In re Estate of Mutisya Ngunze (Deceased) (Succession Cause 9 of 1999) [2024] KEHC 14183 (KLR) (28 October 2024) (Ruling)

Neutral citation: [2024] KEHC 14183 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

SUCCESSION CAUSE 9 OF 1999

G MUTAI, J

OCTOBER 28, 2024

IN THE MATTER OF THE ESTATE OF MUTISYA NGUNZE (DECEASED)

BETWEEN

ONESMUS MULI MUTISYA ..... APPLICANT

AND

NDULULU MUTISYA ..... 1ST PETITIONER

HANNINGTON MUSYOKI MUTISYA ..... 2ND PETITIONER

RULING

1. This Court, in a decision delivered on 19th April 2024, found in paragraph 3 of the ruling that: -

   3. The grant sought to be revoked us dated 25th October 1999 and was issued to the Respondents. Despite the passage of more than 23 years since it was issued, the grant has never been confirmed."

   In paragraph *11*, the Court went on to hold that: -

   11. In this matter it does appear to me that the Respondents did not fully disclose the extent of the deceased's estate. The evidence of the Applicant in support of this contention was not rebutted and thus remains unchallenged. In any case the Respondents do not appear to be keen to complete the administration of the estate."

2. Based on the above findings, this Court revoked the grant. I directed the dependants of the deceased to jointly apply for a fresh grant.

3. Vide Summons dated 26th June 2024, filed by the Petitioners/Applicants under a certificate of urgency, they sought the following orders: -

   1. Spent;

2. Spent;

3. That this Court be pleased to review and set aside the orders made on 19th April 2024 as well as the orders made on 22nd November 2023;

4. That upon setting aside as aforesaid, the Respondent's application dated 30th September 2023 and 2nd July 2002 be heard simultaneously; and

5. That the Respondent be ordered to pay the costs of this application.

4. The grounds upon which the said application was brought are set out in the summons and the joint Supporting Affidavit sworn by the Petitioners/Applicants on 26th June 2024. They urged that the grant made to the Petitioners/Applicants was confirmed on 21st February 2001. It was averred that the Petitioners/Applicants were not served with the application dated 30th September 2023 and the hearing notices for the said applications. For that reason, the ruling and the orders of 22nd November 2023 and 19th April 2024 were made without affording the Petitioners/Applicants a fair opportunity to be heard.

5. It was urged that the Petitioners/Applicants learned of the orders made herein only after they filed Summons for Confirmation of grant. They deposed that they inadvertently filed the said Summons after forgetting that the grant had been confirmed. They accused the Applicant/Respondent of being a vexatious litigant bent on frustrating the administration of the estate.

6. The Applicant/Respondent opposed the application. Through his then advocates EE Wesonga & Associates, he filed a Replying Affidavit sworn on 19th July 2024, through which he averred that he was the only son of the deceased. He averred that his mother, Ndululu Mutisya, the 1st Petitioner/Applicant divorced his father in 1970 and that she married a different man in 1976, with whom he had many children, including Hannington Musyoki Mutisya, the 2nd Petitioner/Applicant herein. He accused the Petitioners/Applicants of being greedy and seeking to inherit an estate they had no right to, as his father bequeathed him his farm, identified as Title No. Kwale/Shimba Hills/670. The alleged Will, written in the Kamba language and with no English translation, was annexed as "OMM-3" to his Replying Affidavit.

7. He accused his mother and brother of not disclosing the existence of Title No. Kwale/Mangwani/485 is situated at Mangwani, where they reside and eyeing what was justly his, it having been left to him by his father. Mr Onesimus Musyoki Mutisya stated that the Petitioners/Applicants used forged letters, purportedly from the provincial Administration, to obtain the grant and that once the grant was issued to them, they purported to sell the land to one Josephat Simon Maithya Kikupi. He averred that once he became aware of the sale, he repurchased the said properly, whereupon the Petitioners/Applicants resurfaced, seeking to inherit the same.

8. The Petitioners/Applicants filed a Supplementary Affidavit sworn on 26th August 2024 in which they averred that the Replying Affidavit of the Respondent did not address the relevant issues, to wit that they hadn't been served with the notice for the hearing of applications, that there had been a mistake by the Court that the grant had not been confirmed and the bad faith on the side of the Applicant/Respondent.

9. They averred that all the three process servers the Applicant/Respondent said to have effected service had denied doing so and were ready to testify in Court. They urged that the Applicant/Respondent obtained favorable orders through deliberate lies, deception and forgeries. Therefore, it was submitted that the Court should set aside the orders it made on 23rd November 2023 and 19th April 2024.

10. The application was canvassed through both oral and Written Submissions. Those of the Petitioners/Applicants are dated 26th August 2024.

11. The Petitioners/Applicants submitted that they were not served with the hearing notices. Reliance was placed on the affidavits of the process servers, who all denied having effected service. Reliance was placed on the case of Wachira Karani vs Bildad Wachira [2016]eKLR where the Court stated:-

> "The fundamental duty of the Court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is a fundamental principle of natural justice, applicable to all courts, whether superior or inferior that a person against whom a claim or charge is made must be given a reasonable opportunity to appear and present his case. If this principle is not observed, the person affected is entitled, ex debito justitiae, to have any determination which affects him set aside."

12. Counsel submitted that the Court made a mistake apparent on the face of the record in so far as it found that the Petitioners/Applicants hadn't been diligent when, contrary to what the Court found, the grant was confirmed in 2001. They blamed the lack of distribution on the Applicant/Respondent, who, it was said, filed numerous applicants that he did not pursue diligently, to frustrate the administration of the estate. The Petitioners/Applicants accused the Applicant of having come to Court with unclean hands and that he had totally gone against the maxims of equity, that he who seeks equity must do equity and that he who comes to equity must come with clean hands.

13. Counsel relied on in the case of James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016]eKLR for prostitution that where there has been an irregular default judgment, the Court has no option but to set it aside.

14. Regarding costs, it was urged that the Applicant/Respondent's conduct had been so bad that he should be condemned to pay costs.

15. The parties made oral submissions on 18 September 2024. Mr Mutugi, who appeared with Mr Hamisi Mgandi for the Petitioners/Applicants, made oral submissions similar to the written submissions filed by Mr Mgandi in support of the application. I will not rehash them here.

16. Mr. Wesonga, in opposition to the application, submitted that the revoked grant was obtained fraudulently. Counsel submitted that the Petitioners/Applicants seek to disinherit that Applicant/Respondent.

17. It is evident that the Petitioners/Applicants were not served. This is evidenced by the affidavits of the alleged processions, which were all unanimous in their averments that the signatures in the affidavits of service were not theirs. The Applicant/Respondent made no effort to counter the contents of the affidavits of the process servers.

18. Without service, the rulings of the Court of November 2023 and 19th April 2024 were irregular. In *Yooshin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022)* [2023] KECA 872 (KLR) (7 July 2023) (Judgment), the Court of Appeal held as follows in paragraph *26*:-

> 26. What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise."

19. In James Kanyiita Nderitu & another vs Marios Philotas Ghikas & another [2016]eKLR, it was held that:-

> " In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Koteh, AIR 1955 SC 664, at 711:
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> "[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

20. In the circumstances, I find and hold that for want of service, the decision of this Court was irregular and is for setting aside ex debito justitiae.

21. The time the Petitioners/Applicants took to have the grant confirmed was not inordinate, contrary to what this Court held. This court erroneously held that the grant had not been confirmed. Thus, I am persuaded that a review of my previous decision is called for as there is an error apparent on the face of the record.

22. In my foregoing determination, I am guided by the courts' decisions in review matters. I shall set out two guiding decisions below.

23. What amounts to an error apparent on the face of the record was described in Muyodi vs Industrial and Commercial Development Corporation & another [2006] 1 EA 243 as:-

> " ...In Nyamogo & Nyamogo vs Kogo (2001) EA 174 this Court said that an error apparent
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> 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 real distinction between a mere erroneous decision and an error apparent on the face of 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 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 or wrong view is

certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

24. The Court of appeal in National Bank of Kenya Ltd vs Ndungu Njau [1997]eKLR stated as follows:-

> " 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 omissions must be self-evident and should not require an elaborate argument to be established."

25. The error here is easily discernible and does not require elaborate arguments. Therefore, I agree that my decision on 19th April 2024 ought to be reviewed, and I proceed to do so.

26. Having found merit in the application dated 26th June 2024, I set aside and review my decisions of 29th November 2023 and 19th April 2024. I order that the applications dated 30th September 2023 and 2nd July 2002 be heard together.

27. As this is a family matter, each party will bear its own costs.

28. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF OCTOBER 2024.

Delivered Virtually Via Microsoft Teams

Gregory Mutai

JUDGE

In the presence of: -

Mr. Onesmus Muli Mutisya (pro se litigant) (present);

Messrs. Mgandi and Mutugi, for the Petitioners/Applicants; and

Arthur - Court Assistant.