In re Estate of Edward M Mutsotso (Deceased) (Succession Appeal E014 of 2023) [2025] KEHC 15369 (KLR) (31 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15369 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION APPEAL E014 OF 2023

AC BETT, J

OCTOBER 31, 2025

IN THE MATTER OF THE ESTATE OF EDWARD M. MUTSOTSO (DECEASED)

BETWEEN

FRANCIS MMBASU MUTSOTSO ..... APPELLANT

AND

MARY EZEKIEL KILAA ..... RESPONDENT

(Being an Appeal against the orders of Hon. R. S. Kipngeno, Principal Magistrate in Butali SPM's Succession Cause No. E008 of 2022 dated 30th August 2022)

JUDGMENT

Background

1. The Appellant filed a Petition for grant of letters of administration intestate for the deceased's estate on 24th January 2022. In the Affidavit in support of the Petition, the Petitioner, who is a son to the deceased, named the following as survivors of the deceased:-

   (i) Mary Ezekiel Kilaa - Widow

   (ii) Francis Mmbasu Mutsotso - Son

   (iii) Richard Musungu Mulela - Son

2. The Appellant also named the following persons as liabilities to the estate:-

   (i) Isaac Wanjala - 0.24 Hectares

   (ii) Anthony Kafu Mwangale – 0.16 Hectares

3. The estate of the deceased was stated to compromise two parcels of land being L.R. No. Kakamega/Lumakanda/7048 and L.R. No. Kakamega/Lumakanda/7947.

4. A grant of letters of administration intestate was issued to the Appellant on 9th November 2022 and confirmed on 18th April 2023.

5. On 2nd May 2023, the Respondent, who described herself as the deceased's second widow, filed Summons for revocation of the grant and the Certificate of Confirmation of grant in which she contested the grant on the ground that the Appellant had failed to involve other beneficiaries of the deceased, to wit, Margaret Nelima Kakai the first widow, Hellen Nakhungu Mutsotso (daughter), Mary Shitawa Mutsotso (daughter), Boniface Mutsotso (son), Seth Kakai Mmbasu (grandson) and herself in the succession proceedings. She denied ever signing any consent to have the Appellant appointed as the administrator of the estate of the deceased and said that as a result of the failure to involve the other beneficiaries, the succession process was a sham and the grant and certificate of confirmation issued should be revoked and annulled.

6. In response, the Appellant filed a notice of preliminary objection in which he stated that the court no longer had the jurisdiction to entertain the Summons for revocation of grant as the grant had since been confirmed and the court was therefore functus officio.

7. By a ruling delivered on 1st August 2023, the trial Magistrate dismissed the preliminary objection and allowed the Respondent's application for stay of implementation of the Certificate of Confirmation of grant pending hearing and determination of the Summons for revocation of grant.

8. Aggrieved by the dismissal of his preliminary objection, the Appellant filed an application for review of the court's order of dismissal. He urged the court to deem his List of Authorities dated 26th June 2023 to be properly on record and to consider his preliminary objection on merit. The basis of the Appellant's application was that the court had not determined the preliminary objection on merit as it pointed out that he had failed to file his submissions and therefore there was an error apparent on the face of the record. He argued that his preliminary objection was properly on record and ought to have been considered by the trial Magistrate as he wrote the impugned ruling.

9. In a ruling delivered on 30th August 2023, the trial Magistrate dismissed the Appellant's application for review of its earlier orders. The Appellant was dissatisfied with the dismissal and lodged an appeal which he later amended. In the amended memorandum of appeal, the Appellant states that his appeal is against the orders issued on 30th August 2023. He lists the following grounds of appeal:-

    1. That the learned duty Magistrate wrongly exercised his judicial discretion in the Orders dated 1st August 2023 and 30th august 2023 by dismissing the Appellant's preliminary objection dated 26th June 2023 without giving effect to the arguments presented.

    2. That the learned duty Magistrate exhibited bias by failing to scrutinize and apply the High Court authority, In re Estate of Kiberenge Mukwa (Deceased) [2021] eKLR, which was made in support of the preliminary objection but instead he chose to selectively evaluate the Respondent's submissions and decide in her favour.

    3. That the learned duty Magistrate erred in law and in fact in failing to exhaustively evaluate the vital evidence annexed to the affidavit in support of the Appellant's application dated 2nd August 2023 and/or consider the elaborate and detailed oral submissions presented before him by Counsel for the Appellant and decide in his favour.

    4. That the learned trial Magistrate erred in law and fact in his construction of the evidence adduced and his reliance of extraneous matters which had him to arrive at an erroneous finding and decision.

5. That the learned duty Magistrate erred in law and fat when he failed to apply the well-known principles of law and judicial precedents when an issue of jurisdiction has been raised before arriving at his decision and thereby condemned the Appellant unheard.

6. That the Orders of the Subordinate Court are wholly erroneous in law and fact, contrary to equity, statue, Article 159 (2) of *the Constitution* of Kenya, judicial precedent and a gross miscarriage of justice.

10. The Appellant seeks that the appeal be allowed and the court do set aside or vacate the orders of the lower court issued on 1st August 2023 and 30th August 2023. However, his amended memorandum of appeal is clearly against the orders dated 30th August 2023. Parties are bound by their pleadings. Order 42 Rule 1 of the Civil Procedure Rules provides that:-

> "(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
>
> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

11. I note that the Appellant specifically indicated that he was appealing against the orders of 30th August 2023 which was an order declining his application for review, but his grounds of appeal are against both orders dated 1st August 2023 and 30th August 2023.

12. Directions were given that the appeal be disposed of by way of written submissions but despite being served severally, the Respondent, who was acting in person, did not file submissions nor attend.

Appellant's Submissions

13. The Appellant submits that the trial court wrongfully exercised its judicial discretion in its orders issued on 1st August 2023 and 30th August 2023 when it failed to address itself on the issue before the court and faulted the trial Magistrate for failing to comply with order 21 Rule 4 of the Civil Procedure Rules in that he failed to outline the points for determination one of which was whether the court was seized with jurisdiction. He posits that the trial Magistrate exhibited bias in only evaluating the Respondent's written submissions and ignoring the issue of jurisdiction.

14. The Appellant further submits that the trial Magistrate failed to evaluate vital evidence annexed to the affidavit in support of the application dated 2nd August 2023 which overwhelmingly demonstrated the participation of the deceased's family beneficiaries prior and subsequent to the filing of the succession proceedings. It was his submissions that the court afforded all beneficiaries an opportunity to object to the distribution of the deceased's estate before confirming the grant as is evidenced by the proceedings of 2nd March 2023 and 18th April 2023.

15. The Appellant further submitted that the court became functus officio upon confirmation of the grant. He relied on the case of JGN v. DKN [2023] eKLR, in re Estate of the late Kiptum Arap Naniwet (deceased) [2024] eKLR and Alexander Njagi Ndambiri v. Jane Waguama Njagi & 2 others [2021] eKLR.

16. The issue before this court is whether the appeal is merited in law.

17. Rules 62 of the Probate and Administration rules provides that:-

> "(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 Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (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. Flowing from Rule 62 of the Probate and Administration Rules, the provisions of Order 45 of the Civil Procedure Rules are applicable to Probate and Administration matters. Section 80 of the *Civil Procedure Act* provides that:-

> " 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."

19. Order 45 Rule 1 of the Civil Procedure Rules which gives effect to Section 80 of the *Civil Procedure Act* states that:-

> "(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) 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 on which he applies for the review."

20. A simple interpretation of Order 45 Rule (1) of the Civil Procedure Rules means that where a party is aggrieved by a decision of the court, he must choose between the option of appealing against the order, or applying for review. In short, he cannot have both. It follows therefore that the Appellant had a right to pursue an appeal against the order dated 1st August 2023 but since he opted to file an application for review of the said order, he cannot have a second bite of the cherry by appealing against it in the guise of an appeal against the subsequent order in which the court declined an application for review. In Serephen Nyasani Menge v. Rispah Onsanse [2018] eKLR, the court held thus:-

> " In my view a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order."

21. In HA v. LB [2022] KEHC 2886 (KLR), G. v. Odunga J. (as he then was) addressed the issue of a party choosing to appeal against an order for which he had already sought review and held thus:-

> " 12. Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequently appealing against the same, it must be noted that the Rules are subject to the provisions of the *Civil Procedure Act* under which section 3A empowers the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. To allow parties who have in the past unsuccessfully attempted to review a decision, to attack the very decision of review on appeal would in my view open several fronts in litigation since the possibility of the applicant also appealing against the decision refusing the review cannot be ruled out. The provisions of Order 45 rule 1 are meant to assist genuine litigants and not to assist parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. In my considered view the wording of the provisions of Order 45 rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of "any person considering himself aggrieved". An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so. But to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts, in my view, to an abuse of the process of the Court. It would also contravene the overriding objective as provided under sections 1A and 1B of the *Civil Procedure Act* whose aim is the disposal of cases expeditiously and avoidance of multiplicity of proceedings. To find otherwise would amount to giving the Court's seal of approval to persons who wish to play lottery with judicial process. Accordingly, I associate myself with the decision in The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi (supra) that both options cannot be pursued concurrently or one after the other.
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> 13. In this case the Appellant having sought to review the order made on 27th May, 2021 cannot now purport to appeal against the same. He can only appeal against the decision made on 4th November, 2021."

22. It is quite clear then that one cannot seek review of an order, and when the court declines the application, proceed with an appeal against the same order.

23. Ground 1 of the appeal challenges both orders dated 1st August 2023 and 30th August 2023 but specifically faults the court for dismissing the preliminary objection. The preliminary objection was dismissed in the ruling dated 1st August 2023. Grounds 2 and 5 challenge the order dated 1st August 2023 and is therefore an attempt to have the preliminary objection ventilated afresh in the guise of an appeal against the order declining the application for review. Ultimately, only ground 3, 4, 5 and 6 of the appeal are competent grounds of appeal as they relate to the order being appealed against.

24. Since the Appellant raised the issue of jurisdiction, I will first address it. It has been held that jurisdiction is everything and where a court finds itself devoid of jurisdiction, it should not take any further step in a matter. This was the firm position of the court in the case of Owners of the Motor Vessel "Lillian S" v. Caltex Oil (K) Limited [1989] KECA 48 (KLR). In Phoenix of E.A Assurance Company Ltd v. S. M. Thiga t/a Newspaper Service [2019] KECA 767 (KLR), the Court of Appeal held thus:-

> " ...Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction."

25. Once a court becomes funtus officio, it loses jurisdiction to re-examine the merits of its final decision save under an application for review limited to correcting errors. This was the holding in Odinga v. Independent Electoral and Boundaries Commission & 3 others [2013] KESC 8 (KLR). Earlier on, in the case of Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 others [2016] KECA 432 (KLR), the Court of Appeal held that once a court has fully and finally adjudicated upon a matter, it cannot re-open the case save under limited circumstances such as through a successful application for review.

26. In the present case, a certificate of grant of letters of administration had been issued to the Appellant. The Respondent sought revocation of the grant on the grounds that she and other beneficiaries of the estate of the deceased had not been involved. The Appellant invoked the principle of funtus officio citing the case of In re Estate of Kiberenge Mukwa [2021] eKLR, the trial court in rejecting the preliminary objection observed that the provisions of Section 76, *Law of Succession Act* allow for revocation of grant whether or not the same has been confirmed and noted that since the Respondent averred that she and her children had been excluded from the succession process nor included in the distribution, then the preliminary objection would likely shut out beneficiaries to the estate of the deceased. On that note, he deemed it necessary to proceed with the application. Although the trial Magistrate did not make a specific finding on jurisdiction, his decision to dismiss the preliminary objection can only mean that he found that the court was not functus officio.

27. The doctrine of functus officio is applicable where a final judgement or order has been entered. The gravamen of the Respondent's application was that neither she nor other known beneficiaries of the deceased had been involved in the succession proceedings. By dint of Section 76 of the *Law of Succession Act*, the court can order revocation of grant even if it had been confirmed, if it finds that the process was tainted with fraud or was obtained by making of a false statement, concealment from the court of material facts, by means of untrue allegation of fact essential in a point of law to justify the grant, or if the court finds that the proceedings to obtain the grant were defective in substance.

28. The import of Section 76 of the *Law of Succession Act* is that the court has a wide discretion and jurisdiction to order revocation of grant at whatever stage and that means that even where transmission of the assets of the deceased have been effected, the court can, if there are sufficient grounds as envisaged by law, order the revocation or annulment of grant.

29. In re Estate of Yawaya Shitanda Nyatati (Deceased) [2022] KEHC 11430 (KLR), W.M Musyoka, J. held thus:-

> "The second aspect of it is that the court can still intervene, after confirmation of grant, where the confirmation process is challenged by way of a review application, on grounds of error on the face of the record, or discovery of new facts, or any other sufficient cause, such as where process of confirmation was flawed as in this case. The court cannot shy away from revisiting its confirmation orders, where a case is made out for review. Secondly, the court can also entertain proceedings, after confirmation of grant, where a revocation application is mounted, on any of the grounds in section 76 of the *Law of Succession Act*. The office of administrator is for life, and a court intervention can be entertained, even where administration is completed and the court file closed under section 83(g) and (i) of the *Law of Succession Act*."

30. In the present case, the Respondent's claim was that she had been left out of the Succession proceedings and that her alleged signature consenting to the Appellant's appointment as an administrator was forged. Rule 7 of the Probate and Administration Rules stipulates that a petition for grant of representation should include:-

> "(1) Subject to the provisions of subrule (9), where an applicant seeks a grant of representation to the estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition in the appropriate Form supported by an affidavit in one of Forms 3 to 6 as appropriate containing, so far as they may be within the knowledge of the applicant, the following particulars—
>
> (a) the full names of the deceased;
>
> (b) the date and place of his death, his last known place of residence, and his domicile at date of death;
>
> (c) whether he died testate or intestate and, if testate, whether his last will was written or oral, and the place where and the date upon which it was made;
>
> (d) a full inventory of all his assets and liabilities at the date of his death (including such, if any, as may have arisen or become known since that date) together with an estimate of the value of his assets movable and immovable and his liabilities;
>
> (e) in cases of total or partial intestacy—
>
> (i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or

persons who would succeed in accordance with section 39(1) of the Act;

(ii) whether any and if so which of those persons is under the age of eighteen years or is suffering from any mental disorder, and, if so, details of it;

(iii)for the purposes of determining the degree of consanguinity reference shall be made to the table set out in the Second Schedule."

Rule 7 (7) stipulates:-

> " Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—
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> (a) renounced his right generally to apply for a grant; or
>
> (b) consented in writing to the making of the grant to the applicant; or
>
> (c) been issued with a citation calling upon him either to renounce such right or to apply for a grant."

37. I have perused the documents lodged by the Petitioner on 24th January 2022. Whereas Form P&A 38 allowing the Appellant to petition for representation was filed, the same is only signed by two people. The Respondent contests her signature, saying it was a forgery. Moreover, the other dependants that the Respondent named in her application did not sign the said form. To compound this anomaly, the consent for confirmation of grant which is Form P&A 37, was only executed by Isaac Wanjala and Anthony Kafu Mwangale who are liabilities of the estate. It is evident that none of the deceased's dependants were involved in the confirmation process. To that extent, the certificate of confirmation of grant cannot be said to have conclusively determined the succession cause. The duty of the court as laid out by the Act is to identify the assets and beneficiaries of a deceased person. In Re Estate of Alice Mumbua Mutua (Deceased) [2017] KEHC 8289 (KLR), it was held:-

> " ...The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets."

38. Ultimately, I find that the court cannot be held to be functus officio and devoid of jurisdiction where certain dependants of the deceased were excluded from the succession process that culminated in the issuance of a certificate of confirmation of grant. Such exclusion is akin to one securing an ex parte judgement without serving the defendant with summons to enter appearance. Such judgement

must be set aside ex debito justitiae. In this instance, the court had no option but to revoke the grant and cancel the certificate of confirmation of grant as it was patently obtained surreptitiously by the Appellant without involvement of the known dependants of the deceased. The trial Magistrate did not err in allowing the summons for revocation of grant to proceed to hearing.

39. Turning now to the ruling dated 30th August, the Appellant has not demonstrated that there was an error apparent on the record nor any other sufficient ground to justify the setting aside of the said ruling. As earlier held, the court was not functus officio.

40. The upshot is that the appeal lacks merit and it is dismissed with no order as to costs as this is a family matter.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF OCTOBER 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Kemunto for the Appellant

No appearance for the Respondent

Court Assistant: Polycap