



REPUBLIC OF KENYA



KENYA LAW
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In re Musakhuru Binyenya alias Musakhulu Binyenya (Deceased) (Succession Cause 14 of 2013) [2025] KEHC 791 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 14 OF 2013**

SC CHIRCHIR, J

JANUARY 30, 2025

**IN THE MATTER OF MUSAKHURU BINYENYA
ALIAS MUSAKHULU BINYENYA (DECEASED)**

BETWEEN

TIMON AYODI MUSAKHULU PETITIONER

AND

JOHN MALESI MUSAKHULU APPLICANT

RULING

1. By way of the summons dated 23rd October 2023 ,the Applicant seeks herein for the following orders;
 - a. That this Honourable court be pleased to review the certificate of confirmation of the grant herein dated 8th July 2014 and have the estate of the deceased re-distributed
 - b. The costs be provided for

The Applicant's case

2. The Application is supported by an affidavit sworn by the applicant and on the grounds appearing on the face of the Application.
3. It is the Applicant's case that he was unaware of the succession proceedings; that his consent was not sought during distribution and that the manner in which the distribution was done was unfair as some of the dependants had been given land by the deceased during his lifetime . He further states that their brother, the late Thomas Lisutsi Musakhulu for instance had already been settled by their late father in Webuye, that the petitioner and Timon Ayodi had been settled by the deceased in Shinyalu sub-county within Kakamega county.



4. He further states that he only came to know about the succession cause when the petitioner told him to vacate land parcel No. Isukha/Lubao/609 (the suit property); that following this threat, he went to the land registry only to find that the land parcel had been subdivided into 6 portions, particulars of which are as follows:
 1. Francis Isabwa Lukayi (son to the late Reuben Lukayi Musakhulu) - Parcel No. Kakamega / Lubao/3264
 2. Teresina Mukalasiga Lukayi (son to the late Reuben Lukayi Musakhulu) - Parcel No. Kakamega /Lubao/3265
 3. Finos Matindu Lukayi (son to the late Reuben Lukayi Musakhulu) - Parcel No. Kakamega / Lubao/3266
 4. Levi Isaalu Lukayi- (son to the late Reuben Lukayi Musakhulu) - Parcel No. Kakamega / Lubao/3267
 5. Rose Mazidza Isuduzi- (widow to the late Thomas Lisutsi Musakhulu) - Parcel No. Kakamega /Lubao/3268
 6. John Malesi Musakhulu (son to the late Musakhuru Binyenya a.k.a Musakhulu Binyenya) - Parcel No. Kakamega /Lubao/3269.
5. He states that the suit property was unfairly distributed, and that he never consented to the mode of distribution. He prays that the estate be redistributed equally between John Malesi Musakhulu (0.4 Ha), that is himself, and late Reuben Lukayi Musakhulu (0.4 Ha).
6. He further states that land parcel No. 609 was to be shared between his brother Nganji Musakhulu, the late Reuben Lukayi Musakhulu and John Malesi Musakhulu; that since Nganji Musakhulu died without a wife or children, the suit property should be shared between the late Reuben Lukayi Musakhulu and himself, John Malesi Musakhulu.

The Petitioner's case

7. Through a replying affidavit dated 23rd May 2024, the petitioner denies that their deceased father had already distributed his estate prior to his demise. He further refutes the allegations that the Applicant was not aware of the succession proceedings ; that on the contrary the Applicant was involved in the entire process, and that the Applicant was in that process allocated 0.24 ha of the parcel, and on which he currently resides
8. He denies having been allocated any land in Shinyalu. However he states that he had purchased his own land at Trans Nzoia and that he gave his share of the suit property to the sons and wife to the late Reuben Lukayi Musakhulu.
9. He dismissed the applicant's proposed mode of distribution, while stating that the proposed distribution will disadvantage some of the beneficiaries. He states that in any event, some of the beneficiaries have already sold their parcels to third parties.
10. Both parties filed submissions which I have read through and considered.

Analysis and determination

11. The only issue for determination by this court is whether a review ought to be allowed and consequently the estate be redistributed.



12. An order for review is founded under Order 45 of the *Civil Procedure Rules* and this order has been imported to the law of succession Act pursuant to rule 63 of the *Probate And Administration Rules*.
13. Order 45 Rule 1 of the *Civil Procedure Rules, 2010* provides as follows; (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 additional sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.
14. The Applicant is not pleading any error on the face of the record or discovery of new facts. However a party is entitled to seek a review for any other reason, which appears to me to be the case in this cause.
15. The Applicant's case herein is that he was not aware that the succession proceedings had been instituted and only came to learn about it when he was ordered to vacate the land. He further states he never gave consent to the filing of the petition or to the distribution of the suit property. He finally states that the distribution currently in place, is unfair.
16. I have considered the Applicant's plea and perused the record. Although the Applicant claims that he never consented to the filing of petition and distribution of the suit property, a thumb print stated to be belonging to him appears in the petition dated 8th November 2012 and on the consent to distribution dated 3rd April 2014. He has not denied that the thumbprints do not belong to him or is a forgery.
17. Further , the Applicant has told the court that he only came to know about the proceedings "recently". He has not stated how recent this was . It is trite law that an Application for review must be brought without any undue delay. The Grant herein was confirmed on 1st July 2014 as indicated in the certificate of confirmation of Grant. That was ten(10) years ago. By the Applicant pleading " recently" this court is not in a position to determine whether there has been a delay in filing the Application for review. I find the Applicant's manner of pleading, in this regard, rather evasive and perhaps is meant to cover up the fact of delay.
18. Nevertheless, I have seen a letter dated 30/11/2016 addressed to the deputy Registrar of this court by the Applicant. Though the letter states that the file is unavailable, it demonstrates that the Applicant was aware of the succession proceedings as far back as the year 2014. The Applicant's allegation that he was not aware of the succession proceedings therefore cannot be true.
19. On the face of the application, the applicant has not proved any of the ingredients under Order 45(1) of the *Civil Procedure Rules* to warrant review of the order. From the face of the record, there is no error apparent nor mistake or discovery of any new evidence or material facts or any other sufficient reason to warrant review.
20. In my view, the issue raised by the applicant is best dealt with under revocation and or annulment of the grant and not an Application for review.
21. Consequently, the Applicant has failed to convince this court that he is entitled to an order of review. The Application is hereby dismissed with no order as to costs.



DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JANUARY 2025.

S.CHIRCHIR

JUDGE.

