



REPUBLIC OF KENYA



In re Estate of Samwel Amanaka Ngoze (Deceased) (Succession Cause E099 of 2021) [2024] KEHC 14841 (KLR) (25 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE E099 OF 2021**

JN KAMAU, J

NOVEMBER 25, 2024

IN THE MATTER OF

JOYCE OPISA AMANAKA 1ST PETITIONER

CHRISTINE NAFULA AMANAKA 2ND PETITIONER

RULING

1. In her Chamber Summons dated and filed on 25th September 2023, the 2nd Petitioner herein sought that the order that this court made on 18th September 2023 directing that a Certificate of Confirmation of Grant be drawn in accordance with the Judgment of Musyoka J on 10th April 2019 be reviewed, set aside and/or vacated and that her Chamber Summons dated 17th March 2021 and filed on 18th March 2021 be set down for hearing.
2. She swore an Affidavit in support of the said application on 25th September 2023. She averred that the 1st Petitioner was her co-widow while the deceased was her husband. She stated that on 10th April 2019, Musyoka J delivered a judgment directing that the Certificate of Confirmation of Grant be issued.
3. She averred that her said Chamber Summons application dated 17th March 2021 and filed on 18th March 2021 had sought a review of the judgment of the Learned Judge. Her assertion was that her advocate was no longer in practise as he had been appointed as a Magistrate. She averred that when the matter came up on 18th September 2023, she was unrepresented and as she struggled to find the right court, her case was called out and the court proceeded to issue its direction that a certificate of confirmation be issued with regard to the aforesaid Judgment which both the 1st Petitioner and herself had sought to be reviewed.
4. She stated that the court was not aware that she had filed a review of the said Judgment on 18th September 2023 and that the same ought to have been set down for hearing before the final determination of this case. She contended that it was in the interest of justice that the orders that she had sought be granted.



5. The 1st Petitioner swore a Replying Affidavit on 13th December 2023 in opposition to the present application. The same was filed on 14th December 2023. She asserted that she was not served with the present application but only managed to get a copy of the same when getting a copy of the order dated 18th October 2023.
6. She stated that the application dated 17th March 2021 was never listed for hearing and was abandoned in 2021 after she vehemently opposed it for being an abuse of the court process and failing to meet the requirements of an application for review.
7. It was her contention that she did not hold brief for the 2nd Petitioner as she had filed her own application for review. She urged the court to allow the prayers in her application dated 8th May 2019.
8. She pointed out that the 2nd Petitioner's application herein had to meet the three (3) ingredients namely, that it had to be brought without undue delay, that she applicant must have discovered something she did not know about and which she could not have known after the exercise of due diligence and that there must be an error apparent on the face of the record and/or the court must have made an error of judgment which goes to the root of the matter. She was emphatic that the 2nd Petitioner had failed to satisfy any of the said three (3) ingredients.
9. She asserted that there was no explanation that was offered for the application to have been brought on 17th March 2021 after a lapse of twenty one (21) months. She urged the court to dismiss the said application with costs to her.
10. The 2nd Petitioner's Written Submissions were dated 31st January 2024 and filed on 12th February 2024 while those of the 1st Petitioner were dated 9th March 2024 and filed on 11th March 2024. The Ruling herein is based on the said Written Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

11. The 2nd Petitioner invoked Rules 63(1) and 73 of the Probate and Administration Rules, Section 47 of the *Law of Succession Act*, Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010 and submitted that her application was grounded on the third limb of the rules under Order 45 Rule 1 of the Civil Procedure Rules, 2010.
12. She contended that her absence and that of her Advocate, Mr Victor Shivega, in court on 18th September 2023 resulted to the failure to explain to court the urgency and the importance of the evidence in her application dated 17th March 2021 that would have assisted the court in making a just, equitable, balanced and fair mode of distribution of the deceased's estate.
13. She further submitted that this application had been brought in good time after seeking services of another advocate. She asserted that her application dated 17th March 2021 sought to review the Judgment of 10th April 2019 as she had discovered new evidence that was not available during the hearing of the proceedings on distribution and was consequently not considered in the Judgment.
14. She pointed out that the new evidence was an account of her financial contribution towards the acquisition and/or development of the deceased's estate and other evidence that had not been scrutinised by this court which if not considered, would be prejudicial on her part.
15. She was categorical that her application herein had been brought within a reasonable timeframe as required under Order 45 Rule 1(b) of the Civil Procedure Rules as only five (5) days had lapsed from the date when the orders were issued. In this regard, she placed reliance on the cases of *Ajit Kumar Rath vs State of Orisa & Others* (eKLR citation not given) and *Official Receiver and Liquidator vs Freight Forwarders Kenya Limited* [1997]LLR 7356 where the common thread was that sufficient



reason meant that the reason had to be one that was sufficient to the court to which the application for review had been made.

16. She was emphatic that the reason she offered herein was sufficient reason within the meaning of the rules cited as it was neither analogous nor ejusdem generis to the other reasons stipulated in Order 45 Rule 1 of the Civil Procedure Rules.
17. She pointed out that the 1st Petitioner was also opposed to the Judgment that was delivered on 10th April 2019 and had filed an application dated 8th May 2019 detailing her dissatisfaction. She urged the court to exercise justice on her part and allow her application.
18. On her part, the 1st Petitioner submitted that she was the one that had filed an application dated 8th May 2019 for review of the said Judgment and that on the date of hearing the same, the 2nd Petitioner had objected to it on grounds that the court did not have jurisdiction to hear the same but the court overruled her objection and matter proceeded for hearing. She argued that the 2nd Petitioner then filed her Replying Affidavit in opposition to the said application on 17th March 2021 which was twenty two (22) months after she had served her with the application.
19. She added that the 2nd Petitioner further filed an application for review on the same date of 17th March 2021 which was brought twenty three (23) months after delivery of the Judgment. She was categorical that no reason had been given by the 2nd Petitioner to explain the delay in filing the said Replying Affidavit and her application for review.
20. She cited Order 45 Rule 1 of the Civil Procedure Rules and argued that at the time of filing this Cause, the 2nd Petitioner was represented by Advocate Amos Wandago and that her assertions that her advocate had since joined magistracy was insincere as she had challenged her then advocate if he had acquired a genuine degree from Moi University which made him disappear (sic).
21. It was her case that the 2nd Petitioner had not produced any new evidence which she did not have at the time of filing this Cause as the documents she relied upon were in her possession at the time she filed the Succession Cause in Nairobi. She asserted that there was no clerical or arithmetical error or mistake apparent on the face of the record and that this application had been brought with undue delay.
22. She pointed out that despite orders that were made on 14th December 2023 directing the 2nd Petitioner to serve her the application herein, she had not been served with the same or her submissions herein. She argued that that amounted to contempt of court.
23. She pointed out that Order 10 Rule 3 of the Civil Procedure Rules gave this court the power to strike the application herein for failure to serve. She added that the subsisting circumstances as of 5th October (sic) when she opposed the hearing of the application dated 17th March 2021 had not changed and that listing the said application for hearing would be an abuse of the court's process.
24. To buttress her case, she relied on the case of Nyamira ELC Case No 21 of 2021 (sic) where it was held that an application for review could not be based on information which the applicant had in her possession at the time the court made the order to be reviewed.
25. Right from the onset, this court noted that the parties proceeded to canvas the threshold to be met for an application for review to be allowed. However, the 2nd Petitioner herein was only seeking that the order of 18th September 2023 be set aside so as to allow her application dated 17th March 2021 and filed on 18th March 2021 to be heard.
26. This court noted that an aggrieved party had a right to seek a review of a judgment as set out in Order 45 Rule (1) and (2) of the Civil Procedure Rules, 2010. The same provides 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 (emphasis court) without unreasonable delay.by a decree or order from which no appeal is hereby allowed,
2. A party who is not appealing from a decree or order may apply for a review of judgment (emphasis court) 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.
27. Setting aside the Judgment of the Learned Judge without the 2nd Petitioner demonstrating that she was entitled to a review of the said judgment at this juncture would be premature.
28. In considering whether or not to grant this application, the court was required to consider if the opposing side would suffer any prejudice. This court did not see any prejudice that the 1st Petitioner would suffer or was likely to suffer if the 2nd Petitioner herein exercised her constitutional right to be heard. If there was any prejudice, then she did not demonstrate the same.
29. This court recognised that there had been inordinate delay in resolving the issues in dispute herein. However, it also acknowledged that every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of *the Constitution* of Kenya, 2010. Even where a party delayed in doing an act, there was always a provision that would give it reprieve to seek justice.
30. Notably, the High Court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process under Rule 73 of the Probate and Administration Rules, 1990.
31. The said Rule 73 of the Probate and Administration Rules provides that:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
32. This was a matter involving family members of the deceased. Indeed, family matters were extremely emotive and had the potential of becoming very convoluted and causing unimaginable rifts amongst family members if disputes affecting them were not heard and determined decisively and conclusively.
33. This court could not grant the 1st Petitioner’s application dated 8th May 2019 seeking review of the Judgment of the Learned Judge as it could not be considered during the hearing and determination of the present application but had to be given its own directions.



34. It was not necessary for parties to file applications to ask the court to determine applications that had already been filed. They were required to fix those applications they wanted heard for hearing and not seek the granting of orders they had sought in subsequent applications. The innumerable applications that had been filed herein may have been the reason why some applications may not have been heard before the Learned Judge delivered his decision on 10th April 2019.

Disposition

35. For the foregoing reasons, the upshot of this court's decision was that the 2nd Petitioner's Chamber Summons dated and filed on 25th September 2023 was partially merited and the same be and is hereby allowed in terms of Prayer No (3) therein only to the extent that her Chamber Summons application dated 17th March 2021 and filed on 18th March 2021 would be set down for hearing.

36. It is hereby directed that the 2nd Petitioner files her Supplementary Affidavit, if need be and Written Submissions in respect of her Chamber Summons application dated 17th March 2021 and filed on 18th March 2021 by 20th December 2024.

37. The 1st Petitioner to file and serve her Written Submissions by 14th February 2025.

38. It is hereby further directed that the matter to be mentioned on 28th April 2025 to confirm compliance and/or for further orders and/or directions.

39. The parties are also hereby directed not to file any other applications to avoid causing confusion and delays in determining the dispute herein.

40. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF NOVEMBER 2024

J. KAMAU
JUDGE

