



Kairu Nyange Estate & another v Akoth & another (Miscellaneous Civil Application 169 of 2023) [2024] KEHC 4727 (KLR) (8 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4727 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION 169 OF 2023
SM MOHOCHI, J
MAY 8, 2024**

BETWEEN

KAIRU NYANGE ESTATE 1ST APPLICANT

NJORO HOUSE 2ND APPLICANT

AND

LEAH A. OKOTH & BEATRICE AKOTH 1ST RESPONDENT

SHELTER CONSTRUCTION LIMITED 2ND RESPONDENT

RULING

1. The Application before me is a Notice of Motion dated 19th March, 2024 filed pursuant to Order 45 Rule 1, Order 50 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#) and Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Article 159 of the [Constitution](#).
2. The Application is supported by a sworn affidavit by John Wanyange Mwangi evenly dated seeking the following reliefs:
 - i. Spent
 - ii. That this Court extends time within which the Applicants are to provide security as the time initially provided as lapsed.
 - iii. That the Court be pleased to review and/or vary the orders of 9th February, 2024 requiring deposit of the entire decretal sum of 1,745, 000 in a joint interest earning account in the names of the advocates on for the parties and allow an alternative security of the 1st Respondent being enjoined as a creditor in the estate.



3. This Court had on 22nd March, 2024 directed the application be served upon the Respondents. That the Respondent files a response within 14 days and that a hearing date be fixed within 3 days' subject to Court diary.
4. The matter was fixed for hearing on the 7th May, 2024 whereby the Applicant wanted to proceed by way of filed written submissions while the Court assigned time for oral submissions giving rise to this ruling.
5. Ms. Nasimiyu for the Applicants submitted that the application is intended to substitute security and extend time for compliance to provide the substituted security.
6. That the 1st Applicant is an estate of a deceased subject to P & A 640 of 2004 a twenty-year probate and administration pending before the High Court at Nakuru. That the administrators have been wrangling hence non-compliance.
7. That the Succession Court has barred administrators from accessing estate funds and that they are thus unable to deposit security in the nature of cash.
8. That they are seeking in P & A 640 of 2004 to have the 1st Respondent enjoined and be deemed as creditors.
9. That this shall ring fence the Respondents as the estate may be distributed to their exclusion.
10. Reliance was placed on the filed affidavit in support. M/s Kirui opposed the application by relying on their replying affidavit dated 22nd April, 2024 sworn by Leah Akoth.
11. The Respondents submits that the application does not satisfy the principles enshrined in Order 45 Rule 1 for Review.
12. The order being sought for review they did not comply and the 21 days lapsed. That no reason of the delay is provided.
13. The security offered as alternative is opposed that when they moved Court in the application giving rise to the ruling dated 9th February, 2024 the Applicant had offered to deposit security hence the order given. That the Applicants cannot now set further conditions for themselves.
14. That the judgment decree was as a result of a fatal WIBA matter where the 1st Respondent lost her husband and bread earner for the family leaving her widowed with a young family and she is unwilling to be enjoined into a 20 year wrangling estate which defeatist.
15. The Court Order must be obeyed. That the Respondent stands prejudiced if the application is allowed.
16. The Respondents are unsure when Succession No. 640 of 2004 shall be concluded having been pending for twenty years and do not wish to be part of a two-decade dispute.
17. Finally, that the Applicant are bound by their pleadings and that this is an abuse of the process of Court liable for dismissal.
18. The Respondents urges the Court to dismiss the application to enable them enjoy the fruits of her judgments.

In Further Rejoinder

19. M/s Nasimiyu in submission further stated that if the Respondents are not enjoined as Creditors in the succession their judgment shall remain a paper judgment.



20. That the Applicants have moved the Court in good faith. They urge the Court to allow the application.

Disposition

21. The substratum of this Miscellaneous Application is an application seeking leave to extend time to file an appeal.
22. That the ruling dated 9th February, 2024 was self-extinguishing leaving nothing to review. Order 45 Rule 1 provides for review of orders, decree or judgment by any aggrieved party.
23. The decree order or judgment sought for review ought to form part of the attachment and in this instance the same is lacking rendering the application fatally incompetent.
24. The second aspect is where the order, decree or judgment is unappealable review can only be allowed upon discovery of new and important matter or evidence after the exercise of due diligence was unavailable to the Applicants.
25. So the application fails from that stand point. The ruling dated 9th February, 2024 paragraph (v) of the final order was a default order that would upon default of compliance automatically render the entire application dated 17th May, 2023 dismissed.
26. The Court finds that the application dated 19th March, 2024 is not anchored on anything. The ruling dated 9th February, 2024 was never appealed and the same cannot be available for review by virtue of the self-triggering order.
27. This Court is unpersuaded as to the good faith of the Applicants, no evidence of being barred by the Succession Court has been offered.
28. No evidence of bickering has been offered or tendered. No evidence of an application to enjoin the 1st Respondent in the P & a No.640 of 2004 has been tendered.
29. The application accordingly fails for lack of merit and the same is accordingly dismissed.
30. Cost of this application and those previous applications herein are awarded to the Respondents.
This file be marked as closed.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 8TH DAY OF MAY 2024

MOHOCHI S.M

JUDGE

