



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO.424 OF 2012

IN THE MATTER OF ESTATE OF MWANGI GATHENYA WACHIRA
(DECEASED)

GEORGE GATHENYAAPPLICANT

Versus

HARRISON KINYUA1st RESPONDENT

JOHN NJOROGE GATHENYA.....2nd RESPONDENT

And

STANELY MOHAYA ISAAC.....1st Interested Party

**SAMMY WACHIRA.....2nd Interested
Party**

**MUHOYA NYAWIRA.....3rd Interested
Party**

KINYUA ISAAC.....4th Interested Party

RULING

1. On the 30th of November 2023 this court partially allowed an Application dated 28th February 2017 for review of Judgment as well as to render an account of the estate and dismissed an Application for revocation of grant dated 1st February 2022.

2. Before me are two Applications the 1st Application by George Gathenya describing himself as Applicant/ beneficiary dated 18th June 2025 is a summons for review of judgment seeking the following reliefs;

- i. **SPENT**
- ii. **The Court orders that the 1st house occupies the middle portion of BARINGO/RAVINE/102/74 marked as B, the 2nd house retains portion A, and the 3rd house retains portion C:**
- iii. **In the alternative to prayer b above, the judgment of the court be reviewed and order that the Part Marked as A in the survey Map for land parcel BARINGO/RAVINE/102/74 be subdivided into three equal plots to be shared between the three houses and the selection of plots be done by way of Balloting: the Parts marked as B and C be subdivided into three equal parts to be shared equally between the three houses and the selection shall be through balloting: and**
- iv. **The costs of the application be borne by the estate.**

3. The 1st Application is based on the following grounds;

- i. **That, the judgment of this Honourable Court delivered on 1st February 2017 distributed the estate, including Land Parcel BARINGO/RAVINE/102/74. equally among the three houses of the deceased but did not specify the actual portions or areas each house was to occupy.**

- ii. **That prior to the judgment, the 2nd and 3rd houses had already settled on the land, occupying portions marked A and C on the survey map, respectively.**
 - iii. **That the 1st house, which had previously been allocated land elsewhere by the deceased, now insists on occupying the portion marked A, already settled by the 2nd house.**
 - iv. **That the resulting dispute has caused prolonged wrangles among the beneficiaries, making it impossible to finalize the distribution and settlement of the estate.**
 - v. **That it is in the interest of justice and in keeping with the equitable distribution intended by the court that this Honourable Court reviews or clarifies its judgment to provide clear occupation boundaries for each house.**
4. **The 2nd Application dated 11th July 2025 by Harrison Kinyua seeks the following reliefs;**
 - i. **That, this honorable court is pleased to grant an order of temporary injunction restraining the 1st to 4th interested party by themselves, their agents, their servants and or employees from interfering. entering, developing, remaining. ploughing. tilling, trespassing. leasing out and or defeating the 1st, 2nd and 3rd Administrators possession of all the divisions currently prevailing in all that parcel of land known as BARINGO/RAVINE/102/74 registered in the name of MWANGI GATHENYA WACHIRA (DECEASED) pending hearing and pending hearing distribution of this property to the beneficiaries.**

- ii. **That in the first instance all the funds held at the bank manager KCB ELDAMA RAVINE is hereby Ordered to share equally and distribute all the funds held at ACCOUNT NO. 11054731 in the name of GEORGE GATHENYA JOINT ACCOUNT to the Firm of GITHUI & Co., ADVOCATES NYAKAGA S.M & Co., ADVOCATES and KEMBOI S.L & Co., Advocates for onward transmission to the Administrators for distribution of the beneficiaries who are their clients.**
- iii. **That, this court be pleased to issue any further Orders it may deem fit to issue in the circumstances.**
- iv. **That, cost of this application be provided for.**

5. The 2nd Application is based on the following grounds:

- i. **That, interested parties have come with hired goons and invaded the property which was being held by the Administrators, for the benefit of the beneficiaries from each family and took over the said land to the detriment of other beneficiaries.**
- ii. **That, the interested parties, have come and destroyed crop planted on the land, despite the fact that they had a channel of coming through their Administrator and took over the land to the detriment of the intended beneficiaries,**
- iii. **That, the property which is situated in Eldama Ravine LR NO. 498/112 is seriously watered down by vagaries of weather and there is a need that the said property**

be repaired to avoid serious sanctions by the County Government of Baringo.

- iv. That, it is fair and necessary that the funds held at Joint Account in Eldama Ravine, be released to the Advocates for onward transmission to Administrators for them to repair this building.**
- v. That the beneficiaries need repairing the building, but the funds are held in a Joint Account and they cannot be released in absence of a Court Order.**

6. This court directed that the two applications shall jointly be heard and all parties were afforded an opportunity to file written submissions and I have accordingly read and considered all submissions and Affidavits filed by the parties.

7. Without using too much ink to regurgitate what has been said in support or opposition it is important to all recall where we are coming from.

- a) Final Judgment was entered on 1st February 2017 by Hon Justice A. K Ndungu this is almost eight (8) years ago. The judgment was never appealed.
- b) The instant remedies being sought are equitable that would warrant the applicants moving the court with clean hands.
- c) The estate has three Administrators representing the three (3) houses who are expected to jointly undertake the administration and settlement of this estate.
- d) The two Applications are by Co-administrators and manifest a dysfunctionality in the Administration
- e) The court had in judgment ordered the Proceeds of rent collected from LR No 448/12 to be held in a joint

trust account in the names of three trustees, George Gathenya, Harrison Kinyua, and John Njoroge Gathenya under a duty to share out the proceeds to their respective houses not later than 10th date of every subsequent month.

8. The jurisdiction to review of decisions of a probate court is governed by **Rule 63 of the Probate and Administration Rules**, which provides as follows: -

“63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

9. In the case of **John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another [2016] eKLR**, the court had this to

say with regards to Rule 63 of the Probate and Administration Rules;

“As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.”

10. A party seeking review of orders, in a probate and succession matter, is bound by the provisions of **Order 45 (1) of the Civil Procedure Rules** which provides that;

“1. (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”

11. **Order 45 provides for three circumstances in which an order for review can successfully be made, the Applicant must satisfy and show-case to the court any of the three circumstances;**

- i. there has been 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. A party may successfully apply for review,
- ii. secondly, if he can demonstrate to the court that there has been some mistake or error apparent on the face of the record.
- iii. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.

12. It is trite law that an application for review should be made without unreasonable delay. I am of the view that, the 1st Application fails on that front, as no reason whatsoever has been offered, as to why the Applicant who is an administrator is moving court almost 8years since judgment without bothering to account as to what has so far transpired, his efforts at joint administration, frustrations if Any. The purported reason for review on lack of clarity in judgment is spurious at best.

13. In **Stephen Gathua Kimani vs. Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR**, the court had occasion to deal with cases of apparent long delay in seeking review, by holding that:

“One thing is clear in this application. The delay of one year has not been explained. Perhaps, it’s important to recall the last sentence of Order 45 Rule 1 (1) (b) which reads “... may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

The logical question that follows is, was the present application made without unreasonable delay” Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant one year to file an application in court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay. Such a long delay must be sufficiently explained.”

14. With regards to the 1st Application, this court finds the Applicant is moving the court with unclean hands, the deceased property in question has been sub-divided equally and if two houses had been prior settled in two distinct sub-division, then logic demand that the 1st house receives the remaining share. Is the Joint Administrators had transmitted the three respective shares into their names then any invasion by strangers or goons would be a criminal matter

without need of this court's intervention. However, the ongoing bickering stems from the dysfunctional administration.

15. Where there is a dysfunctional administration the solution is removal of any or all administrators not keen to undertake the work assigned by the court, as opposed to administering an estate of the deceased thru compulsive court orders.
16. Where Administrators are unable to discharge their duties, and their respective houses are unable to nominate responsible administrators in replacement then the court may consider transferring the deceased asset to the public trustees for administration and settlement.
17. All-in-all this succession cause is a backlog that ought not to be in court, execution of judgment cannot take eight years and the current co-Administrators appear not to be in any hurry to conclude their work.
18. As for funds held in a joint account, the Administrators are expected to disburse the same every month and if one of them now seeks an order for withdrawal without letting the court know why they themselves cannot just withdraw and disburse to the beneficiaries then it further fortifies the theory of dysfunctionality.
19. The Interested Parties are beneficiaries from the 1st House who injunctive relief is being sought against, the court is unpersuaded as to whether such a relief shall further the ends of justice as well as whether the Applicant is moving court with clean hands. If the three subdivisions had been registered in the names of the three trustees then there would be no need to injunct anyone and the failing by the Applicant and his Co-Administrators has given rise to

the current crisis further fortifying the wand of clean hands on the part of the Applicant who appears as a fence-seater he has a critical role to constantly account for to the court.

20. Accordingly, I am accordingly unable to find merit in either the 1st Application, or the 2nd Application in its entirety and I am thus inclined to find as follows: -

- i. The 1st Application dated 18th June 2025 is hereby dismissed for want of merit**
- ii. The 2nd Application dated 11th July 2025 is hereby dismissed for want of merit.**
- iii. An Order is hereby issued, directed at the Administrators to forthwith and not later than sixty days from the date of this ruling, to file a joint Report of their achievement where the same is impossible each administrator to file individual report(s) detailing the role played, handicap (if any) and achievement by individual co-administrator.**
- iv. Any Party aggrieved with the Ruling has a forty-five (45) day leave to Appeal**
- v. This being a family matter, parties shall bear their respective costs.**
- vi. This Matter shall be placed before the incoming judge for mention after sixty days, to determine any progress towards conclusion and settlement of the probate.**

Dated, Signed and Delivered at virtually from Busia

On this day of 7th Day of May, 2026.

S. Mohochi
JUDGE