



REPUBLIC OF KENYA



**In re Estate of Boniface Njaga Gitau (Deceased) (Succession Cause
1836 of 2010) [2025] KEHC 14787 (KLR) (Family) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1836 OF 2010
PM NYAUNDI, J
OCTOBER 23, 2025
IN THE MATTER OF THE ESTATE OF BONIFACE NJAGA GITAU (DECEASED)**

BETWEEN

MICHAEL GITAU NJAGA APPLICANT

AND

JANE NAYMBURA BONIFACE RESPONDENT

RULING

1. The Application for determination is dated 13th February 2025 filed by Michael Gitau Njaga (the applicant/objector). It seeks the following orders;
 1. Spent.
 2. Spent.
 3. The Honourable Court be pleased to review, vary and or set aside its orders made on 17th November 2016 and the process server who effected service of the hearing notice for the said application dated 7th August 2015 be recalled for cross-examination.
 4. Leave be granted to the objector/applicant to file a replying affidavit in response to the application dated 7th August 2015 and the said application be restored so that it can be heard on its merit.
 5. The Honourable Court be pleased to review, vary and or set aside its orders made on 4th March 2015 and its place the Honourable Court do allocate all that parcel of land known as LR Kajjado/ Ole Kasasi/687 to Michael Gitau by revoking the grant made out in favour of one Cecilia Wanjiru Kibe on 12th March 2024 only on that respect.



6. The court do grant any other order it may think fit and expedient in the circumstances to grant.
7. Costs of this application be provided for.
2. The Application is brought pursuant to Articles 25,27,28 &159 of *the Constitution* of Kenya 2010, Section 1A,1B &3A of the *Civil Procedure Act*, Rule 63 &73 of the Probate and Administration Rules in the Law of Succession, Order 44,51 &15 of the *Civil Procedure Act* Chapter 21 of the Laws of Kenya, and was supported by a sworn affidavit by the applicant of even date. He filed a further affidavit sworn on 14th April 2025.
3. The Respondent did not file a replying affidavit or written submissions.

Applicant's Case.

4. The applicant's case is that he was not served with a hearing notice for the application dated 7th August 2015. The hearing notice was served to his former advocates via registered post and he was not notified of the service. He argues that the hearing notice should have been served physically in the office of the advocates. There is need to interrogate the deponent of the affidavit of service dated 20th September 2016 to establish the veracity of the assertion that they attempted to serve. He avers that an eviction order was made on 17th November 2021 without his participation. He was not given an opportunity to address the issues raised in the application dated 7th August 2015.
5. It is his averment that the orders ought to be set aside as he is has a constitutional right to be heard.

Applicant's Submissions.

6. The applicant filed written submissions dated 9th May 2025. He reiterated the facts stated in his supporting affidavit. The applicant is mainly aggrieved by the orders of 4th March 2015. In essence the Applicant has lodged an application on 13th February 2025, seeking to set aside orders made on 17th November 2016 pursuant to a decision of the Court made on 4th March 2015, in respect to the estate of a deceased person who died on 8th September 2006 and in respect of whose estate grant of letters of administration issued on 22nd July 2011 and later confirmed on 12th March 2014

Analysis And Determination

7. On consideration of the pleadings on record and submissions filed I discern the issue for determination is whether the Court should set aside, review or vary orders issued on 17th November 2016 and 4th March 2015.
8. The request to set aside or review the Orders of 4th March 2015 is dead on arrival as it does not meet the statutory and jurisprudential threshold as no attempt is made to fit under the relevant law.
9. 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.”
10. In *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.
11. 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 substantive provisions of Order 45, state as follows:
- “1.
- (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) ...”
12. Order 45 provides for three circumstances under which an order for review can be made. To be successful, the applicant must demonstrate to the court that there has been 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. A party may successfully apply for review, secondly, if he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.
13. The grounds on which the Applicant seeks to review, vary or set aside the orders of 4th March 2015 are to be found on Ground 8 of the face of the Application. The Applicant is aggrieved by the decision of the Court. If this is the case, the option available to him was to appeal.
14. The applicant challenges the service of the application dated 7th August 2015 on his Counsel then on record. At paragraph 6 of the impugned ruling the Court set out the basis upon which it deemed service



to be proper. As stated earlier the application seeking to set aside the orders is lodged 9 years post the event. He contends that the application was allegedly served on his previous counsel by post and that he was not advised of the existence of the application.

15. The applicant is not a pioneer in presenting an application of this nature. There have been many before him and therefore there is judicial precedent on the fate of such an application. Recently in its decision in *Mohamed v Diamond Trust Bank Kenya Limited & another* (Application E035 of 2024) [2025] KESC 17 (KLR) (11 April 2025) (Ruling) the Supreme Court stated as follows-

(16)

- (i)..... extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondents if the extension is granted; whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.
- (vi) Whereas mistakes of counsel ought not to be visited upon a litigant as we held in *George Kang'ethe Waruhiu v Munene & another* (Civil Application 18 of 2020) [2021] KESC 42 (KLR); and *Karinga Gaciani & 11 others v Kimanga & another* (Application E004 of 2023) [2023] KESC 23 (KLR) (*Karinga Gaciani case*) there must be cogent and credible evidence that the applicant made concerted efforts or due diligence, through evidence or correspondence of the follow up with the advocates to pursue his rights. It is not enough for a party to simply blame the advocates on record for all manner of transgressions. As we held in *Karinga Gaciani Case*, "Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not." The appellant changed his advocates on more than one occasion with a similar outcome.
- (vii). It is also worth noting that the applicant avers that the errors in lack of compliance with the rules was discovered in July 2024. However, the application to seek extension was not followed up until this court made a determination on the originating motion in the ruling of November 29, 2024. It is therefore our holding that the delay in filing the application is inordinate and has not satisfactorily been explained. While it is appreciated that the appellant's advocates might have been culpable, the present application in our view is a knee jerk reaction to our earlier ruling.

16. . This application must fail, the applicant allowed the sun to rise and set three thousand and ten times (for 3010 days) before he woke from his slumber and presented this application. He does not, as is required, demonstrate that he was diligent in pursuing his matter or that his application does not prejudice the rights of the respondent who in line with her right to access to justice and fair trial, is guaranteed prompt and efficient determination of matters in Court and enforcement of judgments that are rendered in her favour.
17. For the reasons stated I have no hesitation in dismissing this application in its entirety.
18. As the respondent did not file a response there shall be no order as to costs.



SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 23rd DAY OF OCTOBER, 2025.

P. M. NYAUNDI

JUDGE

In the presence of:

Fardosa Court Assistant

No appearance by parties

