

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI**  
**FAMILY DIVISION**  
**PROBATE & ADMINISTRATION CAUSE NO E152 OF 2025**

***IN THE MATTER OF THE ESTATE OF OGARI SIMON NYAUNDI***  
***(DECEASED)***

**PAMELA KWAMBOKA OGARI** ..... **APPLICANT**  
**VERSUS**  
**CHRISTINE KERUBO OGARI** ..... **RESPONDENT**

**RULING**

1. This matter concerns the estate of Ogari Simon Nyaundi (Deceased) who met his demise on 10 September 2024. This succession cause has, regrettably, turned contentious at an early stage, characterized by disputes over the validity of the Deceased's Will, allegations of intermeddling, and urgent applications for the maintenance of the Deceased's dependants.
2. Before the Court is Chamber Summons dated 25 July 2025 in which the Applicant seeks the review of this Court's previous orders and further directions regarding the sustenance of the Deceased's children pending the final determination of the grant of representation.
3. The Applicant has moved this Court under the provisions of Sections 27 and 47 of the Law of Succession Act, Rule 49 of the Probate and Administration Rules, and Order 45 Rule 1 of the Civil Procedure Rules. The Applicant seeks, *inter alia*, a review of the Order issued on 4 July 2025, which granted

access to specific bank accounts for upkeep and school fees. The gravamen of the Applicant's complaint is that the said accounts are effectively insolvent, containing insufficient funds to satisfy the Court's decree, thereby rendering the order nugatory. Furthermore, the Applicant seek to vary the order to include provision for university fees for Austin Isinta Ogari who has recently attained admission to tertiary education, and to direct that these funds be sourced from rental income allegedly collected by the Respondent.

### **Brief Background**

4. The Deceased died testate, purportedly leaving a Will dated 27 January 2024 and a Codicil dated 9 February 2024. The Respondent is the daughter of the Deceased from his first marriage and the named Executor in the disputed Will. The Applicant identifies as the former wife of the Deceased and mother to three of his children: Austin Isinta Ogari, Aidan Nyandieka Ogari, and Tetta Bitutu Ogari.
5. On 4 July 2025, this Court rendered its Ruling with respect to Summons by Dependents for Reasonable Provision dated 23 April 2025. The Court, having considered the urgent needs of the minors, issued the following directives pending the issuance and confirmation of the Grant:
  - (i) Access was granted to the Deceased's bank accounts at Co-operative Bank of Kenya Ltd (Account No. 011400) and Kenya Commercial Bank (Account No. 111028);
  - (ii) School fees for Aidan Ogari were to be paid directly to Kabianga High School;
  - (iii) School fees for Tetta Bitutu Ogari were to be paid directly to Kilimani Junior Academy;
  - (iv) The Applicant was granted access to a monthly sum of Kshs 80,000/= for a period of six months to cater for accommodation and upkeep.

6. This Court's decision on 4 July 2025 was predicated on the presumption that the designated bank accounts contained sufficient funds to meet these obligations. This presumption was partly fuelled by the text of the disputed Will, which purportedly apportioned Kshs 3,000,000/= from these very accounts to the Applicant for the children's upkeep. The Court aimed to balance the competing interests by utilizing liquid assets (cash in bank) rather than disturbing the corpus of the estate (land/real estate) at an interlocutory stage.
7. Following the extraction of the Order, the Applicants attempted to enforce it. The Applicant's Advocates served the orders upon the respective banks. The response from the banks shattered the presumption of liquidity.
8. Through their Advocates, Karanu Kanai & Co., the Co-operative Bank Limited intimated on 14 July 2025 that the account did not have sufficient funds, attaching a statement showing a balance of mere hundreds of shillings.
9. While Kenya Commercial Bank was initially unresponsive, subsequent statements revealed a complex transaction history that will be analysed in detail below.
10. Beyond the insufficiency of funds, two critical factual developments have been brought to the Court's attention. Firstly, Austin Isinta Ogari, who was not a beneficiary of the school fees order in the previous Ruling due to a lack of admission, has now secured placement at United States International University - Africa (USIU) for a Bachelor of Science in Data Science and Analytics. Secondly, the Applicant alleges that despite the insufficient funds narrative, the Respondent has been collecting substantial rental income from the Deceased's commercial properties, specifically a property in Karen and a hotel in Ogembo.

**The Applicant's Case**

11. The Applicants' case is articulated in the Chamber Summons, Supporting Affidavit, and written Submissions dated 9 October 2025, as well as a Further Affidavit dated 14 November 2025.
12. The Applicant submits that the discovery that the bank accounts are effectively empty constitutes new and important matter under Order 45 Rule 1 of the Civil Procedure Rules. She argues that at the time the Court issued the Order on 4 July 2025, neither the Court nor the Applicants were aware that the accounts had been depleted. They relied on the face of the Will, which implied the existence of millions of shillings. This mistake of fact—the assumption of solvency—is presented as a sufficient reason to review and vary the order to target a viable source of funds: the rental income.
13. The Applicant avers that the Deceased owned two developed commercial properties: L.R. No. 1160/616 in Karen, Nairobi which is occupied by a tenant known as Akirachix, running a school/tech institution, and paying a monthly rent of Kshs 1,200,000/=; and Rhockland Hotel in Ogembo, Kisii County, houses a tenant running a hospital/hotel and generates rental income.
14. The Applicant contends that the Respondent collects this rent exclusively and uses it to the detriment of the 2<sup>nd</sup> House. She argues that since the bank accounts are empty, equity demands that the maintenance order be satisfied from this rental stream.
15. In the rejoinder Submissions, the Applicant draws the Court's attention to specific entries in the bank statements provided by the Respondent. She highlights that on 4 July 2025 the date of the previous Ruling, five 'Agent

Deposits' totalling Kshs 410,000/= were made into the Deceased's KCB account. The Applicant posits that the 'Agent' could only be the Respondent or her proxy, proving that she is actively managing, and intermeddling with, the estate's finances while pleading poverty in Court.

16. The Applicant submits that Austin Isinta Ogari was excluded from the previous order solely because he lacked an admission letter. Now that he has been admitted to USIU, the Applicant argues that Article 55 of the Constitution and the Deceased's own wish to educate his children, as expressed in the Will, mandate that the estate covers his university fees.

### **The Respondent's Case**

17. The Respondent opposes the Application through a Replying Affidavit sworn on 29 August 2025 and written Submissions.
18. The Respondent argues that the Application fails to meet the strict threshold for review set out in Section 80 of the Civil Procedure Act and Order 45 Rule 1. Citing the Court of Appeal decision in ***Accredo AG & 3 Others vs. Steffano Uccelli & Another eKLR***, the Respondent submits that there is no new and important evidence that was not available with due diligence. She contends that the Applicants are merely engaging in an abuse of the court process by trying to re-litigate issues already determined.
19. In a pivotal deposition, the Respondent states at Paragraph 7 of her Replying Affidavit: "*I am a stranger to the averments that the Deceased's estate generates rental income as alleged by the applicants or at all and puts the applicants to strict proof*". She further argues that the Deceased spent substantial funds on medical care prior to his death, explaining the low bank balances.

20. The Respondent submits that one beneficiary should not use an estate as their personal ATM to withdraw as they please to the detriment of the others. The Respondent argues that granting the orders sought would amount to a premature distribution of the estate before the validity of the Will is determined and the Grant confirmed. She maintains that the Applicant, being employed, has parental responsibility under the Children's Act to support her children without stripping the estate.

### **Analysis & Determination**

21. Pursuant to the directions of this Court, bank statements were filed. An independent judicial examination of these documents reveals critical data points that contradict the Respondent's narrative of a dormant estate.
22. The activity on 4 July 2025 is startling. On the very day this Court delivered its Ruling granting the Applicants access to the accounts, a sum of Kshs 410,000/= was deposited into the KCB account via 'Agent Deposits'. The Court makes some inferences from this. First, that the account is active and being operated by someone with access to the account details and significant cash. Second, that if the Respondent made these deposits, she is intermeddling (Section 45). If she did not, she must explain who did. The coincidence of the date suggests a calculated move, possibly to create a specific balance or to hide the true source of funds, for instance by banking a portion of collected rent.
23. The statement for the Co-operative Bank Limited account shows a balance brought forward of Kshs 0.01. On 27 March 2025, there was a credit of Kshs 1,400.00 explicitly labelled 'CHRISTINE KERUBO OGARI REF LETTER COMM' followed by immediate debits for excise and commissions, leaving a balance of Kshs 200.01. My observation is that this account is effectively dead. The specific transaction by the Respondent confirms she has access to and is operating this account. The Applicant's reliance on the Will's

assertion that this account held millions was misplaced, likely due to pre-death depletion or *inter vivos* transfers not currently before the Court.

24. Having dissected the facts and submissions, the following issues fall for determination:
- (i) Whether the Applicant has satisfied the legal threshold for review under Order 45 Rule 1 of the Civil Procedure Rules;
  - (ii) Whether there is sufficient evidence of rental income and intermeddling to warrant a variation of the order to target these funds;
  - (iii) Whether Austin Isinta Ogari, being an adult, is entitled to interim provision for university education from the Estate.
  - (iv) What orders are expedient to preserve the estate and serve the ends of justice?

#### The Threshold for Review

25. Section 80 of the Civil Procedure Act and Order 45 Rule 1(1) of the Civil Procedure Rules provide the statutory scaffolding for review. A court may review its order on the following grounds:
- (a) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge at the time the order was made.
  - (b) Mistake or error apparent on the face of the record.
  - (c) For any other sufficient reason.
26. The Respondent relies on ***Accredo AG & 3 Others vs. Steffano Uccelli & Another eKLR*** to argue that no new evidence exists. I respectfully distinguish that authority. In ***Accredo case***, the Court warned against using review as an appeal in disguise. However, in the instant case, the new evidence is the impossibility of performance of the Court's order due to facts that were unknown to the Applicants and the Court at the time of the Ruling.

27. When this Court issued the order on 4 July 2025, it acted on the presumption that the specific bank accounts identified in the Will contained the funds necessary to effectuate the order. The discovery that Cooperative Bank Ltd Account 011\*\*\*\*\*400 held only Kshs 200/= is a material fact that emerged after the Order. An order commanding a bank to pay school fees from an empty account is an order made in vain. In ***Ndungu Njau v National Bank of Kenya Limited [2008] KECA 188 (KLR)***, the Court of Appeal established that a review is appropriate to correct an error or omission that is self-evident. Proceeding on a mistaken assumption of solvency is such an error.
28. The phrase 'sufficient reason' in Order 45 Rule 1 is interpreted *ejusdem generis* with the other grounds, but also broadly to prevent injustice. In ***Wangechi Kimita & Another v. Mutahi Kimita [1985] eKLR***, the Court of Appeal held that judicial discretion must be exercised to avoid an injustice. Here, the injustice is palpable: minor children are at risk of being sent away from school because the specific method of payment ordered by the Court (bank transfer) has failed. This constitutes 'sufficient reason' to review and vary the mode of execution. The rigidity proposed by the Respondent would lead to an absurdity where the Court's hand is tied while dependants suffer, solely because the deceased's liquidity was overstated.
29. I find that the Application meets the threshold for review. The discovery of the insolvency of the designated accounts constitutes new and important matter that necessitates a variation of the order to ensure the Court's decree is not rendered useless.

#### Rental Income and Intermeddling

30. The Applicants aver that the estate receives Kshs 1,200,000/= per month from the Karen property (L.R. No. 1160/616) occupied by Akirachix. The Respondent denies this, calling the Applicants to strict proof.

31. While the burden of proof lies with the Applicant, the standard in interlocutory probate matters is a *prima facie* case. The Applicants have identified the tenant by name (Akirachix) and the specific property. A simple internet search confirms that Akirachix is indeed a real entity located at 616 Korongo Road, off Ndege Road, Karen. This matches the plot number, 1160/616, referenced by the Applicants. It is highly probable that a commercial entity of this stature pays rent.
32. The Respondent's assertion that she is a stranger to this income is deeply troubling. As the person petitioning for probate and holding the Deceased's documents, she has a fiduciary duty to ascertain the assets. Section 45 of the Law of Succession Act prohibits intermeddling. If the Respondent is collecting this rent and concealing it from the Court, she is committing a criminal offence under Section 45(2). If she is not collecting it, she is negligent in allowing a prime asset to be utilized for free.
33. The KCB bank statement is the smoking gun. The deposit of Kshs 410,000/= on 4 July 2025 1 via 'Agent' signals that someone is actively engaging with the estate's finances. The Respondent's silence on the source of these funds in her submissions—while simultaneously arguing that transactions are deposits—leads to an adverse inference. It is more probable than not that these funds represent rental income or other estate proceeds being channelled into the account by the Respondent to create a semblance of liquidity, or conversely, that she is using the account to bank funds she controls.
34. I find that there is sufficient *prima facie* evidence that the estate generates rental income. The Respondent's denial is evasive. To prevent the dissipation of the estate, this Court must invoke its inherent powers to order that these funds be utilized for the beneficiaries. As held in *In Re Estate of Mary*

**Wanja Wairimu (Deceased)**, the Court must intervene to ensure rental income is collected and not wasted by third parties or intermeddlers.

Provision for the Adult Child

35. The Respondent opposes provision for Austin Ogari, implying that as an adult, he falls outside the scope of immediate maintenance. However, Section 29 of the Act defines dependants to include children whether or not maintained by the deceased immediately prior to his death.
36. Article 53(1)(b) of The Constitution guarantees the right to education. While this explicitly protects children, Article 55 mandates the State to ensure youth access to relevant education and training. Kenyan jurisprudence has progressively interpreted reasonable provision to include university education for children who were dependent on the deceased.
37. The provision of university fees for children is a justifiable claim against a substantial estate. In ***In Re Estate of Daniel A. Korir Kipkurui (Deceased) [2021] eKLR***, the Court granted a limited grant *ad colligenda bona* specifically for the purpose of paying school fees, emphasizing the urgency of education rights.
38. Even the Will relied upon by the Respondent contemplates the sale of land for school fees. This indicates the Deceased's intent to educate his children. Austin Ogari has secured admission to USIU. To deny him fees now would cause him to lose his placement, an irreparable harm that monetary compensation later cannot easily rectify.
39. I find that Austin Isinta Ogari is a dependant deserving of reasonable provision for his university education. The "Personal ATM" argument by the Respondent's counsel is misplaced and insensitive in the context of legitimate educational needs.

### Expedient Orders for the Ends of Justice

40. Section 47 of the Act empowers this Court to pronounce such decrees as may be expedient. Rule 73 saves the Court's inherent powers to make orders necessary for the ends of justice. The ends of justice in this case require that the estate's assets (specifically the rental income) be unlocked to support the beneficiaries who are currently destitute, rather than allowing the assets to be hoarded or dissipated by a hostile executor.
41. Since the bank accounts are unreliable, the Court must target the source of the liquidity. It is just and equitable to order that the maintenance and school fees be paid from the rental income collected from Akirachix and Rhockland Hotel.
42. Guided by the overriding objective of the Civil Procedure Act to facilitate the just, expeditious, proportionate, and affordable resolution of disputes, and having found merit in the Application dated 25 July 2025, I hereby issue the following orders:
- (i) The Orders of this Court dated 4 July 2025 are hereby reviewed and varied to reflect the current financial status of the Estate and the new educational needs of the beneficiaries.
  - (ii) Pending the issuance of Grant and subsequent confirmation, I direct that the Applicant shall have access to the remaining balance in Bank account held at Kenya Commercial Bank Account No. 111\*\*\*\*\*028 only in the following terms:
    - a) School fees with respect to Aidan Ogari shall be payable directly to Kabianga High School;

- b) School fees for Tetta Bitutu Ogari shall be payable directly to Kilimani Jr. Academy;
  - c) University fees for Austin Isinta Ogari, for his Bachelor of Science program shall be paid directly to the United States International University;
- (iii) The hearing of the Objection to the Making of Grant shall be fast-tracked to ensure expeditious conclusion of the same.
- (iv) The costs of this Application shall be in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 16 DAY OF JANUARY 2026**

**HELENE R. NAMISI  
JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For Applicant:	Mr. Masore
For Respondent:	Mr Mugo
Court Assistant:	Lucy Mwangi