In re Estate of Muru Muthanjuki (Deceased) (Succession Cause 452 of 2014) [2023] KEHC 211 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEHC 211 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE 452 OF 2014

LM NJUGUNA, J

JANUARY 25, 2023

IN THE MATTER OF THE ESTATE OF MURU MUTHANJUKI (DECEASED)

BETWEEN

JESKA MUTHANJE MURU ..... PETITIONER

AND

LEONARD THANJUKI WAMURUH ..... 1ST RESPONDENT

NANCY IVETI MURU ..... 2ND RESPONDENT

JULIA MARIGU MURU ..... 3RD RESPONDENT

RULING

1. Before this court are two applications dated November 4, 2019 and November 28, 2019 seeking for orders as enumerated on their faces. The applications are supported by the affidavits of the respective deponents.

2. The protestors via an application dated November 28, 2019, moved this court for orders that a stay of execution do issue for the reason that on behalf of the 2nd and 3rd protestors, the 1st protestor had filed a notice of appeal against the judgement delivered by this court on October 28, 2019. That the petitioner/respondent was in the process of executing the impugned judgment despite them feeling aggrieved by the same. It was his contention that his name had been captured incorrectly and therefore, he urged this court to allow the prayers as sought given that no party stood to be prejudiced if the orders sought herein were to be granted.

3. The petitioner/respondent on the other hand moved this court via an application dated November 4, 2019 seeking for orders that this court be pleased to review its judgment dated October 28, 2019. It was her case that the judgment was delivered in the presence of all the parties and in her understanding, she appreciated that the children of the deceased herein were to benefit almost equal shares which was

about ½ acre. That the children of the deceased who were to get shares in Kyeni/Mufu/5024, Kagaari/Weru/7003 and Kagaari/Weru/7002 were all getting almost ½ acre in their respective shares. It was her evidence that by getting 1/3 in LR Kyeni/Mufu/5997, the other children shall have inherited bigger shares and this may cause division in the family. She therefore prayed that this court allows her prayers.

4. The protestors opposed the petitioner's application deponing that the said judgment which ordered 1/3 share by Leonard Nthanjuki Wamuruh was an error in that the same ought to have read Leonard Thanjuki Wamuruh and the same should be corrected at the Court of Appeal. That in their family, there is nobody by the name Nancy Marigu Muru and all parties understood the said judgment in reference to the distribution of parcel numbers Kyeni/Mufu/5997, Kyeni/Mufu/5024 and Kagaari/Weru/ 7003 and 7002. That all the six children mentioned are the petitioner's four sons and two daughters; that the two daughters have ½ acre and the sons between 1 acre to 3 acres. In the end, the protestor urged this court to dismiss the application herein.

5. In reference to the applicant/protestor's application for stay of execution, the petitioner/respondent filed a replying affidavit on December 17, 2019 wherein she opposed the application and deponed that the applicant is malicious, has ill motives and is using delaying tactics for his own reasons which is clearly uncalled for. That the 1st and 3rd protestors are neither biological nor adopted children of the deceased herein and therefore have no legal authority to contest the estate of the deceased. It was her contention that the same was raised during the hearing of the matter and the protestors failed to prove that indeed they are bonafide beneficiaries of the estate herein. That indeed there was a typographical error in reference to the names of three beneficiaries and that she had made an application for review of the said judgment. It was her case that the said Mary Mwendia was the petitioner's sister who died way back in the year 1960 aged 5 years. It was her deposition that the 1st protestor had previously sold his share of estate and thus has resulted to using delaying tactics to deny her together with the other beneficiaries their rightful inheritance. In the end, it was prayed that this court be pleased to allow the application herein.

6. The court gave directions that the applications be canvassed by way of written submissions.

7. In regards to the application dated November 4, 2019, the petitioner/ respondent submitted that she understood the judgment delivered on October 28, 2019 to mean that LR Kyeni/Mufu/5997 (0/072 ha) was to devolve as follows:

    i. ½ acre Leonard Thanjuki Wamuruh.

    ii. ½ acre Moses Wamuru.

    iii. Remaining share to go to Jeska Muthanje Muru.

8. It was her case that at the time of issuance of certificate of confirmation of grant, she discovered that the distribution of the said estate was contrary to the court's judgment; further, that the name of a beneficiary was captured as Moses Wamuru instead of Moses Kariuki. In the same breadth, that there was also a typographical error wherein the name of the beneficiary of the estate known as Kagaari/Weru/7003 (0.2 ha) was typed as Mary Ramba instead of Mary Rwamba while that of Nancy Marigu Muru was captured as Nancy Iveti Muru. The petitioner /applicant urged this court to review the confirmation of grant dated October 31, 2019 to be in consistent with the judgment delivered on October 28, 2019 in respect to LR Kyeni/Mufu/5997 (0.72 Ha) and further, order for corrections as already noted.

9. The applicant/1st protestor on the other hand submitted that the petitioner was biased against him in regards to the mode of distribution employed in that the petitioner gave false information disguising

it as the wish of the deceased herein. That the petitioner has been misrepresenting facts from time to time thus misleading the court by what she calls the deceased's wishes in regard to Kyeni/Mufu No 5997. He referred to the Summon for confirmation of grant dated February 23, 2018, at page 3 No 12 (d) (ii) wherein the petitioner wrote that Jeska Muthanje Muru and Moses Wamuruh were to get the remaining parcel and the same be registered in favour of the two in accordance with the wishes of the deceased; petitioner's statement dated January 10, 2019 at page 2 paragraph 5 where the petitioner indicated that the said land Kyeni/Mufu/5997 measuring 0.351 be registered under her name; and further via replying affidavit to the protest, the petitioner deponed that Moses Wamuruh should get 0.2 ha and 0.30 ha of the parcel Kyeni/Mufu/5997 be registered in her name in trust. That the parties were present when the judgment being sought to be reviewed was delivered and that the parties understood the same as it was read in both English and Kiembu. It was submitted that all the six children belonging to the petitioner received their parcels of land and they have not registered any complaint in reference to the estate herein. In the end, the protestor submitted that the application by the petitioner is an abuse of the court process and therefore should be dismissed.

10. In regards to the application by the protestor, it was submitted that he was dissatisfied with the whole judgment and as such, sought for prayers herein to enable him appeal the same. That the deceased had directed that none of his wives should inherit his land and the same was only to be realized through Leonard Thanjuki Muthanje for Jecklia Rwamba and Moses Wamuruh for Jeska Muthanje. He contested the court's finding that Jecklia Rwamba had been divorced by the deceased herein via customary law as no witness was presented before this court to support such a finding. It was his contention that the petitioner had misled the court to believe that he had previously sold a parcel of land belonging to the estate. That no evidence was produced before this court to support the allegations given that the said properties were still listed in the name of the deceased. He submitted therefore that, any execution of the impugned judgment would lead to the protestors being disadvantaged and as such, urged this court to allow their prayers.

11. I have considered and analyzed the applications and the submissions by the parties herein and it is my view that the main issue for determination is whether this court can issue the orders sought in the respective applications.

12. The principles upon which the court may stay execution of orders appealed from, are settled. The Applicant must approach the court timeously and demonstrate the likelihood that he will suffer substantial loss if the order is denied. He must also furnish security for the due performance of the decree in the event the appeal does not succeed. These are the requirements stipulated in Order 42 Rule 6(2) of the *Civil Procedure Rules 2010*. However, it is trite that such orders can only be made where there is pending appeal. The operating words therefore are "pending appeal." Order 42 Rule 6(4) provides that: -

> " For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given".

13. I have perused the court record and indeed there is a notice of appeal dated November 7, 2019. As such, there is a pending appeal. The question thus comes to my mind is whether this court can issue the orders sought herein for the reason that although there seems to be a dichotomy of opinion and two schools of thought on the necessity of leave to appeal in succession matters, insistence has been that appeal from the decision of the High court in exercise of its original jurisdiction is only with the leave of the court.

14. The Court of Appeal in the case of *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014 eKLR stated that :-

> " We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where the application for leave is refused, with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."

15. Further, in the case of *Mary Wangui Karanja & Another v Rhoda Wairimu Karanja & Another* [2014] eKLR, where Musyoka J held the view that:-

> " ...A right of appeal is statutory and since the Law of Succession Act has not provided for such a right the same does not exist. ''

16. This court is alive to the provision of Article 50 of the *Constitution* that a litigant may pursue redress to the highest court, an entitlement that should not be derogated without a just cause. But be that as it may, the law requires that the applicant applies for leave to appeal from the High Court to the Court of Appeal in succession matters. I hold the view that this is a major consideration in this application.

17. In any case, this court is not in a position or in possession of any material in this case on the basis of which it can appreciate whether there are weighty issues requiring further serious judicial consideration and interrogations. [See *Rhoda Wairimu Karanja* [2014 eKLR].

18. That notwithstanding, in determining the merit of the application by the applicant/protestor, the objective of stay of execution is to prevent substantial loss or irreparable damage. The applicant stated that the estate property is likely to be distributed, hence, this will cause substantial loss to him given that he is not satisfied with the manner in which this court sub- divided the estate herein.

19. As the estate property has been subdivided and distributed, the request for stay of execution of the judgment herein has been overtaken by events. Be that as it may, I do not find any sufficient reason upon which the court can grant any other form of relief.

20. Lest it is forgotten, I noted two incidents which would also cripple this application. No leave to appeal was applied for. And, there is no material to show that the applicant will suffer substantial loss unless stay is granted. The Applicant merely stated that he's not satisfied with the decision he is seeking to appeal against. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the Learned Judge held as follows in relation to substantial loss; -

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold.... does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the

cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

21. In *Kenya Hotel Properties Limited v Willesden Investments Limited* [2007] eKLR, the Court of Appeal stated that: -

> "……..It does appear to us that in considering the question as to whether the success of the intended appeal would be rendered nugatory were we to refuse the application for stay, the main requirement is to weigh the position of the parties before the court with the background of ensuring justice in mind…..

22. I am guided by the above authorities. However, in the instant application, the applicant neither proved any substantial loss that he stands to suffer in fact, he did not make any deposition to that effect.

23. As to the condition that the applicant must provide security, the applicant did not offer any security and there is nothing deposed to that effect. However, it is trite that the issue of security is discretionary and it is upon the court to determine the same. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal held as thus: -

> "……..5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

24. However, it is clear that this court can order security to be provided suo moto but in the instant case the applicant having failed to prove that he will suffer substantial loss, this court does not have the jurisdiction to proceed and determine the other conditions or order provision of security. Evidently, the three (3) prerequisite conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules, 2010* cannot be severed. The key word is "and" which connotes that all three (3) conditions must be met simultaneously. The applicant must meet all the tenets – requirements of- Order 42 Rule 6 of the *Civil Procedure Rules*. Failure to satisfy any one of the tenets stipulated in that rule is fatal to the application. (See *Equity Bank Limited –vs- Taiga Adams Company Limited* [2006] eKLR).

25. It is trite law that a winning party should not be denied enjoyment of the fruits of his lawfully acquired judgment unless there are compelling reasons to do so. The applicant herein has not convinced the court that he is deserving of the orders sought and as a consequence, the same is dismissed.

26. In the same breadth, can the orders sought by the petitioner be reviewed for the reasons that she has submitted on? [See Order 45 of the *Civil Procedure Rules*].

27. An error within the meaning of Section 80 and Order 45 of the Civil Procedure law was defined in the case of *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR, the Court of Appeal as thus:-

> "A review may be granted wherever 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 a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law".

28. The Court of Appeal had the following to say in an application for review in the case of *National Bank of Kenya Ltd v Ndungu Njau* (1979) eKLR.

> "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 a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

29. As indicated above, a review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed; the underlying objective of this provision is neither to enable the court to write a second judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on her part in adducing all possible evidence at the trial.

30. Where an applicant in an application for review seeks to rely on the ground that there is *discovery of new and important evidence, one has to strictly prove the same. In the case of Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & Another* (2018) eKLR the Court of Appeal stated as follows:

> "We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation."

31. In the same breadth, the Court of Appeal in the case of *Rose Kaiza v Angelo Mpanju Kaiza* (2009) eKLR held that not every new fact will qualify for interference of the judgment. In this case, the applicant states that at the time of issuance of confirmation of grant, she discovered that the distribution of the said estate was contrary to the court's judgment; further, that the name of a beneficiary was captured as yet the official name is Moses Wamuru. That there was also a typographical error wherein the name of the beneficiary of the estate known as Kagaari/Weru/7003 (0.2 ha) was typed as Mary Ramba instead of Mary Rwamba while that of Nancy Marigu Muru was captured as Nancy Iveti Muru. She therefore urged this court to review the confirmation of grant dated October 31, 2019 to be consistent with the judgment delivered on October 28, 2019 in respect to LR Kyeni/Mufu/5997 (0.72 Ha).

32. As I have already stated in this ruling, the statutory grounds upon which orders for review can be obtained are; firstly, there ought to exist an error or mistake apparent on the face of the record. Secondly, that the applicant has discovered a new and important matter in 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 order was made. Thirdly, that there is sufficient reason to occasion the review.

33. To the statutory grounds, may also be added instances where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury:[See *Serengeti Road Services v CRBD Bank Limited* [2011] 2 EA 395]. The court has perused the record and more specifically the judgment delivered on October 28, 2019 and the confirmed grant as alluded to by the petitioner dated October 31, 2019.

34. The court reached a determination that the protest was partly successful and proceeded to distribute the estate as follows:

    i. Kyeni/Mufu/5024 devolves to Morris Mbogo wholly.

    ii. Kagaari/Weru/7003 devolves to Mary Rumba Peter.

    iii. Kagaari/Weru/7002 devolves to Nancy Iveti Muru and Julia Marigu Muru jointly in equal shares.

    iv. Kyeni/Mufu/5997

        a. 1/3 share Leonard Nthanjuki Wamuruh

        b. 1/3 share Moses Kariuki.

        c. 1/3 share Jeska Muthanje Muru.

35. The certificate of grant on the other hand distributed the said LR. Kyeni/Mufu/5997 (0/072 ha) as per the said judgment. The applicant submitted that in her understanding, the judgment delivered on 28.10.2019 by Muchemi J., she understood the same to mean that LR. Kyeni/Mufu/5997 (0/072 ha) be devolved as follows:

    i. ½ acre Leonard Thanjuki Wamuruh.

    ii. ½ acre Moses Wamuru.

    iii. Remaining share to go to Jeska Muthanje Muru.

36. In my humble view, I find that the petitioner is attempting to review the mode of distribution as was already determined by this court but in an indirect manner. It is trite that the same is improper as the law contains provisions on how the same can be achieved.

37. On the ground that the names of some beneficiaries were captured incorrectly, I have perused the said grant and I find as follows that the court captured the details of the beneficiaries as:

    i. Morris Mbogo – Kyeni/Mufu/5024 – wholly.

    ii. Mary Rumba Peter – Kagaari/Weru/7003 – wholly.

    iii. Nancy Iveti Muru & Julia Marigu Muru – Kagaari/7002 – to share equally.

38. The petitioner on the other hand has submitted that there was a typographical error wherein the name of the beneficiary of the estate known as Kagaari/Weru/7003 (0.2 ha) was typed as Mary Rumba instead of Mary Rwamba while that of Nancy Marigu Muru was captured as Nancy Iveti Muru. The petitioner /applicant urged this court to review the confirmation of grant dated October 31, 2019 to be in consistent with the judgment delivered on October 28, 2019 in respect to LR Kyeni/Mufu/5997 (0.72 Ha) and further, order for corrections of names as already noted.

39. In reference to the above, I find that indeed there was an apparent error as the name of the beneficiary of Kagaari/Weru/7003 was captured as Mary Rumba instead of Mary Rwamba; and Moses Kariuki to be amended to read Moses Wamuru; I therefore allow the same.

40. In reference to Nancy Iveti Muru, I find that the name was captured rightly as exhibited right from the chief's letter to the said judgment. I therefore find no other reason to interfere with the said judgment.

41. In any event, the court heard the summons for revocation of the grant dated the June 16, 2020 in which all the parties participated and in its ruling delivered on the October 11, 2022, the same was dismissed. However, the correction of the names of the beneficiaries whose names were incorrectly captured is necessary.

42. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF JANUARY, 2023.

L. NJUGUNA

JUDGE

.....for the Petitioner

.....for the 1st Respondent

.....for the 2nd Respondent

.....for the 3rd Respondent