

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CORAM: R. MWONGO, J.**  
**SUCCESSION CAUSE NO. 349 OF 2007**  
**IN THE MATTER OF THE ESTATE OF NYAGA MBUCHO ALIAS NYAGA MBUCO**  
**(DECEASED)**

JOHN MURIITHI NYAGA.....APPLICANT

**-VERSUS-**

MARY WACHERA NYAGA.....PETITIONER/1<sup>ST</sup> RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA.....2<sup>ND</sup> RESPONDENT

PETER MBWE KIBIRITI.....3<sup>RD</sup> RESPONDENT

**R U L I N G**

**The Application**

1. The applicant filed a chamber summons application dated 25<sup>th</sup> July 2025 seeking the following orders:
  - 1) That the application dated 10<sup>th</sup> June 2021 be reinstated as it was withdrawn erroneously;
  - 2) That the protests dated 18<sup>th</sup> September 2020 and 12<sup>th</sup> July 2019 be withdrawn as they were intended for withdrawal rather than the application stated in 1 above;
  - 3) That upon the application of 10<sup>th</sup> June 2021 being reinstated, the prayers 3 in this application be allowed;
  - 4) That the application dated 10<sup>th</sup> June 2021 be allowed in terms of prayers 1,2,3 & 4 to allow preservation of the subject matters before this court; and
  - 5) That cost be provided for.
2. The application is founded on grounds that it was the applicant's intention to withdraw the protests and not the application dated 10<sup>th</sup> June 2021 seeking preservation of the estate. On 05<sup>th</sup> July 2023 when the application was inadvertently withdrawn, counsel for the applicant was not present in court but had instructed his colleague to appeal and withdraw the protests dated 12<sup>th</sup> July 2019 and 18<sup>th</sup> September 2020. However, the application was erroneously withdrawn and through the present application, he seeks to have it reinstated for hearing.

## Replying Affidavit

3. Counsel for the 2<sup>nd</sup> respondent opposed the application through a replying affidavit in which she deposed that on 05<sup>th</sup> July 2023, the applicant's advocate categorically stated that he wished to withdraw the application dated 10<sup>th</sup> June 2021 and the same was done with costs. She argued that the summons for revocation of grant dated 11<sup>th</sup> September 2018 was also withdrawn, and the protests were intended to be withdrawn through an application dated 25<sup>th</sup> July 2025.
4. That the intended reinstatement will not serve any purpose because the applicant is not seeking to reinstate the summons for revocation of grant. She also stated that the application dated 10<sup>th</sup> June 2021 seeks to review the orders of another court of concurrent jurisdiction being Kerugoya ELC Petition E006 of 2021, without jurisdiction to do so. It was her position that the application dated 10<sup>th</sup> June 2021 can only be determined before the ELC. That in any event, the applicant consented to removal of one acre which was acquired by the 2<sup>nd</sup> respondent.

## Parties' Submissions

5. In his submissions, the applicant urged the court to exercise its discretion according to Articles 50(1) and 159(2)(d) of the Constitution and reinstate the application which was erroneously withdrawn. He relied on the cases of **CMC Holdings Ltd v James Mumo Nzioki [2004] KECA 143 (KLR)**, **Parimal vs. Veena alias Bharti (2011) 3 SCC 545** and **Wachira Karani v Bildad Wachira [2016] KEHC 6334 (KLR)** and argued that if the court does not exercise its discretion in this matter, he risks being disinherited.
6. He stated that the application is the anchor for his summons for revocation of grant which has not yet been heard. Further reliance was placed on the cases of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] KECA 674 (KLR)** and **Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR)**. He argued that the mistake made by counsel should not disadvantage his case or be used to punish him.
7. The 2<sup>nd</sup> respondent rehashed its position in the replying affidavit and stated that the summons or revocation of grant was expunged from the record and so the application dated 10<sup>th</sup> June 2021 is baseless. It stated that it is unclear what detriment the applicant will suffer if the application is not reinstated. It urged the court to dismiss the application which can only be entertained in Kerugoya ELC Petition E006 of 2021.

## Issue for Determination

8. The issue for determination is whether the application dated 10<sup>th</sup> June 2021 can or should be reinstated.

## Analysis and Determination

9. The applicant filed summons for revocation of grant dated 11<sup>th</sup> September 2018. On 05<sup>th</sup> July 2023, the applicant's advocate informed the court that he wished to withdraw the application dated 10<sup>th</sup> June 2021 in the interest of time. That application sought *inter alia*, injunction against the 2<sup>nd</sup> respondent regarding property no. Kirinyaga/Marurumo/245 pending hearing and determination of the aforesaid summons for revocation.
10. The court duly marked the application as withdrawn with costs to the 2<sup>nd</sup> respondent. On the same day, the court ordered that the summons for revocation be served upon all the respondents. The proceedings after that were geared towards readiness for hearing of the summons for revocation and on 18<sup>th</sup> March 2025, the court scheduled the *viva voce* hearing of the revocation summons for 28<sup>th</sup> May 2025.
11. On 28<sup>th</sup> May 2025, the court's record shows that the applicant's advocate was not in court but his brief was held by one Nzuki. Nzuki informed the court that the only pending application was the one dated 10<sup>th</sup> June 2021. The court recorded:

“the court therefore expunges the summons for revocation of grant dated 11<sup>th</sup> September 2018...”

On the same day, the court scheduled the application dated 10<sup>th</sup> June 2021 for hearing on 22<sup>nd</sup> September 2025. Before that hearing, the applicant filed an application dated 10<sup>th</sup> July 2025 seeking, *inter alia*, a temporary injunction and a restriction in a bid to preserve the estate.
12. The applicant stated that he mistakenly withdrew the application instead of protests dated 18<sup>th</sup> September 2020 and 12<sup>th</sup> July 2019. The 2<sup>nd</sup> respondent opposed this position and stated that even if the application is reinstated, the summons for revocation of grant is no longer on record.
13. The applicant's advocate made several errors which he seeks to correct through the present application. Due to his absence in court at some point during the proceedings, the counsel holding his brief also misled the court into believing that the only pending application was the one dated 10<sup>th</sup> June 2021. As a result, the court expunged the summons for revocation of grant.

14. As the 2<sup>nd</sup> respondent rightly argued, the order preserving the estate should not be made because it will have been made without a purpose, there being no summons for revocation on record any longer. This is why it should be appreciated that there is an error apparent on the face of the record, which should be remedied lest the court ridicules itself.

15. The wording of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules makes it mandatory that the court sitting on review, be moved by the aggrieved party. Section 80 of the Civil Procedure Rules Provides:

***“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.”***

16. Order 45 Rule 1 of the Civil Procedure Rules provides:

***“(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.”***

## **Disposition**

17. The circumstances under which the errors made occurred, can be remedied through the discretion of the court. This is both in the interest of justice and to save judicial time. In my view, I think the following orders are appropriate:

- a. The application dated 10<sup>th</sup> June 2021 be and is hereby reinstated and shall be prosecuted forthwith; noting that the 2<sup>nd</sup> respondent had already filed its replying affidavit dated 15<sup>th</sup> July 2021;
- b. Following order (a) herein, the applicant to file written submissions on the application within 7 days of this ruling and the respondents to file their submissions 7 days after being served, but in any event, not later than 14 days of this ruling. The court shall deliver a ruling on the application dated 10<sup>th</sup> June 2021 within sixty (60) days of this ruling, regardless of whether or not the parties have filed submissions;
- c. The protests dated 18<sup>th</sup> September 2020 and 12<sup>th</sup> July 2019 are hereby marked as withdrawn or struck from the record;
- d. The court hereby reviews and sets aside its orders issued on 28<sup>th</sup> May 2025 which expunged the summons for revocation of grant dated 11<sup>th</sup> September 2018. To that effect, the summons for revocation of grant dated 11<sup>th</sup> September 2018 be and is hereby reinstated and shall be set down for hearing, noting that the 2<sup>nd</sup> respondent had responded to the same. The applicant shall move the court for hearing of the summons for revocation; and
- e. No order as to costs is made.

18. Orders accordingly.

**Delivered, dated and signed at Embu High Court this 25<sup>th</sup> day of February, 2026.**

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**R. MWONGO  
JUDGE**

**Delivered in the presence of:**

1. Murigu for Applicants
2. Nyaga holding brief for Kagio for 2<sup>nd</sup> Respondent
3. No Representation for Omenya for 3<sup>rd</sup> Respondent

#### 4. Francis Munyao - Court Assistant