



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Nyancho Ojwando (Deceased) (Succession Cause
451 of 2014) [2023] KEHC 19474 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 19474 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
SUCCESSION CAUSE 451 OF 2014**

RPV WENDOH, J

APRIL 27, 2023

**THE MATTER OF THE ESTATE OF NYANCHO OJWANDO
(DECEASED)**

BETWEEN

THOMAS TITO NYACHAWO PETITIONER

AND

JUDITH AKINYI NDEGE PROTESTOR

(Formerly Migori Senior Principal Magistrate's Succession Cause No. 76 of 2012)

RULING

- 1 This cause relates to the estate of Nyacho Ojwando (Deceased). By a judgement dated May 12, 2016, the grant in this cause was issued to Thomas Tito Nyanchawo. The court further ordered that the estate of the deceased be distributed as follows: -
- a. Save for the portion measuring 1.928 acres which was acquired by the Government of Kenya and the area forming the homestead of Thomas Tito Nyanchawo and his family, the remainder of the parcel of land known as Kanyamkago/Kawere/713 shall be equally apportioned between Thomas Tito Nyachawo and Judith Akinyi Ndege.
 - b. The Migori County Surveyor and Land Registrar shall sub divide the land known as Kanyamkago/Kawere II/713 as in (a) above an issue separate titles. One of the titles shall be in the name of Thomas Tito Nyachawo and the other title shall be in the name of Judith Akinyi Ndege. For avoidance of doubt, the title to Thomas Tito Nyachawo shall include the area occupied by the homestead.
 - c. The Officer in Charge of Awendo Police Station shall provide security during the exercise.



- d. Each party shall bear its own costs of the distribution as well as of these proceedings.
- 2 The above orders precipitated the applicant's Notice of Motion dated July 14, 2022. The applicant seeks the following orders: -
1. Spent.
 2. Spent.
 3. This court be pleased to review the judgement of this court dated May 12, 2016 in terms of re-distribution of the estate of Nyacho Ojado (deceased) the same being Kanyamkago/Kawere II/713 measuring 21.2 Hectares that was adjudged to be equally distributed among the petitioner and the respondent.
 4. This court be pleased to restrain the Migori County Surveyor and Land Registrar to subdivide the suit land for the time being till the determination of this application.
 5. Costs be in the cause.
- 3 The application is based on the grounds on its face and the supporting affidavit of the applicant, Thomas Tito Nyachawo dated July 14, 2022. The applicant deposed that the Migori County Surveyor and Registrar visited the suit parcel of land for distribution on July 14, 2022; that the respondent is married and has no children and this court in its judgement held the deceased's estate particularly Kanyamkago/Kawere II/713 be equally subdivided between himself and the respondent; that the applicant is married with 3 wives with whom he has many children who are grandsons of the deceased; that the children will be greatly prejudiced in the event that the judgement is not reviewed in terms of distribution; that having a huge family, he needs to get almost 90% share of his father's land. The applicant stated that the respondent will not be prejudiced since she has no children and she has a big property where she is married.
- 4 The application was opposed. The respondent filed a replying affidavit dated August 12, 2022. The respondent deposed that the judgement was delivered on May 12, 2016 a period of about 6 years since the pronouncement and the delay in bringing this application has not been explained; that Order 45 (1) (b) of the *Civil Procedure Rules* requires that such an application be made without unnecessary delay; that she has been informed by her Advocate that an application for review is made on the discovery of new and important matter or evidence which was not within the knowledge of the applicant or could not be produced.
- 5 It was further submitted that the applicant knew all along that he was polygamous with several wives and children; that the grandchildren alluded to have no locus nor are they dependants in the estate of Nyacho Ojwando (deceased); that she has been informed by her Advocates that the estate was distributed in accordance with Section 40(1) of the Succession Act; that the applicant has her own son by the name of Stephen Otieno who is over 18 years old.
- 6 The applicant did not file submissions despite being given an opportunity to do so. The respondent filed her submissions dated February 27, 2023. The respondent reiterated the provisions of Order 45 Rule 1 which provides that an application for review should be made without unreasonable delay. The respondent relied on the case of *Joseph Odide Walome vs David Mbadi Okello (2022) eKLR* where the court addressed the issue of unreasonable delay.
- 7 The respondent submitted that there was no discovery of new important matter; and relied on the cases of *Hosea Nyandika Mosagwe & 2 Others vs County Government of Nyamira (2022) eKLR*, the Court of Appeal decision in *Evans Bwire vs Andrew Aginda Civil Appeal No 147 of 2006* cited in the case of



Stephen Githua Kimani vs Nancy Wanjiru Waruingi T/A Providence Auctioneers (2016) eKLR and *Suleiman Murunga vs Nilestart Holdings Limited & Another (2015) eKLR*. The respondent further submitted that there is no order or decree of this court attached to the application and urged this court not to disturb the distribution of the estate of the deceased which was done in accordance with Section 40 (1) of the Succession Act.

8 I have considered the application dated July 14, 2022, its supporting affidavit and the rival position by the respondent in her replying affidavit and submissions. The issue for determination is whether the application has merit.

9 Section 80 of the *Civil Procedure Act* 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.'

10 Order 45 Rules (1) and (2) of the Civil Procedure Rules provides: -

(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 without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment 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.'

11 The application has been brought under the provisions of Order 45 Rules (1) and (2) of the Civil Procedure Rules. Rule 63 of the *Law of Succession Act* provides on the provisions of the Civil Procedure Rules which can apply in Probate and Succession proceedings as follows: -

63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

- (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap 21, Sub Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub Leg.), shall apply so far as relevant to proceedings under these Rules.
- (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and



testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.'

12 Order 45 of the Civil Procedure Rules on reviews was formerly Order XLIV. In considering whether Order 45 of the Civil Procedure Rules, applies to succession matters, the court, in *John Mundia Njoroge & 9 Others vs Cecilia Muthoni Njoroge & Another (2016) eKLR*, quoted Rule 63 of the Probate and Administration Rules, stated as follows: -

the only provisions of the Civil Procedure Rules imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.'

13 Section 80 of the *Civil Procedure Act* allows a party who is aggrieved by a judgement to apply to the court for review. Order 45 Rules (1) and (2) gives the grounds in which an applicant should base his application for review as follows: -

- a. A decree in which no appeal has been preferred;
- b. There is discovery of new and important matter which after exercise of due diligence was not within the applicant's knowledge;
- c. There was a mistake or an apparent error on the face of the record;
- d. There are other sufficient reasons;
- e. The application must be made without unreasonable delay.

14 The issue this court will consider is whether the applicant has met the above mentioned conditions to warrant the review of its judgment dated May 12, 2016.

15 It is six years since the Judge delivered the judgment in this matter. The applicant has not explained the inordinate delay. Equity does not assist the indolent.

16 The reason for seeking review of this court's judgment dated May 12, 2016 is that the applicant has a large family and therefore he is entitled to a larger portion of the deceased's suit land. The applicant did not base his application on any of the grounds listed in Order 45 Rules 1 and 2 that new evidence has been found or that there is an error apparent on the face of the record or any other sufficient reasons. The applicant is simply of the impression that the deceased's estate was unfairly distributed. It seems therefore that he was dissatisfied with the judgment. He has not demonstrated why he did not prefer an appeal for the six years that have lapsed since delivery of the judgment.

17 Having considered the factors which a party must satisfy under Order 45 Rule 1 for a court to review its decision, this court finds that the reasons fronted by the applicant do not meet the threshold and are not within the ambit of the grounds specified under Order 45 Rule 1. Accordingly, the application dated July 14, 2022 is without merit and is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 27TH DAY OF APRIL, 2023

R. WENDOH

JUDGE



Ruling delivered in the presence of:

Mr. Odongo for the Petitioner/Applicant.

Mr. Aduke h/b for Mr. Awino for the Respondent.

Evelyn Nyauke Court Assistant.

