In re Estate of Solomon Ngari Monjo (Deceased) (Succession Cause 68 of 1988) [2024] KEHC 9411 (KLR) (29 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9411 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION CAUSE 68 OF 1988

DKN MAGARE, J

JULY 29, 2024

IN THE MATTER OF THE ESTATE OF SOLOMON NGARI MONJO (DECEASED)

BETWEEN

WILLIAM NGATIA NGARI ..... APPLICANT

AND

PETER GICHURU NGARI ..... 1ST RESPONDENT

JOSEPH WACHIRA NGARI ..... 2ND RESPONDENT

RONALD KARIUKI NGARI ..... 3RD RESPONDENT

ANNA WANGUI MBOGO ..... 4TH RESPONDENT

SALOME NJOKI GACHERU ..... 5TH RESPONDENT

DAINA WAIRIMU KINUTHIA ..... 6TH RESPONDENT

RULING

1. This is an application dated 3/6/2024 seeking the following orders:
    a. That this Honourable court be pleased to review its judgment dated and delivered on the 2nd day of March, 2013.
    b. That costs be in the cause.
2. The main contention was that the deceased beneficiary Rose Njoki's share be reduced. This he stated was to respect her wishes.
3. The court ordered that she be given 2.1 acres. This was the court's discretion.

4. The Applicant submitted that the late Solomon Ngari Monjo died having distributed all of his properties. At the time of his death, the only assets that were in is name were:-

   a. Kirimukuyu/Ngandu/50 measuring 11.4 acres.

   b. Ruguru/Karuthi/418 measuring 6.2 acres as trustee for Peter.

5. In the summons for confirmation of grant dated 19th September 2008, it was not based on self-interest of how the assets of the deceased should be distributed. It was distributed as directed by the deceased while alive on land Kirimukuyu/Ngandu/50.

6. The matter is not for redistribution but review. Review is provided under Section 80 of the *Civil Procedure Act*, which states that:

> " Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".
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> Section 63 (e) of the *Civil Procedure Act* states that:
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> > "In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

7. Order 45 of the *Civil Procedure Rules* provides for Review and it states as follows:

> " (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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.
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> (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. I associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies v Dr. Badia and another* Kisumu HCCC No 191 of 1994 where he opined that:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

9. There is no error on the record. What constitutes an error apparent on the face of the record was discussed by Mativo J, as he then was, in *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR, as follows: -.

> " Third, a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.[6]
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> 33. In *Nyamogo & Nyamogo v Kogo*[7] discussing what constitutes an error on the face of the record, the court rendered itself as follows:-
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> > "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must 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 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

10. The judgment was entered with different beneficiaries asking for various shares. The court used its discretion, to distribute the estate. This was done in a judgment which was not appealed. Use of discretion is not appealable. The Applicant himself got the same acreage. He is not a special child. I use the word advisedly as he is an octogenarian.

11. The Applicant is motivated purely by greed and nothing else. Parties must understand that succession is not the only source of wealth. They should be hardworking enough to generate wealth for their heirs to fight over and avoid fighting over other beneficiaries' entitlements.

12. Finally, it is greed, gluttony, and sloth to wait till the deceased beneficiary is deceased to try to disinherit her.

13. In any case, the beneficiary is deceased. I cannot make an order against her. Purporting to be suing a judgment is not reasonable. I directed that all beneficiaries be served. The Applicant refused saying he is only challenging the Judgment.

14. His other brother Peter Gichuru Ngari, indicated that this is a family behaving badly. I will agree with him. The level of demands for very mundane things is mind boggling.

15. If the Applicant was aggrieved, he ought to have appealed. He had no reason to file this baseless application. Accordingly the application dated 3/6/2024 is dismissed. Disbursement of 5,000/= to Peter Gichuru Ngari, one of the Respondents who responded.

16. For avoidance of doubt, the court noted that most of the beneficiaries are deceased. The petitioner is to have their shares registered in the estate of the respective heirs pending succession in their individual estates.

Determination

17. The upshot of the foregoing, I make the following orders: -

    a. The application dated 3/6/2024 is dismissed. Disbursement of 5,000/= to Peter Gichuru Ngari, one of the Respondents who responded.

    b. For avoidance of doubt, the petitioner is to have the shares of all deceased beneficiaries registered in the estate of the respective heirs pending succession in their individual estates.

    c. This file is closed.

DELIVERED, SIGNED AND DATED AT NYERI ON THIS 29TH DAY OF JULY, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

William Ngatia Ngari – Applicant

Peter Gichuru Ngari – Petitioner/Respondent

Court Assistant – Jedidah