



**In re Estate of Eliakim Shibia Musa (Deceased) (Succession Cause  
236 of 2012) [2024] KEHC 12307 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12307 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 236 OF 2012  
S MBUNGI, J  
OCTOBER 11, 2024**

**IN THE MATTER OF THE ESTATE OF ELIAKIM SHIBIA MUSA(DECEASED)**

**BETWEEN**

**JEMIMAH SARAH MBAKAYA ..... PETITIONER**

**AND**

**WYCLIFFE MUSA WERE ..... 1<sup>ST</sup> OBJECTOR**

**MUHAMMED MUNYANYA ..... 2<sup>ND</sup> OBJECTOR**

**AND**

**KEVIN ODHIAMBO MAHOBE ..... INTERESTED PARTY**

**MICHAEL SAMWEL KEYA ..... INTERESTED PARTY**

**RULING**

1. Vide a ruling dated 17.11.2023, this court ruled as follows: -
  - a) The grant dated 05.03.2013 issued in favor of Jemimah Sarah Mbakaya is hereby revoked.
  - b) The court appoints Wycliff Were and Phanice Maina Okaka to be joint administrators of the estate.
  - c) that the joint administrators to file fresh summons for confirmation indicating all the beneficiaries of the estate within thirty (30) days from the ruling date.
  - d) the land registrar Kakamega, cancels all title resulting from any subdivision of the property known as Marama/Shianamwenyuli/4 and that the same reverts back to the name of the deceased for the same to be availed for distribution to the persons entitled in accordance with this judgment.



- e) Being a family dispute, each party shall bear its own costs.
2. The petitioner, being aggrieved with the ruling, lodged an application under certificate of urgency and notice of motion for summons for review dated 23.11.2023, seeking the following orders: -
    - a) That the application be certified as urgent and be heard *ex parte* in the first instance.
    - b) That the proceedings and/or orders of this Honorable court dated 17.11.2023 particularly revoking the grant in this matter and all consequential orders hereof in favor of the respondent/ objector by this honorable court be reviewed or set aside and/or vacated.
    - c) That leave be granted to the applicant/petitioner file her replying affidavit, adduce her evidence and call her witnesses as required by law.
    - d) The replying affidavits which were deemed to have been filed by the petitioner herein be expunged from the record and leave be granted for the petitioner to file a fresh one as the same was not extracted from the right sources.
    - e) That the costs of this application be provided for.
  3. The application was premised on the following grounds: -
    - i. That the petitioner hired an advocate, one Mr. Nechesa Maina without getting proper and or full instructions, he proceeded with cause without consulting further instruction from her and she was not aware of what was taking place only to learn after a long time that the cause shall be coming up for ruling.
    - ii. That the petitioner was not heard and did not call any witness as required by law.
    - iii. That the evidence which ought to have been given in court pursuant to the application filed by the objector was not adduced since the petitioner was not given a chance to adduce it.
    - iv. That the orders of this court dated 17.11.2023 particularly revoking the grant in this matter and all consequential orders hereof in favor of the objector by this Honorable court be reviewed set aside and/or vacated as the same was initiated on an off beam replying affidavits.
    - v. That if the orders granted shall not be reviewed, the petitioner herein shall suffer mental torture as the applicant/defendant is not able to meet the demand which seem to be unnecessary to her.
    - vi. That the orders sought are in the best interest of justice as the law of natural justice demands that the petitioner/applicant should not be condemned unheard as the orders dated 17.11.2023 is as if it was obtained *ex parte*.
    - vii. That the applicant cannot be left to suffer on the mistake done by her advocate who was on the record.
  4. The application for review was supported by a sworn affidavit by the petitioner and affidavit evidence dated 19.12.2023 by Phanice Maina Okaka where she stated that the parcel of land in contention, Marama/Shinamwenyuli/2082 was handed over to the petitioner through oral will by the deceased with several eye witnesses, herself included.
  5. The interested parties herein filed a notice of motion dated 15.12.2023 under Certificate of Urgency seeking that the service of the application be dispensed with, and the same be certified urgent and be heard *ex parte* in the first instance. They sought that this honorable court be pleased to order temporary stay of execution of the orders made on 17.11.2023 pending the hearing and determination of this



- application inter partes. It was also their prayer that this honorable court be pleased to set aside, vary and/or review the orders made on 17.11.2023 in respect of the applications dated 23.07.2015 and 20.01.2023.
6. The interested parties prayed that they be served with the applications dated 23.07.2015 and 20.01.2023 and be allowed to file their response on the following grounds: -
    - i. There was an error apparent in the face record.
    - ii. The interested parties had been condemned unheard adverse effects made in the form of cancellation of their title nos. Marama/Shinamwenyuli/2083 and 2967 without their participation and/or involvement.
    - iii. The interested parties were not served with the applications dated 23.07.2015 and 20.01.2023 which sought orders affecting their properties and which culminated in adverse orders against them.
    - iv. That titles Marama/Shinamwenyuli/2083 was acquired during the lifetime of the deceased herein and had never been part of the estate.
    - v. The title Marama/Shinamwenyuli/2967 is subject of Kisumu Court of Appeal Civil Appeal No E009 of 2023 which is pending judgment on notice.
    - e. That the costs of this application be provided for.
  7. Through an affidavit sworn on 15.12.2023, Kevin Odhiambo Mahobe further stated that he acquired the parcel of land Marama/Shinamwenyuli/2083 via succession of his father's estate, one James Mahobe Anjawa.
  8. He further stated that the said parcel of land had never been comprised of the estate of the deceased as it was part of the third series of subdivisions from title No Marama/Shinamwenyuli/4 carried out by the deceased, averring that the only parcel registered to the deceased at his time of death was Marama/Shinamwenyuli/2082.
  9. Through an affidavit sworn on 15.12.2023, Michael Samwel Keya stated that his title No Marama/Shinamwenyuli/2967, which is one of the subdivisions affected by the orders of this court, was successfully defended by him in Butere Spm Land Case No 15 of 2015, Kakamega ELC No E003 of 2021 And Kisumu Court of Appeal Civil Appeal No E009 of 2023(pending judgment on notice);all against the 2nd objector herein, Mohammed Munyanya who was evicted from the said parcel of land as decreed in the lower court judgment.
  10. Vide a replying affidavit filed in this court on 06.02.2024, Mohammed Munyanya stated that the petitioner herein sought to re-litigate the same issues that have been conclusively determined and this court is functus officio to act on.
  11. He further stated that that the introduction of new evidence by the petitioner in her affidavit sworn post the ruling delivered on 17.11.2023, went affront the whole principle of *res judicata*, beseeching the court to dismiss both applications with costs.
  12. The 1<sup>st</sup> objector (Wycliff Musa Were) filed a preliminary objection dated 29.11.2023 in response to the petitioner's application for review on the grounds that the application was fatally defective as it had not complied with the legal requirement to annex the decree that the applicant wishes to have reviewed. Furthermore, he stated that the application did not meet the legal threshold under order 45 rule 1 of the [Civil Procedure Rules](#) as follows: -



- i. There was no new evidence that the applicant did not have at the time the case was being heard that she has just discovered.
  - ii. An application under order 45 rule 1 does not open up a case for a party to introduce new witnesses and evidence. The review is based on the record of the court on an error apparent on the face of the record.
  - iii. Failure by an advocate duly instructed to file relevant evidence and produce witnesses to the satisfaction of a litigant in court does not amount to reasonable grounds envisaged under rule 45(1) of the *Civil Procedure Rules*.
  - iv. Negligence of a party to properly pursue their case is not a ground for review under section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*.
  - v. The suit is *res judicata*.
13. Wycliff Musa Were also filed a replying affidavit dated 29.11.2023 to support the preliminary objection and challenge the application filed by the petitioner.

### **Analysis and Determination.**

14. I have looked at the two applications seeking for review of the court’s ruling dated 17.11.2023, the supporting affidavits, the replying affidavits, and the preliminary objection on points of law raised by Wycliff Musa Were on the application dated 23.11.2023 filed by Jemimah Sarah Mbakaya.
15. As the legal practice demands, whenever a preliminary objection on point of law is raised, the courts are obliged to determine the same before proceeding further. Therefore, I shall first determine the preliminary objection on the points of law placed against the petitioner’s application dated 23.11.2023 seeking review of the orders dated 17.11.2023 and for leave to call witnesses to adduce further evidence.
16. The meaning of what a Preliminary Objection is, was defined by The Supreme Court in *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others* when it cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”.

14. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“ ... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party



to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits...”

14. Section 80 of the [Civil Procedure Act](#) states as follows in regards to review: -

“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.”

14. Order 45 rule 1 of the [Civil Procedure Rules](#) states as follows: -

“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.”

14. As per Order 45 rule 3 of the [Civil Procedure Rules](#), the court may grant or reject an application for review: -

- “(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.
- (2) Where the court is of opinion that the application for review should be granted, it shall grant the same: Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.”

14. I have looked at the law as set out herein above on whether the application is defective for failure on the part of the applicant to annex a decree sought to be reviewed. I say It is not defective for I have not seen any provision under Order 45 of the [Civil Procedure Rules](#), making such a requirement. The Court of Appeal in [Peter Kirika Gitthaiga & another v Betty Rashid \(supra\)](#), went on to state that:-

“...Of course an order or decree is the formal expression of the decision of the court. An order emanates from a ruling whereas a judgment gives rise to a decree and should ordinarily be extracted. As already stated Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a



party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court's attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective..."

14. On the issue of the applicant seeking leave to be allowed to file a replying affidavit, adduce evidence and call her witnesses, I find that she fully participated in the proceedings which led to the ruling dated 17.11.2023. There is evidence in court that the applicant/petitioner filed a replying affidavit dated 15.05.2023 in response to summons for revocation of grant filed in court. On the 18.05.2023 when this matter came up for mention, the applicant was also present in court with her advocate. Further, all parties filed their submissions in compliance with the directions of the court, including the applicant whose filed submissions were dated 11.07.2023. As per the court record, the applicant's counsel was present in court when the matter came up for compliance and a ruling date was given.
15. On the allegation that she was not allowed to call her witnesses and adduce evidence, it is on record that directions were taken the matter to be heard by way of evidence of affidavits. Each of the parties filed.
16. The applicant has not strictly proved that she has discovered new evidence which she could not diligently discover during the hearing which led to the revocation of the grant. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No 317 of 2018, John M. Mativo Judge held: -

"...Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier..."

14. On the issue that the applicant had not instructed her advocate on what to submit before the court, I dismiss this as an act of afterthought. There is no time during the proceedings that she raised a complaint as to how her advocate was conducting the proceedings.
15. In a nutshell, I find that the application dated 23.11.2023 by Jemimah Sarah Mbakaya does not meet the legal threshold as laid down in Order 45 rule 1 of the *Civil Procedure Rules*. Therefore, I uphold the preliminary objection raised by Wycliff Musa Were, the 1<sup>st</sup> objector. Secondly, I also find the reasons adduced by Mohammed Munyanya (2<sup>nd</sup> Objector) in opposing the application similar to the issues raised by the 1<sup>st</sup> objector in the preliminary objection. The upshot is that the application is devoid of merit. It is hereby dismissed. The only option left for the applicant is to prefer an appeal against the ruling dated 17.11.2023.
16. On the application dated 15.12.2023 by the interested parties, Kevin Odhiambo Mahobe avers that he acquired the land parcel No Marama/Shinamwenyuli/2083 after succession proceedings of his father's estate, one James Mahobe Anjawa(deceased), who purchased the land from Eliakim Shibia Musa (the deceased herein) in the year 2000, and title was issued to him in the same year when Eliakim Shibia Musa was still alive. He further states that the land parcel Marama/Shinamwenyuli/2083 was never part of the deceased's estate since it was part of the third series of subdivisions from title No Marama/Shinamwenyuli/4, which was carried out by the deceased herein. He states that the only parcel of land under the deceased's name at the time of his death was Marama/Shinamwenyuli/2082.
17. I have looked at the application, the supporting affidavit and annexures. I have seen a title deed issued on 14.07.2000 in the name of James Mahobe Anjawa, the father of Kevin Odhiambo Mahobe who



inherited the land after the death of his father. A title deed was issued to him on 22.09.2023. The deceased's subject to this succession cause, Eliakim Shibia Musa died on 28.04.2009, when a title deed had already been issued to James Mahobe Anjawa. At the time of his death, title parcel No Marama/Shinamwenyuli/2083 was not under his name, thus was not part of his estate. A fact agreed on by the 2<sup>nd</sup> objector, Mohammed Munyanya.

18. The 1<sup>st</sup> Objector, Wycliff Musa Keya does not dispute that the land parcel No Marama/Shinamwenyuli/2083 is there and avers that no one has interfered with it, and Kevin Odhiambo Mahobe should wait for the confirmation process to proceed as ordered by the court and will get his share if it is true that his father bought the land from the deceased. He opined that this would be the best way to bring an end to this litigation over the estate of the deceased for there is confusion on how the initial land parcel No Marama/Shinamwenyuli/4 was subdivided, for the green card in court record for land parcel No Marama/Shinamwenyuli/1944 was given in the year 2008, yet Kevin Odhiambo Mahobe's card which is a mutation that comes from Marama/Shinamwenyuli/1944 was created in the year 2000, which is an impossibility.
19. I appreciate that Kevin Odhiambo Mahobe has a right to be heard on this and had a right to be informed before the title deed was cancelled, but given the reasons profounded by Wycliff Musa Were (the 1<sup>st</sup> objector) and the need to have a closure on this matter which has been in court for the last 12 years, I'm inclined not to stay the confirmation proceedings as requested by Kevin Odhiambo Mahobe and order that the administrators to include him as a liability so as to secure his interest. To me, this will also assist Kevin Mahobe Odhiambo to have a title deed from an exercise done lawfully and procedurally.
20. The issue raised by Michael Keya that he had bought the land parcel No Marama/Shinamwenyuli/2967 from the petitioner, and has a title deed for the same was litigated in Butere Spm Land Case No 15 of 2015, which decision the 2<sup>nd</sup> objector unsuccessfully appealed against in Kakamega ELC No E003 of 2023 and the matter is currently pending judgment on notice at the Kisumu Court of Appeal Civil Appeal No E009 of 2023.
21. Though Michael Keya was not served or involved, the issue was raised before the court and in paragraph 45 of the ruling dated 17.11.2023; the court said that that ruling should not be viewed as a challenge to the decision of the ELC court matter, for to this court the petitioner ought not to be allowed to ride on, and benefit from her failure to comply with the dictates of the Law of Succession Act which was the vehicle she boarded to acquire the capacity to deal with the estate. The court further said whoever wins the land case will be a liability to the estate and the administrators should have this in mind when processing the certificate of confirmation of grant.
22. In conclusion, I find that all the issues raised in the two applications for review were actually raised before the court and the court considered them when it rendered its ruling dated 17.11.2023. Therefore, the two applications for review are declined for reasons as rendered herein above in this ruling.
23. Each party to bear its own costs on both applications as the matter involves family issues.
24. Right of appeal 30 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 11<sup>TH</sup> DAY of OCTOBER, 2024.**

**S.N MBUNGI**

**JUDGE**



In the presence of:

The ruling delivered in absence of the parties and advocates. The advocates had been notified of the ruling by the Court Assistant.

Petitioner – absent

1<sup>st</sup> Objector – absent

2<sup>nd</sup> Objector – absent

Interested Parties – absent

Court Assistant – Elizabeth Angong'a

