



**In re Estate of Kabiti Mwihatiri (Deceased) (Civil Appeal  
E020 of 2022) [2023] KEHC 17700 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17700 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E020 OF 2022**

**A MSHILA, J**

**MAY 12, 2023**

**IN THE MATTER OF THE ESTATE OF KABITI MWIHATIRI  
(DECEASED)**

**BETWEEN**

**JOYCE MUTHONI MWAURA ..... APPLICANT**

**AND**

**ALICE WANJIRU KIRATU ..... RESPONDENT**

**RULING**

1. The Chamber Summons application dated August 24, 2022 by the Applicant seeks the following orders:
  - a. Spent
  - b. A review of the orders and Ruling by this court of July 28, 2022.
  - c. Stay of the execution of the orders emanating from Gatundu SPMCC Succession No 131 of 2019.
  - d. Revocation or annulment of the grant issued in Gatundu SPMCC SUCC No 131 of 2019
  - e. An order directed to the administrators to apply afresh letters of administration.
  - f. Costs be in the cause.
2. The application is premised on the grounds that the applicant has discovered new facts that invite the consideration of this court, the applicant will suffer substantial harm if stay orders are not granted. The grant issued in Gatundu SPMCC No 131 of 2019 has become inoperative.



3. The application is supported by the annexed affidavit of Joyce Muthoni Mwaura sworn on August 24, 2022, in which she depones she is the daughter in law to the deceased, her husband was gifted the suit property by the deceased, that new facts have been discovered after the delivery of the impugned Ruling of July 28, 2022, a copy of the deceased translated diary which indicates the deceased' wishes on the distribution of the estate. That Njeri Mburu Kuria is a stranger and was not entitled to the property of the deceased and thus the allocation of the deceased property to her was meant to disinherit the Applicant. The review orders will enable the court interact with the new evidence acquired, and will prevent further wasting of the deceased estate.
4. The application is opposed by the Replying Affidavit of Alice Wanjiru Kiratu sworn on September 26, 2022, in which she depones the Applicant has never lived in Ndaragu/Gakoe/14 as her matrimonial home is in Ngoingwa. The Applicant has failed to demonstrate the new evidence acquired. No rightful beneficiary has been disinherited and Njeri Mburu is a beneficiary through her late father Gakuru Kabiti. Counsel submits the orders of stay of execution is res judicata having been previously declined by the court.
5. Counsel urged the court to dismiss the application.
6. The parties were directed to canvass the application by filing and exchanging written submissions.

#### **Applicant's Submissions**

7. On behalf of the Applicant counsel filed written submissions dated October 17, 2022, in which it was submitted that the Applicant has met the threshold of revoking the grant issued to the Respondent as per Section 76 of the [Law of Succession Act](#). The Respondent failed to disclose material facts.
8. Counsel submitted that the Applicant has demonstrated discovery of new evidence after the delivery of the Ruling of July 28, 2022. The issue of res judicata does not arise as setting aside and review orders have not been canvassed in court previously.
9. Counsel urged the court to allow the application.

#### **Respondent's Submissions**

10. By submissions dated October 26, 2022, on behalf of the Respondent counsel submits the application lacks merit, frivolous, vexatious, fatally defective and a clear abuse of the court process. The Applicant has filed a Notice of Appeal on the orders of July 28, 2022 and thus the review is not permissible. Citing the case of [Otieno Ragot & Company Advocates Vs National Bank Of Kenya](#) (2020) EKLR where the court held;

“Section 2(2) of the Court of Appeal Rules defines an appeal to include an intended appeal. the Respondent lodged a notice of appeal on August 30, 2016. The appellant submitted that though no substantive appeal had been filed, a notice of appeal had been lodged. It is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed.”

11. Counsel submits the applicant has failed to attach a copy of the ruling seeking to be reviewed and it therefore unclear as to what and how she was aggrieved. The failure to annex the order or ruling makes the application fatally defective.



12. The Applicant has failed to demonstrate the circumstances which prevented her from obtaining and adducing the new evidence before the determination of the order and ruling was made.
13. Counsel submits the prayer for stay of execution is res judicata as similar prayers were dismissed. Counsel urged the court to dismiss the application.

### **Issues For Determination**

14. Having considered the application, the replying affidavit and the submissions by the parties in support of their respective arguments. The issues framed for determination are:
  - a. Whether this court may review the orders of July 28, 2022?
  - b. Whether the stay of execution orders are res judicata;
  - c. Whether to revoke or annul the Grant.

### **Analysis**

#### **Whether this Court may review the orders of July 28, 2022;**

15. The High Court has power to review, but such power must be exercised judiciously within the framework of Section 80 of the [Civil Procedure Act](#). Section 80 of the [Civil Procedure Act](#) provides :-

“ 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.”

16. Further Order 45 of the [Civil Procedure Rules](#) sets the conditions for review: -

“(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 made the order without unreasonable delay.”

17. In the instance case the Applicant submits she discovered new evidence of the deceased diary which is sufficient to prove that Ndaragu/Gakoe/14 was distributed to her late husband as a gift by the deceased.



18. Having perused the documents attached and as per the affidavit of protest filed by the Applicant sworn on February 8, 2021, she disposes that the said property Ndaragu/Gakoe/14 was distributed to her late husband as a gift by the deceased. It is clear this position of the property being a gift was within her knowledge and she used the same as a ground to revoke the grant.
19. The court in exercising its discretion on review should exercise great caution since a party who has lost may bring in new evidence in order to overturn the decision. In *D J Lowe & Company Ltd – Vs- Bonquo Indosuez*, Nairobi Civil Application No 217 of 1998 the Court of Appeal sounded a caution in such applications and stated that: -

“Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”
20. The discovery ought to be new and important evidence. In this case, the Applicant has not demonstrated that despite due diligence she could not have procured the diary excerpt. This court is not persuaded that the applicant has satisfactorily demonstrated the discovery of new evidence could not have been procured before the determination of the Ruling of July 28, 2022 and prior to filing the application dated February 16, 2022.
21. In the circumstances the prayer for review is found to be devoid of merit.

#### **Whether the Stay of Execution Orders are Res Judicata;**

22. The Applicant had previously filed a Chamber Summons dated February 16, 2022 in which she sought stay of execution orders. The court handling the application extensively dealt with the prayer seeking for the order for stay of execution in its Ruling dated July 28, 2022.
23. The doctrine of res judicata as provided by Section 7 of the *Civil Procedure Act*, ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. Litigation must come to an end, the applicant cannot be allowed to keep litigating over the same issue over and over again.
24. Based on the principles of res judicata this court is satisfied that the prayer sought for stay of execution has all such elements and also having found that the prayer for review fails this opines that the prayer for stay of execution is devoid of merit.

#### **Whether to Revoke or Annul the Grant.**

25. Section 76 of the *Law of Succession Act* provides instances when a court may revoke a grant, for instance if the process of obtaining the grant was attended by concealment, obtained by false statements, where the grant was obtained procedurally but the administrator has encountered problems in administration of the estate and thirdly is when a grant has become in operative.
26. The Applicant submits the grant has become inoperative but has not fully demonstrated how the same has been achieved. This court is not persuaded that the Applicant has satisfied any of the conditions for revocation of the grant.



### **Findings & Determination**

27. In the light of the foregoing this court finds the application dated August 24, 2022 to be devoid of merit in its entirety. The same be and is hereby dismissed.

28. Costs to abide the outcome of the Appeal.

It is so ordered.

**DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**HON.A.MSHILA**

**JUDGE**

