



REPUBLIC OF KENYA



**Khisa & another v Nalika & another (Family Appeal E008 of 2023)  
[2025] KEHC 5797 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5797 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
FAMILY APPEAL E008 OF 2023  
REA OUGO, J  
APRIL 29, 2025**

**BETWEEN**

**DORCAS NAFULA KHISA ..... 1<sup>ST</sup> APPELLANT**

**KENNEDY KOKONYA SIMIYU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DAVIS JOSEPH NALIKA ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN MONNI NALIKA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon. G. Adhiambo in the SPM's Court at  
Kimilili delivered on 30th October 2023, in Succession Cause No. 52 of 2020)*

**JUDGMENT**

1. The appellants, through a motion dated 16.8.2023, sought that the certificate of confirmation of grant dated 17.3.2022 be vacated, the grant of letters of administration intestate dated 22<sup>nd</sup> December 2021 be annulled and that a Public Trustee be appointed to assist in the distribution of the deceased's estate. The respondents raised a preliminary objection on 2 grounds as follows;
  - i. Under the Succession Act a confirmed grant cannot be challenged by way of review application, the instant application offends the provisions of section 76 of the [Law of Succession Act](#) and the instant application is an omnibus application which should be struck off.
  - ii. Section 80 of the [Civil Procedure Act](#), Order 45 of the Civil Procedure is not amongst the provisions of the Civil Procedure Rules to be for the orders sought.
2. The trial Magistrate upheld the preliminary objection. She held that Section 80 and Order 45 of the Civil Procedure Rules do not apply to succession matters and that the appellants had not attached the grant and the subsequent certificate that the appellants sought to review.



3. Aggrieved by the decision the appellants filed this appeal. The grounds of appeal are;
- i. The learned Magistrate erred in fact and in law by dismissing the appellants' review application canvassed on the platform of the preliminary objection in the circumstances of the suit.
  - ii. That the learned magistrate erred in law and in fact by failing to consider the appellants' notice of motion application for review on merit.
  - iii. The process used in distribution of the estate and hearing of the confirmation of certificate of grant was wrought with fraud.
  - iv. The learned magistrate erred in fact and in law by disregarding the appellants' pleadings, the enabling provisions of law, and grounds in the said review application.
  - v. The learned magistrate erred in fact and in law by disregarding the appellants' evidence in the supporting affidavit, which annexed the certificate of confirmation and grant of administration intestate marked as DNK5 and DNK6.
  - vi. The learned magistrate erred in fact and in law by misapplying Order 45 of Civil Procedure Rules and Section 80 of the Civil Procedure Act introduced by Rules 63 of the Probate and Administration Regulation is not applicable to Probate and Administration in so far as review proceedings is concerned. According to the Learned Magistrate, only section 76 of the Law of Succession Act is applicable which nonetheless the appellants had also cited.
  - vii. The learned Magistrate failed to exercise his discretion judiciously under the review application.
  - viii. The learned magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.
  - ix. Learned Magistrate erred in fact and in law in awarding costs to the respondents considering that this is a family matter.
4. The appeal was canvassed by way of written submissions. The appellants identified four issues as follows;
- i. Whether the Ruling delivered by the trial magistrate should be set aside in its entirety and the appeal allowed as prayed. On this issue, the appellants argued that the trial magistrate wrongly held that Section 80 and Order 45 of the Civil Procedure Rules do not apply to succession matters and that the trial court also held that the appellants had failed to attach the grant and the subsequent certificate which the appellants sought to review. It was submitted that the first appellant in her supporting affidavit dated 16<sup>th</sup> August 2023 at paragraph 4 annexed DNK5 and DNK6 the grant and certificate of confirmation and that the Law of Succession Act Cap 160 (the Act). Citing Rule 63 of the Probate and Administration Rules the appellants argue that Order XLIV is the current Order 45 of the Civil Procedure Rules of 2010 (CPR), which was also cited in the case the trial court relied on of Kithmbu Nyaga Elijah ( deceased). It was further argued that in their application the appellants cited Rule 63 of the Rules, Order 45 of the CPR which deals with reviews, and Section 76 of the Act which deals with revocations of grants. It was submitted that section 76 strictly deals with revocation and does not apply to confirmations. The certificate of confirmation amounts to a court order which renders section 76 inapplicable.



- ii. Whether the actions whatsoever undertaken or issued pursuant to the Ruling delivered in Succession cause No. 52 of 2020 be declared void and of no consequential effect is tenable in law and under this court. On this issue, it was submitted that the administration of the estate is not complete and that they are apprehensive that the respondents could misuse the technicalities of the court to waste away the properties of the deceased. The respondents need to comply with the provisions of section 83 of the Act to produce a full account of the deceased's properties at the point of his death and any changes done after the appellants after the appellants sought the court's intervention should be rendered void ab initio for lack of capacity.
  - iii. Whether the subordinate's court's judgment on the mode of distribution can be set aside and substituted with the mode of distribution that is in tandem with the intestate estate of the deceased, which complies with section 40 of the *Law of Succession Act*. Does this court have the powers? On this issue, the appellants relies on Article 165 (7) of *the Constitution* 2010 and argue that the High Court can reverse, affirm, or amend the magistrate's decision or remit the matter to the magistrate with its opinion. The appellants urged this court to deal with the matter conclusively. The appellant made detailed submissions on this plea in their submissions.
  - iv. On costs of this appeal and proceedings before the Senior Principal Magistrate Court at Kimilili to be awarded the appellants. It was submitted that the awarding of costs by the courts is discretionary and that this being a family matter the court should allow each party to bear its own costs.
5. The respondent submitted as follows; the learned magistrate did not err in allowing the preliminary objection. The appellants' application was fatally defective as it was not accompanied by the order they sought to review. To support their argument that in an application for review, the order sought to be reviewed must be attached to the application the respondent relied on the case of Hosea Nyandika Mosagwe *¶ 2 others vs The county Government of Nyamira ELC CASE NO.21 of 2021* where the court cited with approval the case of Suleman Muranga vs Nilestar Holdings Limited & another (2015) eKLR where the court held as follows; " The plain reading of the above provision (referring to Order 45 (1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought".
  6. It was further submitted that similarly in this appeal the appellants have failed to extract and filed a certified copy of the order appeal against and as such the appeal is incompetent and should be dismissed. A confirmed grant cannot be challenged under section 80 of the *Civil Procedure Act* ( CPA) and Order 45 of the Civil Procedure Rules ( CPR).

### **Analysis and Determination.**

7. My task is to review the evidence/ proceedings that were before the lower court and arrive at an independent decision. The only issue for determination in my view is whether the learned magistrate erred in upholding the preliminary objection raised by the respondents on the application dated 16.8.2023.
8. The appellants filed an application dated 16.8.2023 seeking various orders. The application was brought under Article 159, 27, 2 (5) of *the Constitution* of Kenya 2010, Rule 63, 44, 64 of the Probate and Administration Rules, 1980, Section 76 , 80 (2) , 45,35,40,29,28,38 of the *Law of Succession Act*, Section 23 of the Magistrates Court Act, *Act No 26 of 2015*, Order 45 Rule 1 of the Civil Procedure Rules 2010, Section 3A & 80 of the *Civil Procedure Act* Cap 21, section 3 (4), 107 ,108 of the *Evidence Act*, Kenya and all other enabling laws. The appellants sought the following orders THAT ;



- i. The Certificate of Confirmation of Grant dated 17<sup>th</sup> March 2022 be vacated and the Grant of Letters of Administration Intestate dated 22<sup>nd</sup> December 2021 annulled upon the basis that the same was obtained fraudulently and by concealment of material facts from the court relating to the Estate.
  - ii. All steps taken by the administrators pursuant to the said Order granting the Letters of Administration and subsequent Certificate of Confirmation and which may have changed the assets of the estate subject of this application be declared nullity in law.
  - iii. Court should appoint a Public Trustee to assist the estate in equal distribution of the estate among the 11 surviving children/ beneficiaries.
  - iv. The current status of the Estate be preserved until the hearing and determination of the application.
  - v. The 1<sup>st</sup> and 2<sup>nd</sup> respondents herein be ordered to give a full account of all the monies accruing from any property, things, chose in action forming part of the estate of Joseph Nalika Masafu from the 17<sup>th</sup> March 2022 to date , all the motors vehicles left by the deceased and any other property under their control.
  - vi. The officer commanding station (OCS) Sirende and Ndalul police station be directed to assist the applicants in the enforcement of the orders hereinabove.
  - vii. An Order do issue to Bungoma and TransNzoi County Land Registry stopping any dealings with the register of the land known Kiminini Scheme Plot 204( 39,965Acres) , Waitaluk/ Mabonde/ BLK 13.50 ( 2.5 Acres) and Trans Nzoia Kapomboi Farm Plot 464 ( 5 Acres) pending the hearing and final determination of the succession proceedings including this review application.
  - viii. Costs of the application be provided for.
9. The appellant's grounds on the face of the application dated 16.8.2025 were as follows;
- i. That the proceedings to obtain the grant were defective in substance.
  - ii. The Grant was obtained fraudulently by making of a false statement and concealment of material facts from the court.
  - iii. The grant was obtained by means of untrue allegations of a fact essential in point of law to justify the grant and confirmation of grant.
  - iv. The applicants consent was not obtained, and that the consent form dated 16<sup>th</sup> March 2022 attached to the petition for grant and confirmation of certificate of grant was forged since at the time the application was presented none could have appended their signature to the consent and that they in fact never signed the purported consent to making of the grant.
  - v. The applicants were never made aware of the proceedings to obtain the certificate of confirmation which included the mode of distribution.
  - vi. That the court has the jurisdiction to determine the validity of the impugned grant of representation and subsequent certificate of confirmation and the matter is not res judicata.
10. The appellants' application was an omnibus application. It cited the following provisions of the law, Article 159, 27, 2 (5) of *the Constitution* of Kenya 2010, Rule 63, 44, 64 of the Probate and Administration Rules, 1980, Section 76 , 80 (2) , 45,35,40,29,28,38 of the *Law of Succession Act*,



Section 23 of the Magistrates Court Act, Act No 26 of 2015, Order 45 Rule 1 of the Civil Procedure Rules 2010, Section 3A & 80 of the Civil Procedure Act Cap 21, section 3 (4), 107, 108 of the Evidence Act, Kenya. The objection that was raised by the respondent was that under the Succession Act, a confirmed grant cannot be challenged by way of a review application and that the application offends the provisions of section 76 of the Law of Succession Act. The appellants in their application did not seek orders of review, they sought to have the certificate of grant dated 17<sup>th</sup> March 2022 vacated and the grant of letters of administration intestate dated 22<sup>nd</sup> December 2021 annulled upon the basis that the same was obtained fraudulently and by concealment of material fact from the court relating to the estate. The grounds on the face of the application as reproduced in paragraph 9 above supported the grounds provided under section 76 of the Law of Succession Act. Section 76 of the Law of Succession Act was one of the provisions of the law cited by the appellants. They are statutory grounds to revoke a grant and were properly cited by the appellant. The appellant did not seek a review of a Court order. Since the appellants were not seeking a review of a court there was no need to annex a court order. I must comment that the appellant expected the trial court to shift the provisions of the law cited and choose the correct one. This is not good practice. The learned magistrate corrected stated that section 76 of the Law of Succession Act provides for revocation and annulment of grant. The appellants sought annulment of the grant in their application. In my view, the trial court should have considered the actual prayers being sought by the appellants and decide the application on merit. I therefore find that the learned erred in not considering the substance of the application as sought by the appellants. There was no specific prayer for review of a court order, even though order 45 of the CPR and section 80 of the Act were cited.

11. The learned magistrate also held that the provisions of Order 45 and Section 80 are not applicable under the Probate and Administration proceedings. In Succession cause No. 88 of 2011 In the Matter of the Estate of Simoto Omwenje Isaka (Deceased) the court stated as follows:

“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. In *John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge &*



Another [2016] eKLR, the court cited Rule 63 of the Probate and Administration Rules, and then stated as follows:

“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.”

12. Order 45 deals with reviews and section 80 of the Act too, a party seeking a review of an order must meet the substantive requirements of an application brought for review as set out in order 45 of the Civil Procedure Rules in succession matters.
13. On whether the appellant has failed to extract and file a certified copy of the order appealed from, I have perused the record of appeal and find that the appellants attached the impugned Ruling. The lower court proceedings has a certification stamp of the proceedings which includes the impugned Ruling. The appeal is therefore competent.
14. The appeal has merit and it is allowed as follows; the Ruling dated 30<sup>th</sup> October 2023 in Succession Cause No. 52 of 2020 is hereby set aside in its entirety. The matter is referred back to the lower court for determination of the application dated 16.8. 2023 on merit. Costs of the appeal and proceedings before the Senior Principal Magistrate Court at Kimilili shall abide the out of the said application.

**DATED SIGNED AND DELIVERED AT BUNGOMA THIS 29<sup>TH</sup> DAY OF APRIL 2025.**

**R.E.OUGO**

**JUDGE**

In the presence of:

Mr. Kokonya -For the Appellants

Miss Imainata -For the Respondents

Wilkister - C/A

