



REPUBLIC OF KENYA



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**In re Estate of Mbuvi Ngosine Mwathai (Succession Appeal E004 of 2022)
[2025] KEHC 13605 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13605 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION APPEAL E004 OF 2022**

RC RUTTO, J

SEPTEMBER 30, 2025

IN THE MATTER OF THE ESTATE OF MBUVI NGOSINE MWATHAI

BETWEEN

MUTINDA MBUVI NGOSINE 1ST APPELLANT

JACINTA KOKI MUSUMBI 2ND APPELLANT

AND

SHADRACK NGOLYA NGINGU RESPONDENT

*(Being an appeal from the Ruling delivered by Hon. E.H. Keago (CM)
on 25th August 2022 in Machakos Succession Cause No. 346 of 2018)*

JUDGMENT

1. This appeal arises from the Ruling delivered on 25th August 2022 in Machakos Succession Cause No. 346 of 2018. In the trial court, the Appellants filed summons dated 12th April 2022 seeking review of the orders issued on 24th March 2022, which had revoked the grant of letters of administration intestate previously issued to them on 17th September 2021. They prayed that the revocation be set aside and that they be reinstated as administrators of the estate of their late father, Mbuvi Ngosine Mwathai.
2. The application was premised on the fact that the appellants had duly petitioned for letters of administration intestate in respect of the estate of their late father, who died on 28th September 1998 and who was the registered absolute proprietor of Land Parcel No. Mwala/Kibau/306. They averred that the grant of letters of administration was made on 13th January 2020, and issued on 17th January 2020. However, the grant of letters of administration, was later revoked by a ruling made on 24th March 2022 pursuant to an application by the Respondent on the erroneous belief that there existed another probate and administration cause in respect of the same estate.



3. The Appellants contended that High Court P&A Cause No. 710 of 2014, which was referred to in the ruling of 24th March 2022, pertained to the estate of Ngungu Ngosini, who died on 16th August 1996 in Kimeri, and not to their father, Mbuvi Ngosine Mwathai. They maintained that the two estates are distinct and independent. On this basis, the Appellants sought review on the ground of an error apparent on the face of the record. They further stated that their late father's estate had not been distributed and that they were in the process of instructing their advocate to file summons for confirmation of grant. They also expressed concern that the Respondent, being the administrator of the estate of his father Ngungu Ngosini, poses a risk of intrusion and intermeddling into the appellants' father's estate, together with other third parties, unless they are reinstated as administrators.
4. In response, the Respondent argued that the Appellants' application could not salvage the revoked grant, as they had failed to disclose that one half of the property forming part of the estate belonged to the late Ngungu Ngosini. He proposed that the proper course of action would be to appoint new administrators, including himself, since his family's share in the estate had already been determined.
5. The Appellants subsequently filed a supplementary affidavit, asserting that the Respondent had, indirectly, conceded to the merit of their application dated 12th April 2022. They argued that by acknowledging the need of administrators, the Respondent effectively admitted that the present cause was independent of High Court Succession Cause No. 710 of 2014, In the matter of the estate of Ngungu Ngosini. They further contended that the Respondent is not a son of the deceased and therefore cannot be appointed as an administrator of this estate. They maintained that he may only participate as a protestor under Rule 40(6) of the Probate and Administration Rules, once summons for confirmation of grant are filed.
6. Upon hearing the parties, the trial court dismissed the application. It held that, its earlier ruling had already established that another succession cause existed in which the present Respondent had been issued with letters of grant that were subsequently confirmed by a certificate of confirmation of grant dated 30th October 2017. That certificate of confirmation related to Land Parcel No. Mwala/Kibau/306, measuring 3.5 hectares, and had not been challenged before the High Court.
7. The trial court further found that the Appellants had concealed material facts regarding the 3 hectares already distributed in Succession Cause No. 710 of 2014, and therefore, the free estate of the deceased could not be of the same size. The court concluded that no new matter had been presented before it to warrant variation of its orders of 24th March 2022. The court directed that if the Appellants were dissatisfied, they should first challenge the High Court orders. Alternatively, if they did not oppose those orders, they ought to include the Respondent as a beneficiary to the extent reflected in the certificate of confirmation issued on 30th October 2017.
8. Aggrieved by the Ruling delivered on 25th August 2022, the Appellants filed this appeal. They argued that the Learned Magistrate erred in both fact and in law by; dismissing the Application for review dated 12th April 2022 despite its meeting the legal threshold for review; finding and holding that a similar succession matter existed wherein the estate of Mbuvi Ngosine Mwathai was allegedly distributed; by failing to recognize that the estate of Mbuvi Ngosine Mwathai was independent and fundamentally different from that of Ngungu Ngosine; misdirected himself by holding that the Appellants ought to have challenged the grant in succession cause number 710 of 2014 In the Matter of the estate of Ngungu Ngosini, despite having no interest in the said estate and by declining to review the order made on 24th March 2022 thereby leaving the deceased's estate without an administrator and exposing the same to intermeddling.



9. The Appellants now seek orders setting aside the ruling of the subordinate court delivered on 25th August 2022 and allow their summons for review dated 12th April 2022.
10. The Appeal was canvassed by way of written submissions. The Appellants' submissions are dated 18th November 2024 while the Respondent's submissions are dated 21st January 2025. These submissions were then orally highlighted.

Appellants' Submissions

11. Learned counsel for the Appellants outlined the background of the matter and argued that the trial court erred in law by dismissing the application, despite its clearly meeting the legal threshold for review.
12. Counsel further submitted that the trial court wrongly relied on the existence of another succession cause. He pointed out that in Succession Cause No. 346 of 2018, the Appellants had been granted letters of administration in respect of their late father's estate. However, those letters were revoked on the basis of Succession Cause No. 710 of 2014 in the High Court relating to the same estate of Ngungu Ngosine. Counsel contended that this was a factual error, as the two succession causes concern different individuals; Mbuvi Ngosine Mwathai and Ngungu Ngosine and therefore relate to two distinct estates.
13. As a result of the revocation, counsel stated that the estate of Mbuvi Ngosine Mwathai was left without an administrator, thereby exposing it to intermeddling contrary to the law. Counsel further observed that Land Parcel Mwala/Kibau/306 which forms part of the estate of the deceased herein, was also included in the estate of Ngungu Ngosine. In such circumstances, the Respondent ought to have approached the lower court either by way of an affidavit of protest at the confirmation stage or by seeking joinder as an interested party, rather than applying for revocation of the Appellants' grant. Counsel concluded that the trial court ought to have reviewed its order of 24th March 2022, since there was an obvious error apparent on the face of the record.
14. In conclusion, counsel for the Appellants urged this Court to allow the appeal and grant the prayers sought.

Respondent's Submissions

15. Learned counsel for the Respondent relied on the submissions filed in the lower court as well as those placed before this Court. He contended that the two succession causes in question concerned the same deceased person and not two distinct estates, as alleged by the Appellants.
16. It was submitted that the Appellants ought to have challenged the orders issued in Succession Cause No. 710 of 2014, which culminated in the grant issued to the Respondent and confirmed on 18th October 2017 in respect of Land Parcel Mwala/Kibau/306. Counsel argued that the Appellants were fully aware that a portion of the land belonged to the Respondent's family, yet they proceeded with Succession Cause No. 346 of 2019 without disclosing this fact.
17. In addition, counsel submitted that during the proceedings in the trial court, the Appellants failed to produce evidence to rebut the Respondent's claim that they had concealed material facts when applying for the grant of letters of administration.
18. In conclusion, counsel for the Respondent urged this Court to dismiss the appeal with costs.



Analysis and Determination

19. As this is a first appeal, this court is under a duty to re-evaluate and assess the evidence presented before the trial court and arrive at its own conclusions. However, it must, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing was aptly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).
20. Upon careful analysis of the record of appeal and submissions by parties, two main issues emerge for determination;
 - a. Whether the Learned Magistrate erred in dismissing the Appellants' application for review dated 12th April 2022 and;
 - b. Whether the estate of Mbuvi Ngosine Mwathai is distinct from that of Ngungu Ngosin and if so, whether the revocation of the grant was based on an error apparent on the face of the record.
21. The Appellants contended that the trial court erred in revoking their grant on the basis that there existed another High Court succession cause No. 710 of 2014 concerning the same estate. They maintained that the said cause relates to Ngungu Ngosine and not their father, Mbuvi Ngosine Mwathai, and that the two estates are therefore distinct. In their view, this confusion constituted an error apparent on the face of the record within the meaning of Order 45 Rule 1 of the Civil Procedure Rules and warranted review of the ruling of 24th March 2022.
22. The Respondent, however, contend that the trial court was correct in refusing to review its earlier ruling, arguing that, Land Parcel No. Mwala/Kibau/306, had already been dealt with in the High Court succession cause. He claimed that the Appellants failed to disclose this fact when they petitioned for the grant in Machakos Succession Cause No. 346 of 2018, amounting to concealment of material facts.
23. The Appellants sought review of the ruling delivered on 24th March 2022 under Order 45 Rule 1 of the Civil Procedure Rules which allows review where there is discovery of new and important matter or evidence which was not within the applicant's knowledge at the time; There is some mistake or error apparent on the face of the record; or for any other sufficient reason. See the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] KECA 71 (KLR), and *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2019] KECA 594 (KLR)
24. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detailed examination. Such a mistake that is clear, self evident, and goes to the root of the decision qualifies as an error apparent on the face of the record. In succession proceedings, the Probate and Administration Rules further recognise that persons claiming an interest in an estate may ventilate their claims at confirmation through an affidavit of protest under Rule 40(6), rather than by short-circuiting the process through erroneous revocations.
25. Rule 40 (6) of the Probate and Administration Rules provides that;
 - “(6) Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.”



26. Applying these principles to the present case, the record clearly shows that the two deceased persons are indeed distinct. The grant of letters of administration intestate issued on 11th May 2016 in High Court Succession Cause No. 710 of 2014 relates to the estate of Ngungu Ngosini who died on 16th August 1996 in Kiri-miri. In contrast, the death certificate in respect of the late Mbuvi Ngosine Mwathai confirms that he died on 28th September 1998 in Kibau, Mwala. Therefore, the two deceased cannot be the same person, they are two different individuals, with two different death certificates. Besides, the appellants on one hand and the respondent on the other, are not siblings. Their respective fathers did not even share the same name - Mbuvi Ngosine Mwathai as against Ngungu Ngosini.
27. It is important to point out that the law of succession contemplates who is entitled to petition for letters of administration intestate in respect of each estate. The listing and distribution of property is secondary to the appointment of administrators. This may explain why the distribution is left to the confirmation of grant proceedings. It is apparent that the Learned Magistrate did not interrogate this distinction, at the onset and instead assumed that the estates were one and the same simply because both succession causes referenced the parcel of land known as Mwala/Kibau/306. In my view, none of the parties could have instituted succession proceedings other than in respect of the estates in which they instituted. In view of the foregoing, I am satisfied that this misapprehension of fact was both obvious and material, falling squarely within the scope of review contemplated by Order 45.
28. While the Respondent's concern regarding the existence of a confirmed grant in the High Court is not without merit, such confirmation does not extinguish the distinct estate of a separate deceased person. The existence of overlapping claims to property must be resolved through proper succession procedures, including joinder and protest, rather than by assuming interchangeable legal identity between estates. From the evidence before Court, it is clear that the Respondent does not claim the entire portion of the land comprising the estate but rather a portion. In the same way the respondent accuses the appellants for non disclosure, the respondent, having already proceeded to confirmation proceedings ahead of the appellants ought to have disclosed to the appellants of the nature and extent of his claim over property that was otherwise also listed as forming the estate in which the appellants were administrators.
29. The appropriate forum for the Respondent to assert any interest in the estate of Mbuvi Ngosine Mwathai would have been through an affidavit of protest at the stage of confirmation of grant, as envisaged under Rule 40(6) of the Probate and Administration Rules. By declining to review its earlier ruling, the trial court effectively left the estate of Mbuvi Ngosine Mwathai without an administrator exposing it to intermeddling. At the same time, it left the property entirely to the estate in which the respondent was the administrator without recourse for the appellants.
30. In light of the foregoing, I am satisfied that the Appellants demonstrated an error apparent on the face of the record and that their application for review was wrongly dismissed. The Learned Magistrate's finding cannot be sustained.
31. Turning to the second issue, the trial court justified the revocation of the appellant's grant on the basis that another court had already issued and confirmed a grant in respect of the same estate.
32. However, the evidence on record, including as earlier noted, makes it abundantly clear that the two deceased persons are separate. This would necessitate two different estates to be administered by their respective survivors/ dependents as contemplated by law. The only commonality between their estates is that both succession causes referred to Land Parcel Mwala/Kibau/306. This overlap in property does not, in itself justify the legal conflation of the two estates.



33. The law provides sufficient mechanisms for resolving competing claims. Section 82 of the *Law of Succession Act* empowers administrators the power to ascertain and collect the free estate of the deceased. Additionally, Rule 40(6) of the Probate and Administration Rules allows any person claiming an interest in the estate to file an affidavit of protest at the confirmation stage. These provisions are designed to ensure that disputes over entitlement are addressed transparently within the succession framework without confusing the identity of the deceased.
34. In this case, the Respondent is not a son of the deceased, Mbuvi Ngosine Mwathai. His interest in Land Parcel Mwala/Kibau/306, if any, arises from his late father's estate, which was the subject of Succession Cause No. 710 of 2014. While such an interest may give rise to a legitimate claim, it does not make him an heir of Mbuvi Ngosine Mwathai nor does it justify collapsing two distinct estates into one. The proper course would have been for the Respondent to pursue his claim as a protestor during the confirmation proceedings in the Appellants' cause, or, if necessary, to institute appropriate proceedings for determination of the ownership of the disputed parcel.
35. The trial court therefore erred in law by conflating the two estates and treated them as one. In doing so, it misdirected itself on the factual matrix before it and thus the revocation it ordered was based on that misdirection.
36. In light of the foregoing, this appeal is allowed in the following terms.
 - a. The order made on 24th March 2022 in Machakos Succession Cause No 346 of 2019 revoking the grant of letters of administration intestate dated 17th September 2021 issued to the appellants is set aside.
 - b. The appellants are reinstated as administrators of the estate of Mbuvi Ngosine Mwathai.
 - c. The appellants to apply for confirmation of grant and the court, in confirming the grant to take into account the representation by the respondent arising in Succession Cause No.710 of 2014 in relation to property known as Land Parcel Mwala/Kibau/306 in order to ascertain the respective share of the property by the estates of Mbuvi Ngosine Mwathai and Ngungu Ngosini, respectively
 - d. Each party to bear the costs of the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 30TH DAY OF SEPTEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for Appellants

.....for Respondent

Selina Court Assistant

