



In re Estate of the Late Thomas Kienga Katumo (Deceased) (Succession Cause 170 of 2011) [2024] KEHC 15156 (KLR) (28 November 2024) (Ruling)

Neutral citation: [2024] KEHC 15156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 170 OF 2011**

MW MUIGAI, J

NOVEMBER 28, 2024

**IN THE MATTER OF THE ESTATE OF THE LATE
THOMAS KISENGA KATUMO (DECEASED)**

BETWEEN

COUNTY GOVERNMENT OF MAKUENI APPLICANT

AND

ESTHER MUKULU KISENGA 1ST PETITIONER

BENJAMIN MAILU KISENGA 2ND PETITIONER

AND

HENRY MULI KISENGA PROTESTOR

JAMES MUSAU KISENGA PROTESTOR

JACKSON MASAVU KISENGA PROTESTOR

RULING

1. The Ruling was delivered on 21/5/2024 whose Disposition was as follows verbatim;
 1. The Court orders of 24/2/2023 shall continue in operation and bind the disputants, the Administrators who allegedly received monies and did not share with beneficiaries, the beneficiaries and buyers/ occupants of Nziani water Borehole CDF Committee Makueni County and the Community users of the Borehole shall All use share and have access to water and borehole pending hearing and determination of the dispute in ELC.
 2. Any alleged sale of any part of the property shall be ventilated before ELC Court by virtue of Section 13 of *Environment & Land Act* & Article 162 of the *Constitution*.



3. Distribution of the estate of the deceased is as outlined above at Paragraph 79 in Partial Confirmation of Grant save for the hived off part of Suit property 1696 where stands the Community Borehole and is the subject of dispute to be heard and determined by ELC Court.
4. Any aggrieved Party may apply to Court in default; A partial confirmation of grant shall issue on the distribution highlighted above.

Summons Dated 28.5.2024

2. Via summons dated 28.05.2024, the applicant sought orders that;
 - a. spent
 - b. That there be stay of execution of the court's judgement delivered on 21.5.2024 and all subsequent proceedings pending the hearing and determination of this application
 - c. That upon granting of the orders above the succession proceedings be re opened to allow taking of evidence of all parties and conclusion of the matter.
 - d. That the Court does review, vary and or set aside the judgement delivered on 21.5.2024 and does proceed to make a finding that this application is merited and allows the same
 - e. That the cost of the application be provided for
3. The application was supported by the supporting affidavit of Henry Muli Kisenga sworn on 28.5.2024 where he stated that being dissatisfied with the judgment delivered on 21.5.2024, he filed this application seeking review and setting aside of the said judgment, that this court summarily and irregularly determined the suit by invoking Section 38 of the Law of Succession thus distributing the estate of the late Thomas Katumo while proceedings were in progress.
4. That at the time of entering the judgment parties had not closed their respective cases and evidence was not conclusively taken and advocates on record were not accorded opportunity to finalize on their respective cases, some beneficiaries never testified, the County Government of Makueni raised a protest which was opposed and that the effect was that this halted the proceedings of the main suit which had been partially heard.
5. That this court erroneously delivered judgment summarily without allowing parties to conclude their cases hence putting the administration of the whole estate in jeopardy and failure to review/set aside the irregular judgment of 21/5/2024 would result to an injustice and that there was malice by the court in invoking Section 38 of the Law of Succession to distribute the entire estate in disregard of the will of the beneficiaries that not all assets were in dispute.
6. That the actions amounted to condemning the parties unheard contrary to Article 50 of the Constitution and that the court ought to look at the intention of the beneficiaries and the impact of distributing the estate summarily without hearing and interrogating the evidence of all the parties involved.
7. That there would be irreparable consequences if the orders sought are not granted as it would leave the estate in disarray and it will be impossible to implement the judgment.
8. The court was urged to grant the orders as sought and set aside/ review the judgement and afford the applicant a fair hearing.



Replying Affidavit

9. Via Replying affidavit dated 18.7.2024 sworn by Esther Mukulu Kisenga who deposed that she was the firstborn daughter and a beneficiary in the estate of the deceased. That the main parties in the cause testified and their Court testimonies were sufficient for the court to make a determination on issues thus the ruling of 21.5.2024 is not unjust or prejudicial.
10. That this matters goes way back from 2011 and the court took into account the lengthy delay and thus rendered itself with finality on the issues raised by the parties. That the court rendered itself on the issue of the borehole water project raised by the County Government of Makueni.
11. That the Ruling of 21.5.2024 was very fair as the court distributed the deceased's estate equally and equitably to each beneficiary. That the applicants closed their protest case and cannot be heard saying that they have not been heard.
12. That the other beneficiaries have not indicated any dissatisfaction with the Ruling and there is no proper reason to set aside the regular ruling and there is no injustice or prejudice to the applicants.
13. It was finally averred that the application was an abuse of the court process meant to delay the case and should be dismissed.

Petitioner's Submissions Dated 23.09.2024

14. It was submitted that upon delivery of the ruling, the Court became functus officio and the issues herein res judicata. That the aggrieved parties should have preferred an appeal
15. Reliance was placed on Order 45 of the Civil Procedure Rules 2010 on the grounds for setting aside proceedings.
16. The ruling in this case was not delivered in error. There was no fraud or mistake and no new evidence to justify setting aside of the proceedings. The fact that the ruling did not go as anticipated by the applicants is no ground for setting aside.
17. It was their final issue that the applicants had not satisfied the requirements for the grant of the orders sought. Their dissatisfaction is a ground for appeal not review. She urged the court to dismiss the application with the cost to the petitioner.

Analysis and Determination

18. I have considered all the pleadings, the well - articulated submissions and the relevant provisions of law by the Advocates for the parties.
19. The issue that arises for determination in this application is whether the court should review/vary and set aside the ruling dated 21.5.2024.
20. Section 80 provides:- 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 Judgement to Court which passed the decree or made the Order and the Court may make such order thereto.
21. Order 45 (1). States as follows:- Any person considering 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, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the 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 review of Judgement to the Court which passed the decree or made the order without unreasonable delay”.
22. From the stated provisions, it is quite clear that they are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.
- a) There should be a person who considers himself aggrieved by a Decree or order;
 - b) The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;
 - c) A decree or order from which no appeal is allowed by this Act;
 - d) There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
 - e) 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.
 - f) The review is by the Court which passed the decree or made the order without unreasonable delay.
23. The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on the face of the record and re – appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is permissible
24. In the case of “*Nyamongo & Nyamongo – Versus – Kogo*” (2001) EA 170 discussing what constitutes an error on the face of the record, the Court rendered itself as follows:-
- “An error apparent on the face of the record cannot be defined or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on 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 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 is certainly no ground for review though it may be one for appeal.....”



25. Similarly the case of “*Tokesi Mambili and Others – Simion Litsanga* (19) where the court held as follows:-

In order to obtain a review an applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason (Emphasis is Mine).

26. In applying the principles of review illustrated by the authorities above, it is clear that the applicant has not established grounds to warrant grant of review or setting aside of the ruling of 21.5.2024.

27. The Applicant’s twofold grounds for review are that there was malice by the court in invoking Section 38 of the *Law of Succession* to distribute the entire estate in disregard of the will of the beneficiaries that not all assets were in dispute. That this court erroneously delivered judgment summarily without allowing parties to conclude their cases hence putting the administration of the whole estate in jeopardy.

28. This Court was/is not motivated by malice; the facts as per the Court record are as follows;

- a) The matter was filed in 2011 and proceeded before various Judges culminating with before Hon D.K.Kemei J who on 23/11/2020 ordered the Summons for Confirmation & Protests would proceed by viva voce evidence.
- b) This Court took over the matter on 24/11/2021 and commenced hearing of PW1 Esther Mukulu Kisenga (due to her advanced age) on 22/2/2022
- c) On 27/4/2022 PW2, Henry Muli Kisenga the Applicant herein testified and on the following date 20/6/2022 PW3 Julius Muthenya Mwatu testified for PW2 another witness for PW2 PW3(4) Joseph Mailu Mandi testified for PW2
- d) On diverse dates Mary Syukwaa Kisenga testified James Musau Kisenga testified and was recalled and thereafter the interested 3rd Party filed an Application that was served to all parties and parties respond and written submissions were exchanged.

29. From the record, if the parties/Counsel wished to call more witnesses than those who had testified as Protestors and/or Administrators they ought to have raised the same in Court. The Court wrote and delivered on the hearing of Summons for Confirmation and Protest and the 3rd Party’s interest.

30. Secondly, the Applicant did not state which witness who supposed to testify was left out, application made in Court and /or refused.

31. The Third issue which is the basis of alleged malice is the mode of distribution adopted by the Court in its Ruling of 21/5/2024. The Court heard evidence of members of the family of the deceased and there were competing and contested version, with PW1 was given land by deceased or not, was it land to build on or complete gift all these were tested and the conclusion I found PW1 was given land by deceased.

32. On the issue of alleged sale/purchase of land by Benjamin Mailu Kisenga and Esther Mukulu Kisenga from James Musau Kisengo & Jackson Masavu Kisenga if at all; was left for determination by ELC. The issue of the public borehole by Makueni County was also left for determination by ELC



33. The rest of the Properties the mode of distribution was more or less as proposed in the Summons for Confirmation that distribution would be 7 equal shares in the properties Kitaingo/Uvete 35; Kitaingo Uvete 51 & Kitaingo Uvete 1696.
34. This Court is guided by law; Section 38 of LSA provides;
38. Where intestate has left a surviving child or children but no spouse
- Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children
35. Reading LSA with the Constitution 2010 Art 27 which provides for equal benefit and protection of the law and non-discrimination; it means the law applies equally fairly to all. This Court applied the law.
36. This Court notes that parties went for Court Annexed Mediation and the same did not work which was an opportunity to reach homegrown solution.
37. From the court record it is clear that the court reached its decision after hearing of the parties and this seems to be a ploy to delay the implementation of the orders of the court. I agree with the petitioner that if the applicant is dissatisfied with the ruling of the court, they can exercise their right of appeal.

Disposition

1. The application dated 28.5.2024 is unmerited and is hereby dismissed.
2. The Applicant may exercise right of Appeal.

RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 28/11/2024 AT MACHAKOS HIGH COURT. (VIRTUAL CONFERENCE.

M.W.MUIGAI

JUDGE

In the presence of:

Mr. Muema H/B for Mutava for the Applicant

Geoffrey/Patrick - Court Assistant(s)

Mr. Muema H/B for Mutava for the Applicant: We wish to file Appeal.

COURT: Right of Appeal is granted.

M.W.MUIGAI

JUDGE

28/11/2024

