



REPUBLIC OF KENYA



**In re the Estate of Kiiti Mulinge Ngao (Deceased) (Succession Cause
357 of 2006) [2024] KEHC 9631 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 357 OF 2006**

MW MUIGAI, J

JULY 29, 2024

IN THE MATTER OF THE ESTATE OF KIITI MULINGE NGAO(DECEASED)

IN THE MATTER OF

PAUL WAMBUA KIITI 1ST ADMINISTRATOR

PHILIP KISILU KIITI 2ND ADMINISTRATOR

RULING

Introduction

1. This Court in its Judgment delivered on 8/12/2023 directed that the Summons for Confirmation Applications on record are compromised as follows in terms of distribution of deceased's estate:-
 - a. Parcel Number 412 Kathekani Settlement Scheme in the names of Grace Kailu Kiiti for 1st House only.
 - b. Parcel Number Kalama/Kitini/648 for Philip Kisilu Kiiti only.
 - c. Kalama/Kiitini/566 for the 2nd House only.
 - d. Costs in the Cause.

Summons for review dated 15th February, 2024

2. Paul Wambua Kiiti the 1st Administrator herein filed summons for Review and sought the following orders:-
 - (1) Spent
 - (2) The Impugned judgment dated 08/12/2023 be reviewed as follows:-



- (a) Land parcel No.412 Kathekani Settlement Scheme be excluded from the properties available for distribution in this Estate because it belongs to a different estate to wit; the Estate of Grace Kailu Kiiti.
 - (b) The Grant of letters of Administration intestate made on 24/02/2021 be confirmed in terms of paragraph 3 of the Affidavit in support of the summons for confirmation of grant dated 21/06/2017.
- (3) The costs of the Application be provided for.
3. The Application for Review is supported by the Affidavit sworn by Paul Wambua Kiiti on even date stated that Land Parcel No.412 Kathekani Settlement Scheme is neither available for distribution nor confirmation in this estate because the same belongs to a different Estate to wit the Estate of Grace Kailu Kiiti which she solely acquired and the same was demarcated in her name on 15/08/1991 and the deceased herein never challenged the same in his lifetime. He stated that the as long as the 2nd Administrator did not lodge an Appeal against the Ruling of by Hon. Justice D. K. Kemei of 31/07/2009 or institute a suit in Environment Law Courts the said Ruling is not only binding but also subsisting.
4. According to the Applicant this Court mistakenly disinherited the beneficiaries from the 1st house of the deceased by granting the whole land parcel No. Kalama/Kiitini/566 unto the second house only yet they were entitled to ½ share of the same. He stated that the 1st Administrator together with the other Beneficiaries from the 1st house attended Court thrice during the Confirmation of grant hence the grant was partly confirmed.

Submissions

5. None on record.

Determination

6. I have considered the Summons for review that have been placed before this court. I note that there is an affidavit of service dated 16.05.2024 that indicates that a 2nd Administrator /Respondent was served with a mention notice but there is no evidence that they were served with the Application for review. It would be in the interest of justice that all the parties to this estate be served with the said application.
7. Order 45 rule 1 of the *Civil Procedure Rules* is a proviso that gives the conditions to be met by a court before granting an order for review; it states 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 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.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

8. The Court of Appeal in *Mabinda v. Kenya Power & Lighting Co. Ltd* [2005] 2 KLR 418 expressed itself as follows:

“The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made.”

9. This same court in the case of *Anthony Gachara Ayub v. Francis Mabinda Thinwa* [2014] eKLR which quoted with approval the judgment of the High Court in *Draft and Develop Engineers Limited v. National Water Conservation and Pipeline Corporation*, by stating:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible.”

10. I have considered the grounds upon which the Summons are premised. It is clear that the same is based on the contention that Land parcel No.412 Kathekani Settlement Scheme belongs to the Estate of Grace Kailu Kiiti. A cursory look at the grounds for review indicate that the issues raised in the summons were within the knowledge of the Applicant and the same was presented to this court and made a determination on them. Further that there is no proof of a mistake or error apparent on the face of the record.

11. For avoidance of doubt, the court stated as follows with regard to Land parcel No.412 Kathekani Settlement Scheme;

“The Court in *Re Estate Of John Musambayi Katumanga – Deceased* [2014] eKLR held as follows:

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections



35(5) and 38 is 'equally' as opposed to 'equitably'. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

75. The statutory provisions and case-law point to equal distribution of the estate of the deceased to the family members as far as possible irrespective of age gender ability affluence success of any of the children or surviving spouse(s). In the instant case, 1st house has beneficial interest in Parcel Number 412 Kathekani Settlement Scheme which was from the deceased but by the time demarcation of land was conducted, it started in Kibwezi and since deceased's demise in 2001, the surviving spouse was registered in 2004 and the same was/is available to/for the 1st House. The suit property Kalama/Kitini/648 was given/sold by deceased to Philip Kisilu Kiiti. What remains is that the 2nd House has no property bequeathed to the family members with beneficial interest. In light of the above circumstances is it fair the 1st house has another bite at the cherry where they already enjoy beneficial interest in Parcel Number 412 Kathekani Settlement Scheme and also be entitled to ½ of Land Parcel Kalama/Kiitini/566?

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This Court finds that during the deceased's lifetime Parcel Number 412 Kathekani Settlement Scheme was not demarcated and registered in the name of 1st wife Grace Kailu Kiiti. Circumstances changed after the deceased's demise. Therefore, in the spirit of fairness, equal/equitable distribution Kalama/Kiitini /566 ought to held by the 2nd House only.”

12. This issue has been settled by this Court and therefore to the extent that the application seeks review rather than clarification, it is incompetent and lacks merit. The same is dismissed.
13. The Parties/Counsel may exercise right of appeal as there is no new evidence but this Court is being asked to reconsider its decision on the same facts presented. This Court lacks requisite jurisdiction to sit on appeal over its own decision.

It is so ordered.

RULING (2) DELIVERED SIGNED & DATED IN OPEN COURT ON 29/7/2024 IN MACHAKOS HIGH COURT (VIRTUAL/ PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

We pray for leave to appeal.

COURT: Granted.

M.W.MUIGAI

****JUDGE****

