order that the grant of Letters of Administration Intestate issued to Francis Muthoka Mbithi on 20<sup>th</sup> February, 2008 be confirmed.
13. The application was supported by an affidavit sworn by Francis Muthoka Mbithi, the Petitioner herein, wherein, he deposed that Grant of Letters of Administration of the deceased’s estate herein was made to him by this Honorable Court on 20/8/2008. He contended that the grant was on 23/3/2009 confirmed by this Honorable Court, with the only identified property of the estate (land parcel No. Machakos/Kiandani/1750) being ordered to be registered in his name and to hold in trust.
14. He deposed that pursuant to the said confirmation of grant, the deceased’s aforesaid land Parcel No Machakos/Kiandani/1750 was transmitted from the deceased and was registered in his name. He deposed further that pursuant to an application for revocation of the said confirmed grant dated 29/6/2009 and filed herein, this Honorable Court delivered a ruling on 8/2/2021 and in view of that he prayed that the deceased asset known as land parcel No. Machakos/Kiandani/1750 be equally distributed amongst the following:
  - a. Francis Muthoka Mbithi (the Petitioner).
  - b. Mary Mbithe Samuel (being the widow of the late Samuel Muu Mbithi).
  - c. Elizabeth Wambui Titus (being the widow of the late Titus Kasema Mbithi).

### **Affidavit Of Protest Against Confirmation Of Grant**

15. The Affidavit of Protest of against Confirmation of the grant dated and filed in court on 16<sup>th</sup> March, 2022 sworn by Muthama Samuel, the 3<sup>rd</sup> Objector herein, wherein, he deposed that many beneficiaries of the estate of the deceased herein have been clearly left out of these proceedings contrary to the provisions of Section 51 (g) of the Law of Succession Act and Rule 7 (e) of the Probate and Administration Rules as duly informed of the laws by his Advocates on record.
16. He deposed that there can be no parallel succession causes dealing with the estate of the same deceased person. Lamenting that several free properties of the deceased as defined under Section 3 of the Law of Succession Act and as required under Section 51 (2) (h) of the Law of Succession Act and Rule 7 (d) of the Probate and Administration Rules as duly informed of the laws by his advocates on record.
17. He deposed that they enquired through their advocates on record about the purported Machakos High Court Succession Cause No. 140 of 2016 but they found that the same was non-existent in the registry with matters only reaching 100 in that years register .
18. Further he deposed that there has been intermeddling with the estate of the deceased herein and it is necessary for the 2<sup>nd</sup> Objector Patrick Mulee Samuel to be made a co- administrator herein so that he may follow up on assets of the deceased intermeddled with as the Petitioner is unwilling to do so.



## Summons To Review The Orders Dated 8/2/2021

19. The Applicant vide his Summons dated and filed in court on 16<sup>th</sup> March, 2022 brought under Sections 45 and 47 of the Law of Succession Act and Rules 49 and 59 (5) of the Probate and Administration Rules sought orders that:

1. This Court to review its orders dated and delivered herein on 8/2/2021 and order that all other free property of the deceased namely Machakos/Kiandani/2050 and Machakos/Kiandani/2097 be listed as his assets herein and all beneficiaries of the deceased from his two houses namely
  - a. Mukonyo Mbithi Deceased 1<sup>st</sup> Wife
  - b. Samuel Muu Mbithi Deceased Son
  - c. Titus Kasema Mbithi Deceased Son
  - d. Mery Kiilu Deceased Daughter
  - e. Josephine Wayua Makau Deceased Daughter
  - f. Beatrice Joseph Adult Daughter
  - G. Rosphele Mbithi Adult Daughter
  - h. Agnes Musau Deceased Daughter
  - i. Meli Wambua Adult Daughter
  - j. Susan Joseph Adult Daughter
  - k. Francis Muthoka Mbithi Adult Son
  - l. Jotce Mbithe Samuel Adult Daughter
  - m. Elizabeth Wambua Titus Adult Daughter
  - n. Ngii Mbithi Deceased 2<sup>nd</sup> Wife
  - o. Ndwiwa Mbithi Deceased Son
  - p. Munyao Mbithi Deceased Son
  - q. Joyce Kanini Kipkemei Adult Daughter
  - r. Dorothy Nthenya Mbithi Adult Daughter
  - s. Nyiva Mbithi Deceased Son
  - t. Ngundo Mbithi Deceased Son
  - u. Muthoki Mbithi Deceased Daughter
2. The 2<sup>nd</sup> Objector/Applicant herein Patrick Mulee Samuel be made a co-administrator to Francis Muthoka Mbithi.
3. The Respondents be cited for intermeddling with the free property of the deceased herein, that is parcels land numbers Machakos/Kiandani/2050 and Machakos/Kiandani/2097 and this Honorable Court be pleased to grant any other orders that it may deem just and expedient



to meet the ends of justice including punishment of the Respondents and any other person whomsoever interfering with the herein.

20. The Summons is supported by the Affidavit dated and filed in Court on 16<sup>th</sup> March,2022, sworn by Patrick Mulee Samuel, the Applicant herein, wherein, he deposed that that many beneficiaries of the estate of the deceased herein have been clearly left out of these proceedings contrary to the provisions of Section 51 (g) of the Law of Succession Act and Rule 7 (e) of the Probate and Administration Rules as duly informed of the laws by his Advocates on record.
21. He deposed that there can be no parallel succession causes dealing with the estate of the same deceased person. Further that several free properties of the deceased as defined under Section 3 of the Law of Succession Act and as required under Section 51 (2) (h) of the Law of Succession Act and Rule 7 (d) of the Probate and Administration Rules have been left out.
22. He contended that they enquired through their advocates on record about the purported Machakos High Court Succession Cause No. 140 of 2016 but they found that the same was non-existent in the registry with matters only reaching 100 in that years register and further opined that it was clear that the Petitioner and the Respondents have been intermeddling with the estate of the deceased herein and it is necessary for him Patrick Mulee Samuel to be made a co-administrator herein so that he may follow up on assets of the deceased intermeddled with as the Petitioner was unwilling to do so.

#### **Affidavit In Reply toProtest Against Confirmation ofGrant And In Reply toThe Summons Dated 16<sup>th</sup> March,2022**

23. The above affidavit dated 15<sup>th</sup> June,2022 and filed in court on 13<sup>th</sup> July,2022, sworn by Francis Muthoka Mbithi, the Petitioner herein, wherein he deposed that the protest and the summons are scandalous, frivolous and an abuse of this Honorable Court's process only meant to further frustrate the process of confirmation by rehashing issues that were already litigated upon and finalized by this Honorable Court. deposing that vide a ruling dated 8<sup>th</sup> February,2021, this Honorable court made a finding to the extent that the only property of the deceased available for distribution was land parcel No. Machakos/Kiandani/1750
24. He opined that the properties alluded to by the Objectors herein were already distributed by the deceased herein during his lifetime, a fact of which the court noted in the aforementioned ruling and the beneficiaries purported to have been left out and properties purported to have been omitted were already distributed to the deceased's 2<sup>nd</sup> house vide Succession Cause 140 of 2016, which fact the Objectors herein brought to the attention of the court on their own motion.
25. He deposed that the deceased's 2<sup>nd</sup> house, who were the recipients of the aforementioned properties have never filed any objections in the proceedings herein indicative of their contentment with the properties they already received and distributed. He deposed further that the house of Ngii Mbithi (the deceased 2<sup>nd</sup> house) sold the properties distributed to them vide the said Succession Cause 140 of 2016, then this is the wrong forum for the Objectors to ventilate their issues and further that the Objectors herein have not shown that the aforementioned Succession Cause does not exist; that it is intriguing that they brought the said Succession Cause to the attention of the court and now aver that the same does not exist. Opining that the protest against confirmation coupled with the Summons for Review of this Honorable Court's aforementioned ruling are cleverly crafted to achieve the objective of revoking the grant herein on the same grounds the Objectors used before.

#### **Grounds of Opposition**

26. The 2<sup>nd</sup> Respondent objected the summons dated 16.3.2022 on the following grounds:



- a. The present protest and Summons is an afterthought and meant to delay distribution and an abuse of the court process.
  - b. The present Summons and protest is res judicata for Summons for revocation of grant were heard over the same issues and determined.
  - c. The present Summons for review are brought with an undue delay that is not explained.
  - d. The 2<sup>nd</sup> Respondent is wrongfully joined in these proceedings since he has no interest in the land parcel No. Machakos/Kiandani/1750 the subject of this Petition.
  - e. The Land Parcel No. Machakos/Kiandani/2097 is/was not free property of the deceased and cannot form part of the estate for the same is already distributed and transferred to a third party.
  - f. The Objectors categorically stated that they have no interest in Machakos/Kiandani/2097 and that is in courts proceedings and Ruling dated 8/2/2021 sought to be reviewed.
  - g. The distribution was done vide Succession Cause No. 140/2016 and the 2<sup>nd</sup> family is not contesting for they are contended and not asking anything from the present distribution.
  - h. The land parcel No. Iveti/Mungala/2097 is already distributed and not available for distribution in this petition and the petitioners can only challenge the distribution in the other Succession Cause No. 140/2016 in Environmental Land Court. the 2<sup>nd</sup> Respondent prayed that for the summons for review and protest to be dismissed with costs.
27. The matter was canvassed by written submissions.

## **Submissions**

### **Objectors' Submissions Dated 1.11.2022**

28. Counsel for the Applicants submitted that it was evident and was admitted that many beneficiaries of the estate of the deceased herein have been clearly left out of these proceedings contrary to the provisions of Section 51 (2) (g) of the [Law of Succession Act](#) and Rule 7 (1) (e) of the Probate and Administration Rules and they have never been served or renounce their right herein as required by law. Reliance was placed on Section 51 [Law of Succession Act](#).
29. It was submitted that there can be no parallel succession cause dealing with the estate of the same deceased person. The rigorous filing and sending matters to the Principal Registrar even before gazettelement is to ensure this and the court ought not to shut its eyes when there are admitted beneficiaries not involved in the matter.
30. Submitting that there are several free properties of the deceased as defined under Section 3 of the [Law of Succession Act](#) and as required under Section 51 (2) (h) of the [Law of Succession Act](#) and Rules 7 (1) (d) of the Probate and Administration Rules that have been left out in these proceedings. Contending that the Petitioner and the other Respondents have been intermeddling with the estate of the deceased herein and it is necessary for the 2<sup>nd</sup> objector Patrick Mulee Samuel to be made a co-administrator herein so that he may follow up on assets of the deceased intermeddled with as the Petitioner was clearly unwilling to do so.
31. Counsel averred that it was not disputed that parcels of land numbers Machakos/ Kiandani/ 2050 and Machakos/ Kiandani/2097 were registered in the names of the deceased at the time of his death unencumbered. That the copy of record for parcel of land number Machakos/Kiandani/2097 clearly



shows that the same was changed from the names of the deceased otherwise than through Succession as required by law.

32. Counsel urged the court to uphold the law and allow both the summons application and protest as prayed.

### **1st Petitioner's/respondent Submissions Dated 29.11.2022**

33. The Petitioner raised the following issues:

- i. Whether the Objectors/Applicants have met the threshold for Review.
- ii. Whether the protest has merit.

34. As to whether the Objectors/Applicants have met the threshold for review, counsel placed reliance on Order 45 of the Civil Procedure Rules 2010 and submitted that order 45 provides for three circumstances under which an order for review can be made. To be successful, the Applicant must demonstrate to the court that 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.
35. It was submitted that a party may successfully apply for review, secondly, if he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. Contending that the third ground for review is worded broadly: an application for review can be made for any other sufficient reason.
36. It was the case of the Petitioner that the Applicants have not demonstrated any mistake or error on the face of the record. Opining that the Applicants have further not demonstrated any discovery of any new and/or material pieces of evidence unavailable to themselves upon due diligence. Averring that the Applicants herein brought to the attention of the court the existence of Succession Cause No. 140 of 2016.
37. Counsel submitted that according to the Applicants, the deceased distributed his property among his two houses during his lifetime. The 1<sup>st</sup> House filed the instant proceedings regarding Machakos/Kiandani/1750 which they were given. Further that the 2<sup>nd</sup> House filed Succession Cause No. 140 of 2016 regarding Machakos/Kiandani/2050 and 2097 which they were given.
38. Submitting that the said discovery is predicated on the aspect of due diligence. The Objectors herein having introduced the Succession Cause No. 140 of 2016 proceedings had every opportunity to ascertain their existence and cannot now therefore denounce them simply because it is convenient to them. Contending that the Objectors/Applicants have not provided any sufficient reason to warrant the review of the ruling dated 8/2/2021. Counsel prayed that summons dated 16/3/2022 be dismissed with costs.
39. On whether the Protest has merit, it was contended that the 3<sup>rd</sup> Protestor/Applicant herein swore an Affidavit of Protest against confirmation of grant. The same was based on similar grounds as presented in the summons for review. Counsel reiterated his submissions in part (i) hereinabove and add that the Protest is completely devoid of merit.
40. On without prejudice, it was contended that whereas both houses filed their own set of proceedings, neither of the proceedings have been shown to be prejudicial to one another. Submitting that the Objectors herein even in the ruling dated 8/2/2021 are shown to have admitted not claiming any stake in the property given to the 2<sup>nd</sup> house. Opining that unless the Objectors have had a change of mind and



now seek over and above their entitlement to include what was given to the 2<sup>nd</sup> house by the deceased hence no one has been prejudiced by the two sets of proceedings.

41. It was the position of the Petitioner that the most aggrieved party toward being excluded would be the deceased's second house, there lack of participation in the proceedings herein despite knowledge thereof speaks volumes. Averring that the deceased's house upon obtaining letters of administration and subsequently disposed of their properties, then, no basis for intermeddling has been met.
42. Counsel prayed that both the protest and the summons for review be dismissed with costs to the Petitioner.

## **2nd Respondent's Submissions**

43. The 2<sup>nd</sup> Respondent in his submissions dated and filed in court on 9<sup>th</sup> January,2023, counsel for the 2<sup>nd</sup> Respondent submitted that in order for an application for review to succeed, the Applicant must convince the Court of the existence of new and important mater or evidence which, after the exercise duly 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. Counsel placed reliance on the case of James M Kingaru & 17 others v J.M Kangari & Muhu Holdings Ltd & 2 Others [2005] eKLR, where principles governing review was considered.
44. On an error or mistake on face of record, it was submitted that the Applicant has not shown that there is/was error apparent on the face of record. Contending that no error can be said to be apparent on the face of record if it is not manifest or self-evident and requires an examination. Opining that in making an examination as to whether there was/is an error apparent on face of record, the court must check on decision that is merely erroneous in nature and an error that is self-evident on the face of it.
45. It was submitted that the ruling sought to be reviewed was as a result of a full hearing whereby evidence was adduced and tested and therefore denied the summons for review.
46. Regarding res judicata, counsel relied on Section 7 of the Civil Procedure Act, and submitted that the 1<sup>st</sup> Objector filed summons for revocation of grant dated 29/6/2009 and sought for grant of letters of administration to the Petitioner be revoked. That directions were taken that the summons for revocation be heard by way of evidence and tested through cross examination. Averring that in those proceedings it emerged that there was Succession Cause No. 140/2016 over the same deceased person whereby the two parcels of land no. Machakos/Kiandani/2050 and 2097
47. It was submitted that the trial court on 8/2/2021 gave directions that the Objectors refused to follow and opted to protest and seek for review. Counsel urged the court to find all issues in the review and protest relating to same parties were heard and determined in the summons for revocation.
48. On the free asset, it was the position of the 2<sup>nd</sup> Respondent that he was joined in these proceedings as the registered owner of Machakos/Kiandani/2097, arguing that the Objector/ Applicant has taken an issue since that property was not included. To buttress this point on free property reliance was made on Section 3 of the Law of Succession Act, and submitted that land parcel No. Machakos/Kiandani/2097 is/was not a free property of the deceased, the same was allocated to the 2<sup>nd</sup> house of the deceased who filed Petition No. 140/2016 and the said property was distributed and transferred to the 2<sup>nd</sup> Respondent. Submitting that the property ought not to have been listed in this petition since it is already distributed and the only way to challenge its distribution was in Succession Cause No. 140/2016 whereby no objection was lodged. Contending that if the Objector is challenging its distribution and registration, he is free to file suit in the Environmental Land Court on basis of fraud if any.



49. It was urged that the court finds that the 2<sup>nd</sup> Respondent is wrongfully joined in these proceedings since he is not a beneficiary of the deceased, he has no interest to the estate of the deceased and land parcel no. Machakos/Kiandani/2097 is not in the names of the deceased. The 2<sup>nd</sup> Respondent urged court to dismiss the summons for review and protest with costs to the 2<sup>nd</sup> Respondent.

### **Determination/analysis**

50. I have considered the Summons for Confirmation of grant, the Affidavit of Protest, the General Summons and Applications the Grounds of opposition as well as the corresponding affidavits.

### **Succession Cause 140 OF 2016**

51. I have also considered the submissions of the parties and the Court record of CMCC Succ. Cause 140 of 2016, Estate Of Mbithi Muu Engoli(Deceased) which was availed to this Court through Deputy Registrar Machakos High Court.
52. Upon perusal of the Court file the following was revealed;
- i) The Petition was filed on 25/4/2016 in the High Court -Machakos but strangely this Court notes with concern, that the Petition was later processed, heard and determined in the Chief Magistrate's Court-Machakos.
  - ii) The beneficiaries listed were/are;
    - a. Joyce Kanini Kipkemei
    - b. Dorothy Nthenya Peter
    - c. Muthoki Mbithi
    - d. Antony Mutuku John
    - e. Onesmus Mutuku Munyao
    - f. David Kioko Munyao
  - iii) The Asset that comprised of the deceased's estate available for distribution was /is Machakos/ Kiandani/2050.
  - iv) The Petition was gazetted on 19/8/2016 and on 25/10/2016 the grant was issued to Administrators Anthony Kituku John, Onesmus Mutuku Munyao & David Kioko Ndiwa.
53. The Summons for Confirmation application was filed on 3/7/2017 where beneficiaries consented that the Administrators jointly hold the property Machakos /Kiandani in trust for other beneficiaries as shown in the Certificate of Confirmation of Grant issued on 4/9/2017.
54. On 3/8/2020 under Certificate of Urgency, the Applicants Emily Mutindi, Jackline Nduku & Elizabeth Ngii filed Summons for Revocation of Grant and property LR No Machakos / Kiandani/2050 reverts back in the name of the deceased.
55. The grounds elicited for revocation were as follows;
- The Applicants for grant of letters of administration intestate failed to disclose they are grandchildren of the deceased and left out living children of the deceased.
- The Applicants excluded widows of the deceased who were alive then.



The Applicants claimed to have obtained written consent from one of the siblings who lacked capacity to give consent due to being of unsound mind.

The Applicants/Petitioners intermeddled with the estate by disposing the property without knowledge consent of other beneficiaries and account for the proceeds of sale.

56. By Replying Affidavit filed on 11/8/2020, the Applicants/Petitioners admitted that they are grandsons of the deceased and what was written in the Petition for letters of administration that they were/are sons of the deceased was a typographical error. The 2 wives /widows of the deceased Mukonyo Mbithi & Elizabeth Ngii and were omitted in the Petition as they were deceased at the time.
57. There was consensus that the suit properties that comprised of the deceased's estate Machakos / Kiandani/1750 belonged to the 1<sup>st</sup> House & Machakos/Kiandani/2050 belonged to the 2<sup>nd</sup> House. Therefore, in petitioning for grant letters of administration, the Petitioners/Applicants herein represented the interests of the 2nd House only.
58. The extensive/detailed Ruling of the Trial Court Hon C. N.Ondieki SRM Machakos Law Courts of 12/11/2020 granted revocation of grant and interests of 3<sup>rd</sup> Parties to be addressed during the hearing and determination of the Intended new Petition for grant of letters of administration. The Trial court ordered the title to property LR Kiandani Machakos/2050 to revert to the name of the deceased.
59. The Court granted injunction restraining Respondents/ Petitioners/ Administrators from any disposal sale leasing charging or in any way dealing with LR Machakos /Kiandani/2050 in a manner inconsistent with the rights of beneficiaries or defeat filing of new Petition.
60. The Court granted mareva injunction against Cooperative Bank Machakos Bank to preserve deposits in AC 01109792502900 held in joint names of Petitioners/Administrators.
61. Within 21 days each house was to nominate 1 person from each house as representative/Administrator to file Petition.
62. The discretion to confirm grants is provided for under section 71 of the [Law of Succession Act](#). The court upon filing of petition for grant of letters of administration, issuance of the grant and subsequent filing of summons for Confirmation of grant; The Court shall apply [Law of Succession Act](#) and confirms the proper appointment administrators of the estate, the beneficiaries of the estate, the properties that comprise of the estate of the deceased and available for distribution and confirms the proposed mode of distribution with written consents of beneficiaries or orders distribution in accordance with the law.
63. Section 71(2) of the [Law of Succession Act](#), as read with Rule 40(4) of the Probate and Administration Rules, are explicit and speak to distribution of deceased's estate.
64. In the instant case, from the detailed outline above, it is manifestly clear that what commenced as Succession Cause 167 of 2008 proceedings in the High Court midstream metamorphosed into Succession Cause 140 of 2016 by the 2<sup>nd</sup> House Succession proceedings in the Chief Magistrates Court.
65. Now, after Ruling revoking the grant the Protestors moved this Court to include them in the current proceedings in the instant Cause and redistribute the estate of the deceased including the 2<sup>nd</sup> House whose properties clearly have been sold to 3<sup>rd</sup> Parties and hence it would amount to the Petitioners/ Protestors members of the 2<sup>nd</sup> House stealing a match to obtain portion of the Property; Machakos/Kiandani/1750 which by their own admission in the pleadings ie Replying Affidavit admitted that this property was for the 1<sup>st</sup> House only.



66. On the Court Record, is a letter dated 6/11/2023 by Counsel for the Respondents through DR MHC to the effect that Machakos/Kiandani/2050 & Machakos /Kiandani/2097 by copies of Green Cards attached were transferred to the Protestors Antony Mutuku John Onesmus Mutuku Munyao David Kioko Munyao. They cannot benefit twice and this Court would irregularly and unlawfully distribute the estate to the Protestors twice contrary to Section 71 of LSA.
67. I find the issues for determination to be as follows;
- a. Whether all the beneficiaries have been listed
  - b. Whether all the assets of the deceased have been listed
  - c. Whether the matter is res judicata
  - d. Whether the threshold for review has been met
  - e. Whether the 2<sup>nd</sup> Respondent is rightfully enjoined in these proceedings
68. On the first issue of whether all the beneficiaries have been listed, the protestor contends that many beneficiaries of the estate have been left out but does not specify who has been left out of the distribution. This issue was addressed by the court in its Ruling of 8.02.2022 where Justice D.K. Kemei found as follows;
- “Even though the objectors have maintained that the second house should have been listed, I find the failure did not prejudice anyone especially from the first house where both petitioners and objectors belong. The objectors confirmed that the second house has been given their two separate portions of land and they have no claim thereon. In any event evidence presented is to the effect that the second house filed a separate Succession cause number 140 of 2016 and proceeded to distribute their properties. Hence the petitioner could not have listed the said properties in this cause. I note that the second house has not lodged any objections in this cause thereby indicating that they were fully satisfied with what they had been given. The objectors in their evidence confirmed that the two parcels duly belonged to the second house hence , I find it rather curious that they are now accusing the petitioner for not including the said properties for distribution yet they have no claim thereon. They attempted to avail copies of search records (green cards) but which actually confirm that the said properties have already been distributed vide succession cause no 140 of 2016. This in my view was rather defeatist and did not help to advance their case against the petitioner, in any way. Further the chief’s introductory letter presented by the objector had the names of the sons of the 1<sup>st</sup> house one of whom was the father to the objectors. It is therefore disingenuous and in bad faith on the part of the objectors to accuse the petitioner for omitting names of family members when in fact the name of their father Samuel Muu Mbithi was duly listed. In any case, the Petitioner being the only surviving son of the deceased ranked in priority to take out letters of grant of administration while the objectors being grandsons are to get their share through their deceased father.”
69. The finding by the court on this issue not being disturbed by way of appeal, I find that the issue of beneficiaries is settled.
70. As to whether all the assets of the deceased have been listed, the Petitioner contends that Machakos/ Kiandani/2050 and Machakos/ Kiandani/2097 which are the properties the deceased ‘s family agreed that the 2<sup>nd</sup> House would take and distribute among them while Machakos /Kiandani/1750 would



be distributed to/by the 1<sup>st</sup> House. The Ruling of the Court dated 8.02.2021 by Hon. D.K. Kemei J addressed the issue of these properties and rendered himself as follows;

“.....it is also noted that the other two parcels 2050 and 2097 have since changed hands pursuant to conclusion of Machakos Succession Cause Number 140 of 2016 that had been lodged by the second house and therefore have already been distributed. As the two assets have already been distributed then the same has become fait accompli thereby militating against the objectors claim that the assets should still be free property of the deceased. Such an assertion at this stage holds no water as the same has been overtaken by events. Indeed good practice would have required that one succession cause be filed and that all the assets of the deceased be distributed under the said cause. That notwithstanding, I find that no prejudice has been suffered by the parties since the objectors themselves are in agreement that parcels 2050 and 2091 had been given by the deceased to the second house of Ngii Mbithi. In any event the said second house has not lodged any objection in these proceedings implying that it is fully satisfied with the distribution of their properties. The conduct of the objectors in trying to bring up the issue of those two properties merely to bolster their case against the petitioner but as said above, the said properties are not available for distribution then their claim in that regard is rejected. That being the position, I find that the only property that is freely belonging to the deceased is Machakos/ Kiandani/1750.”

71. There is a letter dated 9.03.2021 annexed to the affidavit of protest addressed to the Deputy Registrar of Machakos High Court inquiring about succession cause 140 of 2016. There is no letter in response to corroborate the finding by the objectors that the case does not exist.
72. Similarly, the finding by the court on this issue not being disturbed by way of appeal, I find that the issue of Machakos/Kiandani/2050 and Machakos/ Kiandani/ 2097 is settled.
73. The next issue is the issue of res judicata defined in Section 7 of the *Civil Procedure Act* as follows:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

74. The Court of Appeal held in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, that:

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

75. The Objectors/Applicants contend that there cannot be parallel succession proceedings however, the Petitioner contends that they are the beneficiaries in the 2<sup>nd</sup> House and have never filed any objection proceedings herein indicative of their contentment with the properties which they received



- and distributed. I find that the Objectors are being dishonest as they were aware of and instituted the proceedings in Succession Cause No 140 of 2016 in the Magistrates Court after the instant matter was filed in 2008 in the high Court.
76. Having found that the issues raised in the affidavit of protest were already determined by this court between the same parties over the issue of the list of beneficiaries and the properties culminating with the Ruling of then I find that the protest is res judicata and cannot be determined by this court. This court has been asked to review of the instant Ruling and allow the Protestors to join in these proceedings.
77. Lastly, is the issue of review, the protestor has asked the court to review its orders dated 8/2/2021 and order that all other free property and order that all other free property of the deceased namely Machakos/ Kiandani/2050 and Machakos/ Kiandani/2097 be listed as his assets herein and all beneficiaries of the deceased from his two houses.
78. Review is provided for under section 80 of the Civil Procedure Act Any person who considers himself aggrieved—
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
79. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-
- “ Any person considering himself aggrieved
- By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”
80. From the record, the issue of the assets and beneficiaries was raised by the protestors in their summons for revocation of grant dated 29/06/2009 and was determined by the court vide Ruling of the Court of 8/2/2021. There is no new evidence or information that has been presented to necessitate review of the orders given on 8.02.2021. The fact is as outlined above, the 2<sup>nd</sup> House moved the Court and filed Succession Cause 140 of 2016.
81. Where the grant was revoked and they were ordered to file a petition. Instead of doing so in the said Succession Cause they filed the instant application as Protestors in the instant case after the properties in the 2<sup>nd</sup> House have all been sold to 3<sup>rd</sup> Parties and are enjoined to further deal with the properties and sale proceeds held by the Bank until a Petition is filed.



82. Secondly, an error apparent on the record was defined in the case of Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR held;

“ 37. The term “mistake or error apparent” by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.”

83. The scope of review was discussed by the Supreme Court of India in the case of Ajit Kumar Rath v State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608 where it was stated that:-

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” ..... means a reason sufficiently analogous to those specified in the rule.”

84. Guided by the above authorities, the reasons cited by the applicant do not qualify to be any of the grounds prescribed in Order 45 Rule 1 of the Civil Procedure Rules.

### **Disposition**

85. I hereby order as follows;

- a) The Summons for revocation dated 16<sup>th</sup> March 2022 is dismissed.
- b) The Summons for confirmation of grant dated 18<sup>th</sup> February 2021 are hereby confirmed.
- c) The Ruling of 8/2/2021 remains legal regular and lawful order of the Court until successfully appealed against.
- d) The land parcel known as Machakos/ Kiandani/1750 be equally distributed among the following;
  - i. Francis Muthoka Mbithi
  - ii. Mary Mbithe Samuel
  - iii. Elizabeth Wambui Titus



- e) The County Surveyor- Machakos is hereby directed to equally distribute land parcel known as Machakos/Kiandani/1750.
- f) There are no orders as to costs.

It is so ordered.

**RULING DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 16/5/2024  
(VIRTUAL /PHYSICAL CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. MUSYIMI h/b B.M. KITUKU FOR THE APPLICANTS**

**MR. A. K. MUTUA FOR THE 2<sup>ND</sup> RESPONDENT**

**MR. JUDAH - FOR THE PETITIONER**

**PATRICK - COURT ASSISTANT**

