

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. E028 OF 2021
IN THE MATTER OF THE ESTATE OF DAVID GIKUNDI
MARETE (DECEASED).

FLORENCE GAKII MWITI.....1ST
PETITIONER/APPLICANT

BRENDA KARIMI GIKUNDI.....2ND
PETITIONER

VERSUS

NELLY DOLLY KATHURE.....
RESPONDENT

BANK OF BARODA.....
.....CREDITOR

RULING

1. For determination is the application dated 8/7/2025, under **Order 9 Rule 9, Order 40 Rules 1, 2, 3 & 4** and **Order 45 Rule 1** of the Civil Procedure Rules, Sections 80 (b), 1A and 1B of the Civil Procedure Act, Section 68 of the Land Registration Act, Rules 49, 63 and 73 of

the Probate and Administration Rules and Article 159 (2) (d) of the Constitution, seeking that:

- 1. Spent.**
- 2. This Honourable Court be pleased to grant leave to the firm of JOSHUA MWITI LAW to come on record for the 1st petitioner herein.**
- 3. This Honourable Court be pleased to stay execution of the Ruling dated and delivered on 5th June 2025 pending the hearing and determination of this Application.**
- 4. This Honourable Court be pleased to vary, review and/or set aside the orders of this Honourable Court delivered on 5th June 2025.**
- 5. This Honourable Court be pleased to order that the Mother of the Minor Nelly Dolly Kathure do provide for her minor pending the determination of this succession cause.**
- 6. This Honourable Court be pleased to review, vary and/or set aside the order of the 5th June 2025.**
- 7. The costs of this summons be provided for.**

2. The application is predicted on the grounds that the 1st Petitioner/Applicant herein is the wife of the deceased, and on 5/6/2025, this Court ordered the petitioners to pay

a monthly sum of ksh. 100,000/- for the minor. There is an error apparent on the face of the record, because all the properties reverted to the Estate of Julius Marete Ibutu, vide the Judgment in Civil Appeal No. E014/2023.

3. The Respondent swore a replying affidavit on 23/7/2025 in opposition to the application. She avers that there is neither an error apparent on the face of the record nor discovery of new and

important relevant matters to justify the grant of the review sought. In her view, the alleged failure by this court to consider the Court of Appeal decision in Nyeri Succession Cause Appeal No. E014/2023 would be a case for appeal as opposed to review. FLOJOY guest house, previously known as GOOD NIGHT lodge, sits on the deceased's land parcel No. Ntima/Igoki/9446 and the petitioners are utilizing the income from the estate to her detriment. She prays for the dismissal of the application and compliance with the orders of 5/6/2025, pending further directions of the Court.

4. The application was canvassed by way of written submissions, which were only filed by counsel for the respondent.

Disposition

5. I have considered the application, the affidavits, the submissions and the authorities relied on.

6. Review is provided for under **Order 45 Rule 1 of the Civil Procedure Rules** as follows: ***“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.”

7. There is no doubt that the application was filed without unreasonable delay on 8/7/2025, as the order sought to be reviewed and/or set aside was made on 5/6/2025. The 1st petitioner terms the court’s purported failure to consider the judgment in Nyeri Court of Appeal No. E014/2023 as an error apparent on the face of the record. In that Judgment, it is contended that the Court of Appeal invalidated the will and ordered the properties to revert to the estate of Julius Marete Ibutu. That judgment was rendered on 22/3/2024 before the impugning decision was made, and was at all material times, in the possession and/or knowledge of the applicant. Consequently, the same cannot be construed as discovery of new and important evidence within the ambit of **Order 45 of the Civil Procedure Rules.**

8. There is no contestation on whether the 1st respondent and her child are beneficiaries and/or dependants of the estate of the deceased. I note the copy of records evincing that Motor Vehicle Registration No. KCR 993 R, originally owned by the deceased herein, was fraudulently transferred to the 2nd petitioner, during the pendency of these proceedings, in an attempt to dissipate the estate and thereby defeat the ends of justice.

9. I find no sufficient basis to warrant a stay of execution or a review of the impugning decision, which remains binding and must accordingly be complied with. Suffice it to state that granting the stay sought would ultimately undermine the best interests of the minor, which are of paramount importance.

10. The Petitioners are hereby reminded that court orders must be obeyed, as any disobedience may attract penal sanctions.

11. On leave to come on record, the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** make it mandatory that for any change of Advocates after judgment has been entered, there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming Advocate.

12. In order not to impede the applicant's right to be represented by an Advocate of her choice, I hereby grant the leave sought.

13. The upshot from the foregoing analysis is that the application dated 8/7/2025 is in want of merit, and it is hereby dismissed.

DATED AND DELIVERED AT MERU THIS 13TH DAY OF MAY, 2026.

S.M. GITHINJI -JUDGE

13/5/2026

In the presence of:-

Mr. Gikunda Kiautha for the Applicant.

Firm of Joshua Mwiti is for the Respondent (absent).

