

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 124 OF 2010

ROSE SYOMBUA MUTHINI. 1ST
ADMINISTRATOR/APPLICANT

VERSUS

PETER KIBWAA MUTHINI..
2NDADMINISTRATOR/APPLICANT

DENNIS MUTISYA MUTHINI
.....APPLICANT

RULING

1. Before the court for determination is the application dated 20th January 2025 seeking to set aside the Ruling delivered on 17th October 2024 together with all consequential orders thereto and for leave to the Applicants to file and adduce new evidence.
2. The Applicants' application is based on the grounds outlined in its face and is supported by the affidavit sworn by the Applicant, Dennis Mutisya Muthini. He asserts that he is a beneficiary of the estate of the deceased. He stated that, together with the 2nd Administrator/Applicant, they appointed the firm of Musee Munyalo & Associates Advocates to represent them in this matter, having never been represented by any other advocate. He further

deposed that when the matter came up before the court on 3rd June 2024, the 1st Administrator/Respondent's advocate, L.N. Ngolya & Company Advocates, raised a preliminary objection on the locus standi of the said firm of advocates to act for the Applicants.

3. He averred that the court directed that the issue be canvassed by way of written submissions. Counsel for the 1st Administrator/Respondent waived his right to submit on the issue of locus standi. Consequently, the court directed the firm of Musee Munyalo & Associates Advocates to file submissions on the preliminary objection. The Applicants' counsel thereafter filed submissions addressing the issue of compliance with Order 9 Rule 9 of the Civil Procedure Rules, the submissions were dated 15th July 2024 and filed on the Case Tracking System (CTS) on 16th July 2024. He further stated that the court scheduled the ruling for 8th October 2024, before directions were given on the supplementary affidavit sworn on 3rd June 2023, in which the Applicant sought to adduce new evidence to demonstrate that the 1st Administrator/Respondent had concealed material facts relating to the estate of the deceased. He deposed that when the matter came up on 8th October 2024, the court did not deliver the ruling on the preliminary objection raised by counsel for the 1st Administrator/Respondent, but instead, on 17th October 2024, delivered a ruling on the supplementary affidavit

without first disposing of the issue of representation, which, he claims was the core of the preliminary objection.

4. The Applicant contends that the said ruling prejudiced them, by denying the opportunity to present compelling evidence that the 1st Administrator/Respondent had concealed material facts and fraudulently sold and transferred assets of the estate, including Athi River/Athi River/Block 5/162, despite a restriction being in place. He further avers that the deceased had purchased Machakos/Matuu/1114 from one Peter Munguti Kibala, which property formed part of the estate, but that the 1st Administrator colluded with the seller to transfer the property to William Mukeka Matheka, who is not a beneficiary of the estate. He adds that their late mother wrote a letter to the Clerk, Matuu Municipal Council, alerting the Council of the intermeddling by the 1st Administrator in respect of the said parcel.
5. He asserts that the ruling of the court effectively barred them from pursuing their rights as beneficiaries of the estate and, in effect, allowed the 1st Administrator/Respondent liberty to intermeddle, defraud, disenfranchise, and disinherit them. He further deposed that the 1st Administrator has since presented the Certificate of Confirmation of Grant to the Land Registrar,

Machakos County, and intends to transmit the estate of the deceased to herself on the strength of the said ruling.

6. In response, the 1st Administrator/Respondent swore a Replying Affidavit on 29th January 2025 arguing that the application is an afterthought and an abuse of the court process. She stated that the estate of the deceased was distributed on 22nd January 2024 in accordance with the wishes of the beneficiaries who were present in court and who unequivocally consented to the proposed mode of distribution. She further claimed that her co-administrator has, without any lawful justification, unreasonably declined to sign the requisite documents to facilitate the transmission of the estate's assets in line with the Certificate of Confirmation of Grant. She noted that the Applicants' earlier application dated 31st January 2024 for revocation of grant was dismissed on 17th October 2024, and that no appeal was preferred against that decision.
7. The Respondent maintained that her advocate on record never raise any issue regarding the Applicants' representation and that the only objection before the court concerned the Applicants' Supplementary Affidavit sworn on 3rd June 2024. She argued that the Applicants are conflating issues and that either they or their counsel failed to comprehend the nature of the objection raised. She asserts that the Court correctly found no merit in the Applicants' application for revocation, and accordingly,

dismissed it on 17th October 2024. She further contended that the current application is procedurally flawed under the Law of Succession Act, and that the legal provisions cited do not grant the court jurisdiction to issue the orders sought.

8. The Respondent denied selling any estate property and specifically stated that Machakos/Matuu/1114 was not part of the deceased's free property at the time of his death, as it had already been sold to another person. She claimed to have actively protected the estate from intermeddling and alleged that the Applicants' application is intended solely to frustrate the final distribution of the estate. She therefore urged the court to declare the co-administrator is unfit to continue serving as an administrator and sought orders revoking his appointment to enable her to conclude the distribution of the estate as per the Certificate of Confirmation of Grant.
9. When the application came up for directions on 19th March 2025, counsel for the 1st Administrator/Respondent informed the court that they did not intend to file submissions in opposition to the application. The Applicants, on their part filed their written submissions dated 20th April 2025.

Applicants' Submissions

10. The Applicants began their submissions by reiterating the issues raised in the supporting affidavit to the application. They identified two key issues for determination, that is: a) Whether this Honourable Court has the power to review its ruling where there is a mistake or error apparent on the face of the record; and b) Whether there is, in fact, a mistake or error apparent on the face of the record.
11. On the first issue, the Applicants relied on Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, in submitting that they were aggrieved by the Court's ruling delivered on 17th October 2024. They argued that they had intended to introduce new evidence to demonstrate intermeddling and concealment of material facts by the 1st Administrator/Respondent in the administration of the deceased's estate. However, they contend that the Court's ruling of 17th October 2024 effectively foreclosed their opportunity to seek appropriate directions, thereby prejudicing them. They submit that the dismissal of their substantive supplementary affidavit caused them significant grievance and, as such, they have properly invoked the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules in seeking a review.
12. On the second issue, the Applicants cited the case of **Multichoice (Kenya) Limited v Wananchi Group**

(Kenya) Limited & 2 Others [2020] eKLR to support their position that a pending Preliminary Objection remains undetermined. They argue that the court's failure to address the Preliminary Objection before determining the supplementary affidavit constitutes a mistake or error apparent on the face of the record. They further relied on **Republic v Cabinet Secretary for Interior and Coordination of National Government ex parte Abdulahi Said Salad [2019] eKLR**, submitting that it is evident that counsel for the 1st Administrator raised a Preliminary Objection viva voce on 3rd June 2024 under Order 9 Rule 9, challenging the appearance of the firm of Musee Manyalo & Associates Advocates for the Applicants. They noted that the 1st Administrator subsequently waived his right to submit on the Preliminary Objection, and the Court directed the firm of Musee Manyalo & Associates Advocates to file submissions, which were duly filed on 16th July 2024. The Applicants state that the ruling on the Preliminary Objection was scheduled for 3rd October 2024 but was later adjourned to 17th October 2024, when the Court instead proceeded to determine the substantive application rather than the Preliminary Objection.

13. In conclusion, the Objector/Applicants submit that they have established their case on a balance of probabilities. They therefore urge the Court to set aside its ruling delivered on 17th October 2024, together with all

consequential orders arising therefrom and to allow their supplementary affidavit to be admitted.

Analysis and Determination

14. I have carefully considered the application dated 20th January 2025, the supporting affidavit, the replying affidavit filed by the 1st Administrator/Respondent, and the submissions by the Applicants, and the following issues arise for determination:

a. Whether this court has jurisdiction to review or set aside its Ruling delivered on 17th October 2024.

b. Whether there exists a mistake or error apparent on the face of the record to warrant the review sought.

c. Whether the Applicants have satisfied the conditions for adduction of new evidence.

Whether this court has jurisdiction to review or set aside its Ruling delivered on 17th October 2024.

15. The Applicants rely on Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, urging this court to review its Ruling on the basis of an error apparent on the face of the record. It is well established that although succession proceedings are primarily governed by the Law of Succession Act and the

Probate and Administration Rules, the Civil Procedure Rules may apply where the Act or Rules are silent, pursuant to Rule 63 of the Probate and Administration Rules.

16. Rule 63 specifically imports certain provisions of the Civil Procedure Rules, including Order 45, which governs applications for review, provided the conditions for review are satisfied.

17. Accordingly, this court finds that it is properly vested with jurisdiction to review its ruling delivered on 17th October 2024, subject to the Applicants satisfying the legal threshold for such review.

Whether there exists a mistake or error apparent on the face of the record to warrant the review sought.

18. The Applicants contend that there exists an error apparent on the face of the record because, according to them, the court failed to first determine a pending preliminary objection allegedly raised by counsel for the 1st Administrator/Respondent on 3rd June 2024. They argue that the preliminary objection concerned the issue of representation under Order 9 Rule 9 of the Civil Procedure Rules and that the court's ruling of 17th October 2024 prejudiced them by foreclosing their opportunity to adduce new evidence regarding concealment of material facts by the 1st Administrator/Respondent.

19. However, upon a thorough review of the court record, there is no indication whatsoever that any preliminary objection was ever filed or raised orally by counsel for the 1st Administrator/Respondent on 3rd June 2024 or at any other time. In fact, the record contains no proceedings for 3rd June 2024, nor any other directions issued by the court for parties to file submissions on a preliminary objection. This court, being a court of record, can only act upon and pronounce itself on matters properly before it and reflected in its proceedings.

20. It is settled law that a mistake or error apparent on the face of the record must be self-evident and not one that requires elaborate arguments to establish. Such an error must be manifest and discernible by a mere perusal of the record without engaging in a long-drawn process of reasoning.

21. In the present case, the Applicants' claims of a pending preliminary objection is not supported by the court record. There is no reference to such an objection in the proceedings nor any indication of directions were issued for submissions on the same. The court's Ruling of 17th October 2024 addressed the application that were properly on record, that is, the application seeking revocation of grant. The Applicants have not demonstrated that the court considered extraneous matters, misapprehended the

evidence before it or failed to determine an issue that was properly before it.

22. What the Applicants are essentially asking the court to do is to revisit its findings and re-evaluate the merits of the previous application. That, however, is not the purpose of review. A review is not an appeal in disguise. It is not intended to give a losing party a second bite at the cherry, but only to correct a clear error, mistake, or injustice apparent on the face of the record.

23. Consequently, I find that the Applicants have failed to establish the existence of any error apparent on the face of the record that would justify interference with this court's decision of 17th October 2024.

Whether the Applicants have satisfied the conditions for adduction of new evidence.

24. The Applicants further seek leave to adduce new evidence, alleging that the 1st Administrator/Respondent concealed material facts and intermeddled with the estate by selling estate property in contravention of existing restrictions.

25. The power to admit additional or new evidence post judgment is exercised sparingly and only in exceptional circumstances. The applicable test, as was articulated by the Court of Appeal in the case of **Wanje v Saikwa [1984] KLR 275** where it was held, inter alia as follows:-

“1. Before the Court of Appeal will permit additional evidence to be adduced under rule 29 it must be shown that it could not have been obtained by reasonable diligence before and during the hearing.

2. It must also be shown that the new evidence would have been likely to have affected the result of the suit.”

26. Flowing from the above, the criteria for admitting new evidence are clear (a) the evidence must be new and not available at the time the decision was made, (b) it must be material and likely to influence the outcome, and (c) it must not have been obtainable through reasonable diligence before judgment.

27. In the present case, the Applicants have not provided any new documents or material evidence to demonstrate what specific evidence they intend to introduce or why it could not have been presented before the ruling of 17th October 2024. Their claims of concealment by the 1st Administrator are broad and unsubstantiated. Mere allegations of concealment without credible documentary support do not meet the legal threshold for admission of new evidence.

28. Moreover, the Applicants were already accorded an opportunity to ventilate their grievances through the application for revocation of grant, which the court dismissed on its merits. If they were dissatisfied with that

determination, the appropriate recourse would have been to prefer an appeal, not to seek review on the same grounds.

29. Accordingly, the application dated 20th January 2025 is without merit and is hereby dismissed. Each party shall bear their own costs.

Orders accordingly.

Dated, Signed and delivered at Machakos this 13th day of November 2025.

RHODA RUTTO
JUDGE

In the presence of;

.....FOR 1st Administrator/Respondent

.....For 2nd Administrator/Applicant

.....For the Applicant

Selina Court Assistant