



REPUBLIC OF KENYA



**In re Estate of Peter Mwaniki Githaiga (Deceased) (Succession Cause
532 of 2005) [2024] KEHC 11215 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 532 OF 2005
DKN MAGARE, J
SEPTEMBER 26, 2024**

BETWEEN

DANIEL GITHAIGA MWANIKI 1ST APPLICANT

DAVEPETER MWANIKI MUCHEMI GAKIO 2ND APPLICANT

AND

FRANCIS WANJOHI MWANIKI RESPONDENT

RULING

1. By a Summons General dated 17/1/2014, the Applicants sought the following reliefs:
 - a. That this Honourable Court do review and set aside the Judgment dated 22/10/2008 and the resultant certificate of grant.
 - b. Costs.
2. The application is premised on the grounds on its face and the Supporting Affidavit of Daniel Githaiga Mwaniki sworn on 17/1/2014 and a further affidavit sworn on 9/6/2014 thus:
 - a. The Applicants were named as beneficiaries of the estate of the deceased, but were not parties to the proceedings.
 - b. The Respondent testified that the 2nd Applicant was deceased when in fact he was alive.
 - c. The 2nd Applicant has been staying in South Korea as an athlete.
 - d. The 1st Applicant has substantially developed part of the land parcel LR No. Githi/Muthambi/796
 - e. The judgment and certificate of grant disinherited the 1st Applicant.
3. The Respondent filed Replying Affidavit sworn on 16/5/2014 as follows:



- a. The Applicants filed summons for revocation of the grant which was dismissed.
- b. The Applicants appealed to the Court of Appeal and the appeal was equally dismissed.
- c. There is no new and important matter of fact or evidence.
- d. The death of Mwaniki Gakio was disclosed.

Submissions

4. The Applicants filed submissions dated 25/7/2023. It was submitted that the 2nd Applicant had justified existence of new and important matter of evidence being that he was not a party to the proceedings leading to the impugned judgment and was presented as person believed to have died when he was in fact alive.
5. He relied on *Hardayal vs Azam Singh* AIR 2001 MP 203 to submit that the Chief's letter relied upon to show that he was dead as well as the burial permit and the death certificate should be disregarded since he is alive.
6. The Respondent also filed submissions dated 21/6/2024. It was submitted that the Applicants had not satisfied the conditions for an order for review.
7. Reliance was also placed on Rule 63 of the *Probate and Administration Rules* and Order 45 of the *Civil Procedure Rules*.
8. Further, the Respondent submitted that 2nd Applicant failed to prove that he was a beneficiary of the late Robert Gakio Mwaniki. They cited Section 107 of the *Evidence Act* and the case of *FWK (Guardian ad litem for TK and SN Minors) v MWM & Another* (2022) eKLR.

Analysis

9. The issue before me for determination is whether there is any lawful ground on which the Judgment of Court dated 22/10/2008 should be reviewed and set aside.
10. The ground upon which the application is based is that the judgment was based on the Respondent's evidence that the 2nd Applicant was dead and therefore not entitled to the estate.
11. On the other hand, the Respondent states his case that the application intends to challenge the court's judgments of 22/11/2008, 17/6/2011 and the Court of Appeal order dated 6/11/2013 dismissing the appeal.
12. This court observes that family rivalry and distrust is a normal trend among families in quest to establish their boundaries to their inheritance following the demise of deceased property holder. Factions grow among families with antagonistic forces among members of the same family and which are manifest in the thirst for keeping certain members of the family out of inheritance or within dismal ranges of mounts on the bounds of the estate. What such parties forget is that inheritance is a matter of right and one cannot exclude the other. Even a parent cannot exclude their most detested child from inheritance as a matter of law unless all indications justify such exclusion. See *Re Sigsworth* (1935) in which the *English Administration of Justice Act* 1925 was interpreted using the wider approach to not allow a son who murdered his own mother to inherit where no will was established as this would bring the absurd result for rewarding homicide.



13. The grounds for review are applicable to succession matters and ought to have been proved. In *John Mundia Njoroge v Cecilia Muthoni Njoroge & Another* [2016] eKLR the court cited Rule 63 of the *Probate and Administration Rules*, and 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*.”

14. Consequently, Section 80 of the *Civil Procedure Act* states that:

“Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (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”.

Section 63 (e) of the *Civil Procedure Act* states that:

“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

15. Order 45 of the *Civil Procedure Rules* provides for Review and 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”

16. I also associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies vs. Dr. Badia and Anor* 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.”

17. In this case, the application for review is not a proper application for review. It is an abuse of the court process. I have perused the impugned judgment and the judgment dated 17/6/2011. The Applicants are in business of making incessant attempts at what they believe to be justice for them. They do not however seem to understand that justice is a two-way traffic for both the Applicant and the Respondent. The matters stated under this application were partly brought up by the 1st Applicant before this court and determined vide the judgment dated 17/6/2011 when Serгон J dismissed the attempt by the 1st Applicant to revoke the grant.
18. The summons for revocation of grant were pursuant to the judgment dated 22/10/2008 by Kasango J who determined that the 1st Applicant had sufficiently been provided for and was not entitled to inherit. The 1st Applicant appealed to the court of appeal and the appeal was dismissed.
19. The 1st Applicant through the 2nd Applicant makes attempt to revive well settled matters. He submits that the judgment of court dated 22/10/2008 was based on an erroneous fact that he was deceased and ended up disinheriting him. I have to establish whether they satisfy the conditions precedent to reviewing and setting aside a judgment of court.
20. There is no new matter of evidence. The 1st Applicant was a party to the proceedings leading to the impugned judgment. He was a party to the judgment dated 17/6/2011 and in fact appealed against it. All through, he has been a party to the proceedings. He is the one who swore the affidavit in support of the instant application before me. He had all the opportunity to bring up the matters under his knowledge before this court. The allegation that the 2nd Applicant was believed by this court to have died is not proved to the required standard as it was not an issue before the court. It is not proved to have been a matter not within the knowledge of the Applicants or anyone of them.



21. From the face of the Judgment, there is thus nothing to review. The Court of Appeal in Mabinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR418 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 judgment or decision was delivered or made.”

22. In the case of Dock Workers Union & 2 others v Attorney General & another Kenya Ports Authority & 4 others (Interested Party) [2019] eKLR it was therefore held that: -

“In this regard, for a Court to review its own orders, it must be demonstrated that there is discovery of new and important matter or evidence. It must also be shown that the new evidence was not within the knowledge of the party seeking review or could not be produced at the time the orders were made. Such party must also satisfy the Court that this was the case even after exercise of due diligence. A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay.”

23. The Code of Civil Procedure, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

“The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper.”

24. Therefore, this court’s exercise of unfettered discretion in review as craved by the Applicants has to be premised within the bounds of the law. Otherwise it will be capricious and whimsical and defeat the very purpose of serving justice that the law is set to achieve. I find no legal basis on which to exercise my discretion in favour of the Applicants in the applications before me. In the case of Ramakant Rai vs. Madan Rai, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

“Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is not to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order



in the social life.’ Wide enough in all conscience is the field of discretion that remains”.

25. I find no merit in the application which lies for dismissal.

Determination

26. In the upshot, I make the following orders in the interest of justice:

- i. The Application dated 17/1/2014 is dismissed in limine.
- ii. Due to the conduct of the Applicants, the Respondent shall have the costs of this application assessed at Kshs. 55,000/- payable within 30 days in default execution do issue.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

C.M. King’ori & Co. Advocates for the Applicants

Kebuka Wachira & Co. Advocates for the Respondent

Court Assistant – Jedidah

