



REPUBLIC OF KENYA



In re Estate of Ndungu Maina Njau (Deceased) (Succession Cause 87 of 2017) [2024] KEHC 14956 (KLR) (28 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 87 OF 2017
CM KARIUKI, J
NOVEMBER 28, 2024**

IN THE MATTER OF THE ESTATE OF NDUNGU MAINA NJAU (DECEASED)

BETWEEN

PAULINE NJAMBI NDUNGU APPLICANT

AND

AMOS MAINA NDUNGU 1ST RESPONDENT

GRACE WANJIKU NDUNGU 2ND RESPONDENT

RULING

1. The Applicant herein filed an application dated 15th June 2023 in which she sought the following orders:-
2. Spent.
3. Spent.
4. That the orders issued on 30th April 2019 be reviewed and/or varied.
5. That the costs of this application be in cause.
6. The application was brought on the grounds that the Applicant stands to suffer prejudice as she did not get an equal share with the rest of the beneficiaries.
7. On the other hand, the Respondents filed a replying affidavit dated 17th April 2024 deponing that the application was an afterthought and that the Applicant never appealed that decision on time and later filed an application to lodge a notice of appeal out of time in the Court of Appeal at Nakuru which was denied. Further, it was averred that the Applicant did not set the grounds of review and her application is meant to hoodwink this court to issue orders of review of interpartes judgement without any basis.



8. The Respondents deponed that no sufficient explanation was given for the delay to warrant the exercise of discretion in the Applicant's favour especially when the delay was inordinate. It was pleaded that the Applicant has not demonstrated any diligence in this matter and that the Respondents stand to suffer great prejudice if the orders sought were to be issued as they would have effect of prolonging the litigation which has span over a period of 4 years.
9. Applicant's Submissions
10. The Applicant submitted that the wishes of the deceased were that she gets the whole share of Wiyumiririe Farmers Sacco Cert No. 681 Farm No. 2. However, the said parcel of land was subdivided between the Applicant and the 2nd Respondent. That the Respondents were aware of what the wishes of the deceased were but decided not to guide the court on the same for their own benefits. Reliance was placed on Section 35 of the Law of Succession Act, re Estate of Nicholas Kaaka Kapore (deceased) [2018] eKLR
11. It was further stated that there are some people who shared the properties of the deceased but they were not deserving e.g. Gerald Njau Maina and stated that he should be removed from the certificate of confirmation of grant. Reliance was placed on the case of Paul Kiruhi Nyingi & Another vs. Francis Wanjohi Nyingi [2009] eKLR
12. Respondents Submissions, not in file at the time of drafting this decision.
13. Analysis and Determination
14. The power of review in the High Court is anchored in Section 80 of the Civil Procedure Act which provides as follows: -
15. Any person who considers himself aggrieved—
 - I. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - II. 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.
16. Further, Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides for review in the following manner: -
17. Any person considering himself aggrieved—
18. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - I. 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.



19. The Court of Appeal in *National Bank of Kenya vs. Ndungu Njau*, Civil Appeal No 2111 of 1996 observed as follows in respect of reviews applications: -

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 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 proceeds on an incorrect expansion of the law.

20. The Supreme Court in *Parliamentary Service Commission vs. Martin Nyaga Wambora & Others* [2018] eKLR quoted with approval the findings of the East Africa Court of Appeal in *Mbogo and Another v Shah* [1968] EA, upon establishing the following principles: -

(31) Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:-

- I. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
- II. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the Applicant to the satisfaction of the Court;
- III. An application for review of exercise of discretion is not an appeal or a chance for the Applicant to re-argue his/her application.
- IV. In an application for review of exercise of discretion, the Applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- V. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- VI. The Applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - VII. as a result, a wrong decision was arrived at; or
 - VIII. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

21. Accordingly, review is permissible when in instances where there is a glaring omission, evident mistake or an error apparent on the face of the record. The Applicant based her application on the fact that she stands to suffer irreparable loss and damages if the orders sought are not granted. Having thoroughly perused her application and submissions, it is my considered finding that the Applicant did not establish any error or omission on the part of the court for the orders sought to be granted. The Applicant did not demonstrate in any way how her matter conforms to the specific requirements enumerated under Order 45 Rule 1 of the Civil Procedure Rules, 2010. Further, the Applicant's application was misconceived and is an attempt by the Applicant to have this court sit on appeal on its own decision.

22. In the circumstances, I find that the application herein lacks merit and thus make the orders;



- i. The application is dismissed with costs to the Respondents.

RULING, DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 28TH DAY OF NOVEMBER 2024.

C. KARIUKI

JUDGE

