



**In re Estate of Mbuve Munyao alias Joseph Mukuthi (Deceased) (Succession Cause 487 of 2013) [2024] KEHC 15659 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15659 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 487 OF 2013**

**MW MUIGAI, J**

**DECEMBER 9, 2024**

**IN THE MATTER OF THE ESTATE OF MBUVE  
MUNYAO ALIAS JOSEPH MUKUTHI (DECEASED)**

**BETWEEN**

**PIUS MUKUTHI MBUVE ..... APPLICANT**

**AND**

**JOHN MUASYA MBUVE ..... 1<sup>ST</sup> RESPONDENT**

**JANE MICHAEL MUINDI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Summons For Review**

1. The Summons has been brought under Rule 63 and 73 of the Probate & Administration Rules, Order 45 of the Civil Procedure Rules, 2010 seeking the following orders, that;
  - a. This Honourable Court be pleased to set aside and/or review its further orders of 7/12/2023 directing that 4.2 acres be given to Jane Michael Muindi during the survey.
  - b. The costs of the application be provided for.
2. The Summons are supported by the affidavit of Pius Mukuthi Mbuve who stated that by order of the court dated 7.12.2023 parties were directed to get a surveyor to distribute the properties as per the confirmed grant and that all beneficiaries be present during the survey exercise either by themselves and/or appointed representatives however the administrators have deliberately arranged for a secret survey exercise without involving him. He stated that on 9.2.2024 his advocates received a surveyor's report on Land Parcel Number Mavoko town 3/44917 alleging that a survey had been conducted on 13.01.2024. He stated that the survey was not done in accordance with the court order and his share has not been provided for.



3. He stated that through his advocate, he wrote to the surveyor informing him that the survey was deceptively done. Further, that upon perusal said surveyors report and the court file, they discovered that the court on 7/12/2023 issued orders directing that Jane Michael Muindi should get 4.2 acres which was the Applicant's share. He stated that he did not consent to his share going to Jane Michael Muindi nor did they enter an agreement of sale. He stated that the documents being relied upon were forgeries. He stated that the court should review by setting aside the orders and reverting to the order that the surveyor's report be done in accordance with the confirmed grant.

### **1<sup>st</sup> Respondent/ Adminsitrator's Replying Affidavit**

4. In opposition of the summons, John Muasya Mbuve, contended that there was no order requiring for all beneficiaries of the estate to be present, that the order directed the surveyor to distribute the properties and the beneficiaries to avail themselves at their discretion. He stated that the Applicant was duly informed of the date of the survey exercise but deliberately chose not to attend. He stated that the averments that the survey report was fraudulent were unsubstantiated and the Applicant had not made a prayer to have the surveyor summoned in court for cross examination.
5. Erastus Wainaina Mugo, the chairman of Afya Sacco Limited who stated that the Applicant was involved in all discussions about the sharing of the deceased properties leading to the proposal prepared by John Muasya Mbuve. He stated that a meeting was convened by D.M. Mutinda offices in Machakos which he attended with officials together with three advocates in the presence of all beneficiaries including the applicant and all parties agreed to consent on the mode of distribution and signed a consent dated 20.06.2018.
6. It was stated that at the said meeting, the applicant conceded that he had sold his share of inheritance on land No. Mavoko Town Block 3/2014 measuring 40 acres to the family of Jane Michael Muindi measuring 4.2 acres. He contended that the applicant was not to get anything from the subject land as he confirmed that he sold his share to his later brother Michael Muinde and signed the consent willingly in the presence of all beneficiaries and their respective advocates. He therefore contended that the court order was in order.
7. In addition, it was stated that the applicant appeared before Kemei J for confirmation of grant and confirmed the consent leading to the issuance of the certificate of confirmation of grant. He stated that he and other officials were under pressure to give out titles. He alleged that the application was brought with ill intention and was meant to delay the conclusion of the cause.

### **2<sup>Nd</sup> Respondent's Replying Affidavit**

8. Jane Muindi Michael deposed that the court after hearing the oral testimonies of the parties and the witnesses was satisfied that she was entitled to 4.2 acres sold out by the applicant. She contended that the threshold for review under order 45 of the Civil Procedure Rules had not been met and that there was no satisfactory and credible evidence provided. It was stated that all other beneficiaries have agreed to the rectification of grant as per the surveyor's report and the application is only meant in bad faith. It was contends that the Applicant was not entitled to 4.2 acres since he had benefited by selling his share and therefore cannot seek to benefit twice.
9. The application was canvassed by way of written submissions.



## Submissions

10. The Applicant filed submissions on 27.09.2024 where in addition to reiterating the contents of his supporting affidavit submitted that the further orders of 7.12.2023 directing that 4.2 acres in Mavoko Town Block 3/2014 be given to Jane Michael Muindi during the survey were issued in his absence who did not get an opportunity to defend the allegations of a sale transaction between himself and the 2<sup>nd</sup> Respondent. It was contended that the Applicant's name appears as one of the persons entitled to a share in the said parcel of land and the said further orders giving his share to Jane Michael Muindi amounted to an error on the face of the record.
11. The 2<sup>nd</sup> Respondent filed submissions dated 23.07.2024 submitted that the fact that a party believes that the court should have reached a different conclusion of that the decision was erroneous are matters fit for appeal rather than review which is limited in scope. While relying on the case of Paul Mwaniki vs NHIF Board of Management [2020] e KLR, It was submitted that the grounds for review under order 45 of the Civil Procedure Rules had not been satisfied, that the applicant does not point out the apparent mistake or error but instead delves into lengthy arguments on the merits of the ruling and invites this honourable court to speculate as to the error he is alluding to. The court was urged to dismiss the summons.
12. The Administrator /Respondent filed submissions dated 20.05.2024 and while relying on the case of National Bank of Kenya Limited vs Ndungu Njau (1996) KLR 469 submitted that if the Applicant was dissatisfied with the orders issued, he ought to have appealed the substance of the order at the court of appeal and not to institute an application for review. That the allegations that the report was tainted with fraud was not proven and or substantiated by virtue of no evidence being placed before the court. It was submitted that the Applicant was fully aware of the date of conducting the survey exercise as directed by the court and in consonant with the certificate of confirmation if grant issued by the court.
13. He submitted that the orders were made after a detailed explanation that the Applicant had sold his share of the estate to the 2<sup>nd</sup> Administrator as regards the 4.2 acres. The court was urged to dismiss the application.
14. Afya Sacco Society filed submissions on 03.10.2024 reiterating the contents of its Replying affidavit and while relying on the case of Republic vs Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] e KLR and submitted that the Applicant did not deny that he signed the consent of 20<sup>th</sup> June 2018 and neither has he denied his presence during the confirmation of grant. It was submitted that since the survey exercise had already been conducted the portion for the Applicant, termed as the 'property in issue' then the court grants to the rest of the beneficiaries a partial certificate of confirmation of grant for their shares.

## Determination

15. The Court considered the Summons for review, the Affidavits for an against it as well as the submissions of the parties and find that the issue for determination is whether the court should set aside and/or review the further orders of 7/12/2023 directing that 4.2. Acres be given to Jane Michael Muindi.
16. Order 45 of the Civil Procedure Rules, 2010 is the proviso that deals with review, state 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 made the order without unreasonable delay.

(2) ...”

17. Review of decisions of a probate court is governed by Rule 63 of the Probate and Administration Rules, which provides as follows: -

“63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

- (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
- (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

18. In the case of John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another [2016] eKLR, the court cited Rule 63 of the Probate and Administration Rules, and then stated as follows:

“As stated above, the only provisions of the Civil Procedure Rules imported to the [Law of Succession Act](#) are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.”

19. It is, therefore, clear that any party seeking review of orders, in a probate and succession matter, is bound by the provisions of Order 45 of the Civil Procedure Rules. The grounds can be summarized as follows;



- a. 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
  - b. the order made, or on account of some mistake or error apparent on the face of the record, or
  - c. for any other sufficient reason
20. The order 7.12.2023 sought to be reviewed directed as follows;
- “1. 1. That the certificate of confirmation of grant of 29/11/2018 by Hon D. Kemei J and ruling of 14/7/2022 to be the basis of survey in the presence of ALL beneficiaries, Administrators, Purchasers and/or their respective advocates.
  2. That the surveyor appointed /agreed upon the parties be escorted to /by local administration Chief / D.O and police of Kenol police station.
  3. That the surveyor to be appointed by the parties/counsel and to agree on a date and place of survey.
  4. That the surveyors report to be filed in court through the DR Machakos High Court on 13/2/24.”
21. On 27/7/2018 Hon D.K.Kemei J in the presence of Counsel Mr Ndhiwa Mr Musyimi & Mr Gachoka and Beneficiaries Administrators and Purchasers consented to the Summons for Confirmation filed on 12/2/2018 vide Consent dated 20/6/2018. The Court listed them as follows;

Administrators Present-

John Muasya Mbuve ID 605xxxx  
Jane Michael Muindi ID 190xxxx

Beneficiaries Present

Teresia Wayua Nzioka – ID 640xxxx-No objection  
Jackson Makau Mbuve – ID 1033xxxx- No Objection  
Phelister Kavindu Kithuka ID 77xxxx- No Objection  
Pius Mukuthi Mbuve ID882xxxx-No Objection  
Susanna Kasiva Mutisya ID 613xxxx- No Objection  
Victoria Mueni Mbuve ID613xxxx-No Objection  
Rosemary Kamene Mutangili ID644xxxx-No Objection  
Christine MunyivaMbithi ID 613xxxx-No Objection  
Annah Ndunge Manza ID77xxxx-No Objection  
Catherine Mutua ID494xxxx-No Objection  
Margaret Mumbi Musyoki ID 3609xxxx-No Objection  
Angela Wanza Nzivu ID 505xxxx -No Objection



Stephen Mbuve Muinde ID187xxxx-No Objection

Purchasers Present

Erastus Wainaina Mugo ID 1242xxxx -No Objection

Mungai FJ Mbugua ID 896xxxx-No Objection

Mary Wanjiku Macharia ID 1016xxxx-No Objection

Dick Kitele Kisini id 146xxxx-No Objection

22. The Applicant Pius Mukuthi Mbuvi claims that the consent was not informed. This Court by Ruling of 14/7/2022 indicated that the Applicant/Administrator to effect rectification /redistribution of Confirmed Grant within 90 days by all beneficiaries to ascertain each beneficiary's beneficial interest for the properties listed and engage a Surveyor.
23. The Report by Land Surveyor Obadiah Wainanina Licensed Land Surveyor by Report filed with DR MHC of 9/2/2024 confirmed on 13/1/2024 13 family members beneficiaries, Afya Sacco Kiambu Branch representative 2 Advocates representing Administrators attended survey per list attached.
24. On 7/12/2023, the said Jane Michael Muindi (who was present with the Applicant during Confirmation of Grant ) presented Sale Agreement of 4.2 acres she bought from Pius Mukuthi Mbuve.
25. On that day online proceedings included parties and Counsel as reflected on the Court record. Since the issue of sale seemed non- controversial from the parties who were present during confirmation of grant this Court agreed to 4.2 acres to Jane Michael Muindi.
26. Counsel indicated that they were not heard on the matter and had logged off. With respect how would the Court know who has logged off or is still online during proceedings?
27. The Court order issued on 7/12/2023 court stated as follows;
  - a. That the sale agreement to be filed in Court.
  - b. That the court has seen the sale agreement and it is hereby ordered that Jane Michael Muindi to get the 4.2 acres during the survey.
  - c. Further Mention on 13.02.2024
28. Be that as it may if the sale is challenged then the matter between Jane Michael Muindi & Pius Mukuthi Mbuve shall be heard and determined before ELC Machakos by virtue of Article 162 of Constitution & Section 13 Environment & *Land Act*. 4.2 acres hived off and the Certificate of Confirmation of Grant be issued as Partial Confirmation of Grant of what the parties consented to on 27/7/2018 & Surveyor's Report leaving out Applicant's portion for determination in ELC Court.
28. The Applicant application for the order to be reviewed because his share was not in the surveyors report. Parties expended time and funds to attend the survey and no explanation was made/given why the Applicant did not attend or send a representative.
29. The information being brought by the Applicant is not new, there was no error apparent on the face of the record and no other reason has been provided for review of the said orders. The court in its order of 13.02.2024 found that the survey had been done in accordance with the certificate of confirmation of grant. This settled the issue of the survey.



30. The allegation of fraud as raised by the Applicant remains an allegation as the same has not been proven and no evidence has been tendered to the effect that the said orders were obtained fraudulently.
31. In the end, the Summons for review are found to be without merit and the same is dismissed.
32. This being a family matter, each party shall bear its own costs

### **Disposition**

1. 4.2 acres hived off and the Certificate of Confirmation of Grant be issued as Partial Confirmation of Grant of what the parties consented to on 27/7/2018 & Surveyor's Report leaving out Applicant's portion for determination in ELC Court.
2. The matter between Jane Michael Muindi & Pius Mukuthi Mbuve shall be heard and determined before ELC Machakos by virtue of Article 162 of Constitution & Section 13 Environment & [Land Act](#).
3. In the end, the Summons for review are found to be without merit and the same is dismissed.
4. This being a family matter, each party shall bear its own costs

**RULING DELIVERED SIGNED DATED IN OPEN COURT ON 9/12/2024 IN MACHAKOS HIGH COURT (VIRTUAL & PHYSICAL CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

In The Presence Of:

Mr. Mwangi H/B Mrs Nyaata for Protestor/Applicant

Geoffrey- Court Assistant

