



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 784 OF 1990
IN THE MATTER THE ESTATE OF MWAURA GITACHU
(DECEASED)

DR JOSHUA GITACHU MWAURA..... 1ST

EXECUTOR

HENRY GITACHU MWAURA..... 2ND

EXECUTOR

SAMUEL KARIUKI MWAURA..... 3RD

EXECUTOR

DANIEL K MWAURA (*On behalf of the estate
of the late HENRY GITACHU MWAURA deceased*)

APPLICANT

VERSES

GLADYS NYAMBURA MWAURA

BENEFICIARY/RESPONDENT

CATHERINE MURUGI

MWAURA.....BENEFICIARY/RESPONDENT

RULING

1. This ruling relates to the applications dated **9th May, 2022** and **21st November, 2024**.
2. The application dated **9th May, 2022** filed by the Applicant, Samuel Karuru Mwaura; seeks for **ORDERS THAT**:
 1. **Spent.**
 2. **The honourable court be pleased to stay the execution of the ruling dated 27th April, 2022 pending the hearing and determination of this application.**
 3. **The honourable court be pleased to set aside, vary and/ or review its judgment dated 15th October, 2021.**
 4. **The costs of this application be provided for.**
3. The application is based on the grounds on its face and supported by affidavit and further affidavit sworn by **Samuel Karuru Maina** on **9th May, 2022** and **12th July, 2022**.
4. He avers *inter alia* that he is a beneficiary of the deceased's estate. Following directions issued on **12th February, 2021**, the firm of Spatial Planning Designs Solutions, through Mr. Stephen Njenga, filed an affidavit and pleadings were thereafter closed, with a ruling date issued. He contends, however, that a further replying affidavit was subsequently filed by Teresia Wangumo Mwaura without leave of the court after closure of pleadings and that the court nonetheless relied on its contents in the ruling delivered on **27th April, 2022**, thereby occasioning procedural prejudice.

5. He further asserts that the said affidavit introduced new matters, particularly concerning the existence and impact of an access road, which had neither been canvassed in prior proceedings nor subjected to contestation.
6. He depones that he has occupied and developed his portion of land, **LOC 1/Mugumoini/338**, for over **45** years and that the implementation of a new survey plan has resulted in destruction of crops, boundary markers and long-standing trees that historically defined his land. He maintains that the subdivision undertaken by Spatial Planning Designs Solutions is inconsistent with the deceased's Will and the consented sketch map prepared by Hezekiah Njuguna and that the purported road adjustment has disproportionately reduced his acreage while leaving other beneficiaries' shares largely unaffected.
7. He further faults the absence of supporting minutes to justify the revised subdivision and the failure by the surveyor to avail the survey plan for the court's scrutiny despite directions. He disputes the reliance on alleged family resolutions, minutes and consent, contending that they do not constitute a binding agreement capable of altering the deceased's testamentary scheme. He maintains that the survey exercise fundamentally altered the original layout of the land and unjustly diminished his entitlement, contrary to the deceased's intentions and that any reduction necessitated by road expansion ought to have been equitably apportioned among all beneficiaries.

8. In support, he annexes extracts of the deceased's Will, pages **12** - **13**, which demonstrate a structured and deliberate distribution of the estate and emphasize orderly allocation without undue fragmentation.
9. Accordingly, he urges the court, as a court of equity, to review and set aside the ruling of **27th April, 2022** on account of procedural irregularity, inconsistency with the Will and inequitable redistribution, contending that no prejudice will be occasioned to the beneficiaries if the orders sought are granted.
10. The application is opposed vide replying affidavit sworn by Teresia Wangumo Mwaura on **20th June, 2022**. She avers *inter alia* that the Applicant is one of the **27** beneficiaries and asserts that her earlier affidavit dated **21st September, 2021** reflected resolutions reached during a family meeting held at the Applicant's home. She contends that the Applicant ought to have responded to those matters prior to delivery of the ruling and that the issues now raised were neither new nor unforeseen.
11. The Respondent maintains that the estate was distributed in accordance with the deceased's will, which allocated the land among **4** maternal households rather than individual beneficiaries. She avers that the question of the access road was central to the family deliberations and was expressly discussed during the said meeting.
12. In support, she relies on annexed minutes and a consent allegedly executed by the Applicant and his wife,

demonstrating their participation and concurrence with the agreed subdivision framework.

13. She further depones that the subdivision was undertaken by a professional surveyor in accordance with the will and the sketch map prepared by Hezekiah Njuguna and that best practice was applied in implementing the access road and demarcation. She denies that any homestead was unfairly prejudiced, asserting that all households were affected uniformly and in accordance with the survey.
14. She contends that only vegetation along the access road was removed and that the Applicant's homestead remained intact, while any perceived reduction relates to portions he had previously occupied beyond his entitlement. The annexed survey plan is relied upon to demonstrate that the subdivision adhered to the agreed framework and did not disproportionately disadvantage any beneficiary.
15. She avers that the Applicant's complaints are unsubstantiated and amount to an attempt to delay implementation of the distribution while continuing to occupy land belonging to other households. She reiterates that the Will has been faithfully implemented, the survey plan duly reflects the agreed position and the annexed minutes and consent confirm collective participation in the process. She therefore contends that no sufficient grounds have been established to warrant review of the ruling delivered on **27th April, 2022** and that the application should be dismissed with costs.

16. The application dated **21st November, 2024** filed by the Applicant, Daniel K. Mwaura, seeking for **ORDERS THAT:**
- 1. Daniel K. Mwaura be substituted as executor in place of Henry Gitachu Mwaura who died on 27th February, 2024.**
 - 2. The costs of this application be in the cause.**
17. The application is supported by affidavit sworn by Daniel K. Mwaura on **21st November, 2024**. He avers *inter alia* that he is deceased's son and that his brother, Henry Gitachu Mwaura, was one of the executors of the estate but passed away on **27th February, 2024**, as evidenced by the annexed death certificate.
18. He avers that, following the said death, it is necessary for the court to substitute the deceased executor with himself so as to facilitate continuation and completion of the administration of the estate. He expresses his willingness to assume the role of executor from the house of their late mother, Gladys Nyambura Mwaura, and reiterates that the substitution is essential to ensure that the administration process, which is still ongoing, is not stalled.
19. The application is not opposed and no written submissions have been filed.
20. In support of the application dated **9th May, 2022**, the Applicant has filed written submissions dated **30th May, 2024** and **23rd July, 2025**.

21. In opposition to the application dated **9th May, 2022**, the Respondent has filed written submissions filed on **29th October, 2025**.

ANALYSIS AND DETERMINATION:

22. I have read the applications before this court, the responses thereto and the rival submissions.
23. Upon consideration of the application dated **9th May, 2022**, the affidavits on record and the applicable law, the issues for determination are whether the Applicant has satisfied the threshold for grant of stay of execution of the ruling dated **27th April, 2022** and whether sufficient grounds have been established to warrant review, setting aside or variation of the judgment dated **15th October, 2021**.
24. On whether this Honorable Court should to stay the execution of the ruling dated **27th April, 2022** the courts have pronounced themselves as follows:
25. In **ARUN C. SHARMA V. ASHANA RAIKUNDALIA T/A RARUNDALIA & CO. ADVOCATES**, Justice Gikonyo stated: ***“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the Respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as***

security for sue performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

26. In KCB Bank Kenya Limited v Karigi t/a Mugendi Karigi & Co Advocates & another [2023] KEHC 23858 (KLR) it was stated as follows: “... ***15. Eventually, the role of the court is to administer justice. This can only be achieved when the court considers the arguments of both parties, weighing the pros and cons of the discretionary decision of the court to either side of the litigation divide. That is, the losses bound to be suffered by the Applicant as against the gains to the Respondents and vice versa if the orders sought are either granted or denied. The court, in RWW Vs. EKW [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words: “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an***

award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

27. On whether to set aside, vary and/or review its judgment dated **15th October, 2021**, the courts have pronounced themselves as follows:

28. In **Anwar Ali & another v Monica Muthoni & another [2021] eKLR** the court stated as follows:

“8. Further, Order 45(1) of the Civil Procedure Rules, 2010 provide the conditions under which a court can allow an application for review. The Court of Appeal in the case of Pancras T. Swai -vs- Kenya

Breweries Limited (2014) eKLR reiterated the conditions set by Order 45 and held that for an Applicant to succeed in an application for review, he must establish to the satisfaction of the court any one of the following three main grounds: -

i. That there is discovery of new and important evidence which was not available to the Applicant when the Judgment or order was passed despite having exercised due diligence; or

ii. That there was a mistake or error apparent on the face of the record; or

iii. That sufficient reasons exist to warrant the review sought.

iv. In addition to proving the existence of the above grounds, the Applicant must also demonstrate that the application was filed without unreasonable delay.

9. From the above conditions, it is clear that the prayer for review in the instant application is premised on the first condition.

In the case of Turbo Highway Eldoret Limited -vs- Synergy Industrial Credit Limited [2016]eKLR Sewe J. cited the case of Rose Kaiza - vs- Angelo Mpanjuiza [2009] eKLR, where the Court of Appeal considered an application for review on the ground of new evidence and held that:-

“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the Applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence

but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

10. It is therefore clear that the discovery ought to be of new and important evidence which after due diligence was not within the knowledge of the party or could not have been produced when the decree was being made.

In the case of D. J. Lowe & Company Ltd -vs- Bonquo Indosuez, Nairobi Civil Application No.217 of 1998, the Court of Appeal sounded a caution in such applications and stated that:-

“Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his

part in adducing all possible evidence at the hearing.”

29. On the question of stay, the applicable principles under **Order 42 Rule 6** of the Civil Procedure Rules, 2010 require demonstration of substantial loss, promptness of the application and provision of security. While the Applicant alleges prejudice arising from the implementation of the impugned ruling, particularly in relation to alteration of acreage and destruction of developments, such loss has not been shown to be of a nature that cannot be compensated or remedied.
30. Further, the court must balance the Applicant’s right of appeal against the Respondent’s entitlement to enjoy the fruits of a lawful judgment. In the circumstances, and guided by the principles in **Arun C. Sharma v Ashana Raikundalia and Century Oil Trading Company Ltd v Kenya Shell Ltd**, the Applicant has not satisfactorily demonstrated substantial loss to justify stay.
31. On the prayer for review, the law under **Order 45** of the Civil Procedure Rules, 2010 is settled that an Applicant must establish discovery of new and important evidence not within his knowledge despite due diligence, an error apparent on the face of the record or any other sufficient reason.
32. The Applicant’s grievance is primarily anchored on the alleged improper admission and reliance on a further replying affidavit filed without leave after closure of

pleadings, as well as the introduction of issues relating to the access road and survey adjustments.

33. However, the Respondent has demonstrated that these matters formed part of prior family deliberations and were captured in minutes and consents allegedly executed by the Applicant.
34. In that regard, the issues raised cannot be said to constitute new evidence or matters that were not within the Applicant's knowledge or could not have been raised earlier with due diligence. Moreover, no manifest error apparent on the face of the record has been established to warrant the exercise of the court's review jurisdiction.
35. In the premises, and taking cognisance of the history of this matter I find and hold that the Applicant has failed to meet the threshold for both stay of execution of the ruling dated **27th April, 2022** and review of the judgment dated **15th October, 2021**.
36. Although the application dated **21st November, 2024** is unopposed, it is the duty of the Court to nevertheless subject it to a merit evaluation in accord with the applicable laws and principles. Indeed, in **Gideon Sitelu Konchellah vs. Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR** the Supreme Court of Kenya held that: "***...as a court of law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought***

orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court...

37. In light of the foregoing, I do not find any reason to disallow dated 21st November 2024.
38. **The sum total of my findings therefore is that the application dated 9th May 2022 is disallowed and the application dated 21st November 2024 is allowed as prayed.**
39. **Each party to bear its own costs.**

**Dated signed and delivered at Nairobi via video link this
9th day of April 2026.**

**H K CHEMITEI
JUDGE**

