



**In re Estate of Awen Matia Madiba (Deceased) (Succession Cause  
5 of 2015) [2023] KEHC 18878 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18878 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
SUCCESSION CAUSE 5 OF 2015**

**SM GITHINJI, J**

**MAY 3, 2023**

**IN THE MATTER OF THE ESTATE OF AWEN MATIA MADIBA (DECEASED)**

**BETWEEN**

**NYOTA AWEN MANGA ..... APPLICANT**

**AND**

**JOHN YAENDI AWEN ..... RESPONDENT**

*(Formerly Malindi High Court Succession No. 77 Of 2013)*

**RULING**

- 1 This ruling is in respect to an application by the applicant dated September 16, 2022 brought under section 63, 73 and 76 (b) of the [Law of Succession Act](#) seeking the following orders;
  1. Spent.
  2. Spent.
  3. That this Honourable Court do vary orders issued on the June 23, 2022 pending the determination of this application.
  4. That cost of this application be in the cause.
- 2 The application is supported by the affidavit sworn by Nyota Awen Manga on the same day. He deponed that the Respondent is one of the beneficiaries mentioned in the grant and that he has fraudulently misled the court in order to obtain orders to enrich himself. He also deponed that all the other beneficiaries are unaware of the current court proceedings undertaken by the Respondent. He contended that the orders for removal of the title encumbrance obtained by the respondent are now about to be used at Safaricom Kenya Limited to allow him receive a payment which all the beneficiaries are meant to benefit from.



3 The Respondent in response filed a Replying Affidavit sworn on the 16<sup>th</sup> day of December, 2022. He deposed that the applicant has no *locus standi* to bring the instant application and the orders sought in the application before this court. According to him, he is the legal and absolute registered owner of the parcel of land known as Title No Tanadelta 'A'/144 and the same does not form part of the Deceased's properties.

### Disposition

4 I have considered the present application, the response as well as the submissions by both parties.

5 A brief background leading to the present application is that this Honourable Court on May 26, 2015 issued letters of administration intestate to Matilde Nagea Galgalo and confirmed them on June 29, 2019. A close look at the ruling of this court dated November 7, 2017 shows that the Respondent John Yaendi Awen had objected to the grant being issued to the Petitioner and he did not agree with the mode of distribution given the application dated February 13, 2017. When the matter came up for hearing of the objection, he failed to show up in court for the hearing of the protest and as such, the court proceeded to confirm the grant of letters of administration to the Petitioner Matilde Naghea Galgalo and dismissed his objection. The Respondent thereafter filed an application dated June 7, 2022 which was later amended vide an application dated June 20, 2022 seeking to have the grant of letters of administration intestate issued on May 26, 2015 and confirmed on June 29, 2019 revoked, and an order directing the Land Registrar Hola Lands Registry remove any encumbrance put in place in title No Tanadelta 'A'/144. The application was allowed on account of being unopposed.

6 The applicant in the present application is one of the beneficiaries in the estate who contends that the other beneficiaries are not aware there have been any other proceedings in this matter and according to him, the order for removal of the title encumbrance obtained by the Respondent are currently being used at Safaricom Kenya Limited to enable the Respondent receive payment as the sole beneficiary to the exclusion of the rest of the beneficiaries. The Respondent on the other hand asserts that he is the legal proprietor of the plot known as Tanadelta 'A'/144.

7 The issue for determination in my view is whether this court ought to review/ vary its orders of June 23, 2022. In essence the applicant herein seeks for a review of the said orders. This application falls under Order 45 of the [Civil Procedure Rules](#).

8 Order 45 (1) of the [Civil Procedure Rules](#) provides that:

“ 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.”



- 9 The Court of Appeal in *Pancras T Swai v Kenya Breweries Limited*, Civil Appeal No 275 of 2010, (2014) eKLR was of the view that for an applicant to succeed in an application for review, he must establish to the satisfaction of the court any one of the following three main grounds:-
- i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or
  - ii. That there was a mistake or error apparent on the face of the record; or
  - iii. That sufficient reasons exist to warrant the review sought.
- 10 In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.”
- 11 The property in question is listed as the sole property in the estate that was to be distributed to the beneficiaries. The applicant alleges that the Respondent misled the court in granting him an order for removal of the title encumbrance which is currently being used at Safaricom Kenya Limited to enable the Respondent receive payment as the sole beneficiary to the exclusion of the rest of the beneficiaries. The allegations by the applicant though not supported by evidence cannot be wished away. It is my view that the allegation by the applicant constitute new and important information which was not available to them when the order was made.
- 12 In the end, if find that the application is merited and the same is allowed. The order removing the Title encumbrance for land parcel NomTanadelta “A”/144 is hereby stayed.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 3<sup>rd</sup> DAY OF MAY, 2023.**

.....

**S.M. GITHINJI**

**JUDGE**

**In the Presence of the; -**

Nyota Aron Manga – Applicant

John Yaendi Aweni – Respondent

