



REPUBLIC OF KENYA



**In re Estate of Alexander Muchemi Kiago (Deceased) (Succession Cause 23 of 2018) [2023] KEHC 1441 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1441 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE 23 OF 2018  
FN MUCHEMI, J  
MARCH 2, 2023**

**BETWEEN**

**JOHN KIAGO MUCHEMI ..... 1<sup>ST</sup> ADMINISTRATOR  
JOHN WACHIRA KIAGO ..... 2<sup>ND</sup> ADMINISTRATOR  
CHRISTOPHER KIAGO MUCHEMI ..... 3<sup>RD</sup> ADMINISTRATOR**

**AND**

**MONICAH MUMBI KIAGO ..... 1<sup>ST</sup> RESPONDENT  
ESTHER WAITHIEGENI KIAGO ..... 2<sup>ND</sup> RESPONDENT  
AGNES WAMBUI GATUURI ..... 3<sup>RD</sup> RESPONDENT  
MARGARET WANGECHI NGATIA ..... 4<sup>TH</sup> RESPONDENT  
WINROSE WACHUKA MUCHEMI ..... 5<sup>TH</sup> RESPONDENT  
CATHERINE WANGECHI MUGO ..... 6<sup>TH</sup> RESPONDENT  
BEATRICE WANGECHI WAINAINA ..... 7<sup>TH</sup> RESPONDENT  
JOSEPH WAHOME MUCHEMI ..... 8<sup>TH</sup> RESPONDENT  
EUNICE WAIRIMU WAMBUGU ..... 9<sup>TH</sup> RESPONDENT  
JOYCE KARUNGARI MUCHEMI ..... 10<sup>TH</sup> RESPONDENT  
PHYLIS NJOKI MUCHEMI ..... 11<sup>TH</sup> RESPONDENT**

**RULING**

1. The application for determination is dated February 1, 2023 and seeks for orders for review of *ex parte* orders made on 14/11/2022 staying the execution of the grant confirmed on 29/9/2021 in order



to facilitate renovations on LR. No. 3672/13/V Rumuruti Municipality in compliance with the Statutory Notice issued on 1/11/2022 by the Public health Officer, Laikipia County.

2. The 4<sup>th</sup> – 11<sup>th</sup> respondents opposed the application and filed written submissions in support of their arguments. The 1<sup>st</sup> respondent told the court through her counsel that she was not opposed to the application while the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file any responses.

### **The Applicants' Case**

3. The applicants state that one of the widows of the deceased, the 1<sup>st</sup> respondent herein filed an application dated 14/11/2022 to which this court granted ex parte orders staying the execution of the grant confirmed on 29/9/2021. The applicants' further state that at the time the court made the orders, it was not brought to its attention that a statutory notice dated 1/11/2022 had been issued by the public health officer in regard to LR No. 3672/13/V Rumuruti Municipality. Further, the applicants contend that as at 14/11/2022, they had commenced renovations on the estate property in compliance with the said notice.
4. The applicants aver that the estate stands to suffer prejudice if the orders sought are not granted as the premises will be shut down for non-compliance leading to loss of revenue to the estate. The applicants further contend that the orders sought in the instant application are solely for the purpose of compliance with the County Government notice that will assist in making the property habitable for the tenants in occupation.
5. The applicants argue that the respondents shall not suffer any prejudice if the orders sought are granted.
6. The applicants in response to the 4<sup>th</sup> -11<sup>th</sup> respondents opposition filed a Supplementary Affidavit dated 13/2/2023 and stated that they were served with another notice by the public health officer dated 10/2/2023, for immediate closure of the premises and legal action against the estate.
7. The applicants aver that it is immaterial of their knowledge of the statutory notice as they did not have any participation in the issuance of the ex parte orders dated 14/1/2022. The applicants confirm that they had already began renovations in compliance with the statutory notice and had it not been for the ex parte orders made on 14/11/2022, the property would have already been renovated into compliance.
8. Parties disposed of the application by way of submissions. The applicants did not wish to put in submissions and relied on their affidavits.

### **The 4<sup>th</sup> – 11<sup>th</sup> Respondents' Submissions**

9. The 4<sup>th</sup> – 11<sup>th</sup> respondents submit that the applicants have not met the threshold to warrant the review of the ex parte orders made by the court on 14/11/2022. The 4<sup>th</sup> – 11<sup>th</sup> respondents rely on Order 45 Rule 1 of the *Civil Procedure Rules* and the cases of *Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira* [2022] eKLR and submits that the applicants have not demonstrated that there is an error on the face of the record and/or that there is a discovery of new and important evidence in the matter which after the exercise of due diligence, was not within the knowledge of the applicants or could not be produced at the time the order was made and/or any other sufficient reason to warrant the issuance of the order of review of the ex parte order made on 14/11/2022. The 4<sup>th</sup> – 11<sup>th</sup> respondents argue that the application is solely pegged on the discovery of a statutory notice to abate issued by the Laikipia County Government Department of Health dated 1/11/2022. However, the 4<sup>th</sup> – 11<sup>th</sup> respondents argue that the affidavit by the applicants reveal that prior to and since the issuance of the subject ex parte orders, the applicants were aware of the said statutory notice dated 1/11/2022.



10. The 4<sup>th</sup> – 11<sup>th</sup> respondents further argue that the applicants had already begun renovations on the estate property towards compliance with the notice. In light of the foregoing, the 4<sup>th</sup> – 11<sup>th</sup> respondents submit that the statutory notice is evidence that the administrators have immensely mismanaged the estate of the deceased. Moreover, the 4<sup>th</sup> – 11<sup>th</sup> respondents submit that the applicants have not adduced any evidence to prove that there is any reason to warrant the issuance of an order of review given the fact that the applicants were all along aware of the statutory notice.

**Whether the application is merited.**

11. Order 45 of the Civil Procedure Code sets out the parameters for an application for review 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 order made 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 which he applies for the review.

12. It then follows that Order 45 provides for three circumstances under which an order for review can be made. 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. Secondly, the applicant must demonstrate to the court that there has some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

12. The applicants have essentially grounded their application on the fact that at the time the court was making the orders on 14/11/2022, it was not aware of the statutory notice dated 1/11/2022. Thus this falls in the category of discovery of new and important matter or evidence which after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by him at the time when the order was made. In the case of Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya [2019] eKLR Mativo J (as he then was) set out principles from a number of authorities as follows:-

- i. ....
- ii. ....
- vii. Mere discovery of new and 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.



12. The ex parte orders made on November 14, 2022 were made by the court following the application dated November 9, 2022 whereby the 1<sup>st</sup> respondent sought for revocation of grant under certificate of urgency. The statutory notice is dated 1<sup>st</sup> November 2022 and has been addressed to the applicants herein. In this regard, I am convinced that the 1<sup>st</sup> respondent when making the application seeking the orders dated 14/11/2022 was not aware of the statutory notice. I have also perused the court record and noted that the applicants did not respond to the application dated November 9, 2022 but instead filed the instant application. In this regard, it is my considered view that the notice falls within the ambit of discovery on new material that was not within the applicants knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
12. All considered, I find this application merited and it is hereby allowed in the following terms:-
- a. That the exparte orders issued by this court on November 14, 2022 staying the execution of the grant are hereby lifted only in regard to L.R. 3671/13/V/Rumuruti Municipality the subject of the notice issued by the Public Health Officer, Laikipia County Government issued on 01/11/2022.
  - b. That status quo in regard to execution of the grant in regard to all other assets to be maintained by the parties pending hearing interparties of the application dated November 9, 2022.
  - c. That directions in regard to the said application be taken on 22/03/2023
  - d. That any responses to the application be filed within 14 days.

**DATED AND SIGNED AT NYERI THIS 2<sup>ND</sup> DAY OF MARCH, 2023.**

**F. MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEO LINK THIS 2<sup>ND</sup> DAY OF MARCH, 2023**

