



Nyakiri (Suing as the Legal Administrator of the Estate of Morris Nyakiri Ndwiga -Deceased) v John & 4 others (Succession Cause 41 of 1995) [2023] KEHC 18046 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 41 OF 1995
LM NJUGUNA, J
MAY 31, 2023**

BETWEEN

JOSEPH NYAGA NYAKIRI (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF MORRIS NYAKIRI NDWIGA -DECEASED) APPLICANT

AND

**PRISCAL NJURA JOHN 1ST RESPONDENT
MUGO KANYENYEU GITITU 2ND RESPONDENT
PETER NGUU NDWIGA 3RD RESPONDENT
FREDRICK MUNYI NDWIGA 4TH RESPONDENT
PATRICK NDWIGA 5TH RESPONDENT**

RULING

1. The application for determination before the court is dated February 21, 2022 wherein the applicant seeks for orders that :
 - (i) The applicant herein be substituted in place of Morris Nyakiri Ndwiga (deceased).
 - (ii) That upon substitution, this Honourable Court be pleased to review the ruling dated October 03, 1996 and amend the orders issued on August 13, 2021 and include Land Parcel No Ngandori/Ngovio/1512 for cancellation with all resultant numbers to effect the execution of the said order.
 - (iii) Costs of the application.
2. The application is premised on the grounds on its face and its supported by the affidavit of the applicant.



3. The applicant's case is that the Honourable Court by orders issued on October 03, 1996 directed that the grant confirmed on April 01.04.1992 be revoked and all the subsequent distribution of the deceased's estate. That all the purported distribution of the deceased's net intestate estate be revoked and further, that the order be served upon the relevant land registrars for cancellation from Land Register and purported transfers, dealings whatsoever in the net intestate estate of the deceased herein. It was averred that the applicant upon visiting the Land Registry, he was informed that the said order could not be implemented as the land parcel had to be identified. As a result, the application herein was thus made and this court has been urged to allow the same.
4. The 3rd respondent on his own behalf and that of the 4th and 5th respondents swore a replying affidavit on October 05, 2022 in which he has deponed that the application herein is time barred as the same has been filed more than 12 years since the orders subject of the application were issued. That the entire suit has been overtaken by events since the subject suit land has been subdivided into numerous portions and transferred to 3rd parties who are not parties in the application herein. Further, it was deponed that the suit is incompetent as the same has been brought against deceased individuals. That in light of the above, it is only fair and equitable that the application herein be dismissed and that, the same does not warrant the orders sought herein.
5. The court gave directions that the application be canvassed by way of written submissions and all the parties complied with the directions.
6. The applicant submitted that the ruling delivered by Etyang J is still in force as no application has ever been made for its review and/or appeal. That the applicant's father died on May 02, 2017 and it is only after that, that the applicant herein took interest to find out why the orders had not been effected at the land's registry and upon doing so, he found that the said order could not be implemented for the reason that the land reference number was not indicated. As such, the applicant made the application herein to effect the orders of the court as was issued by Etyang J. to ensure that the estate herein devolves to the rightful beneficiaries.
7. It was submitted that the allegation that the orders herein are statute barred is unfounded for the reason that Limitations of Actions Act does not fall under the Law of Succession Act in that, Sections 47, 49, 63 and 73 gives this court unfettered authority to make such orders as may be expedient and the same may include those not provided for in the P&A Rules. That despite the fact that the 1st and 2nd respondents are deceased, the same does not vitiate the application herein as the 3rd, 4th and 5th respondents are still alive to defend the same. Further, no specific orders are sought against the 1st and 2nd respondents as the orders sought by the applicant are specific and in relation to orders made by the court. This court was therefore urged to allow the application herein.
8. The applicant further submitted that the 1st and 2nd respondents were only included herein for the reason that they appear in the title of the suit. That their inclusion does not in any way prejudice the 3rd, 4th and 5th respondents and given that this court has unfettered powers under Section 47 of the LSA, the same ought to be invoked so that the estate herein devolves to the rightful beneficiaries. It was argued that the orders issued on October 03, 1996 are still valid and capable of being executed. That section 4(4) of the Limitations of Actions Act only applies to civil proceedings and not succession proceedings. The applicant submitted that he has approached this court with clean hands and thus prayed that this court invokes its authority in allowing the application herein so as to enable the estate of the deceased be distributed to its rightful beneficiaries.
9. The 3rd, 4th and 5th respondents submitted that the application herein is defective for the reason that the 1st and 2nd respondents have since died. In support of this proposition, the respondents placed



reliance on the case of *Viktar Maina Ngunjiri & 4 Others v Attorney General & 6 Others*, High Court at Nairobi, Civil Suit No 21 of 2016 [2018]. On whether the judgment dated October 03, 1996 can be enforced, it was submitted that the same is time barred since it has been 26 years since the delivery of the same. Reliance was placed on Section 4(4) of the Limitations Actions Act. It was argued that it raises eyebrows as to why the application has been made after several years given that the applicant's father stayed for long without pursuing the same. It was the respondents' case that this being a court of equity, the applicant must come with clean hands for the reason that the same has been made after the death of the previous administrator. Further, it was contended that equity does not aid the indolent but the vigilant and as such, the delay herein was not explained. This court was therefore urged to dismiss the application herein.

10. I have considered the application, the response thereto, and the written submissions by the parties and I find that the sole issue for determination is whether the orders sought herein should issue.

11. 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.”

12. As indicated above, a review is permissible on the grounds of discovery by the applicants of some new and important matter or evidence which, after exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the decree or order was passed; the underlying object 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 their part in adducing all possible evidence at the trial.

13. 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.”

14. In the same breadth, the Court of Appeal in the case of *Rose Kaiza Vs Angelo Mpanju Kaiza* (2009) eKLR held that not every new fact will qualify for interference of the judgment. In this case, the applicant submitted that the Honourable Court by orders issued on October 03, 1996 directed that the grant confirmed on April 01, 1992 be revoked and all the subsequent distribution of the deceased's estate. That all the purported distribution of the deceased's net intestate estate be revoked and further, that the order be served upon the relevant land registrars for cancellation from Land Register and purported transfers, dealings whatsoever in the net intestate estate of the deceased herein. It was submitted that the applicant upon visiting the Land Registry, was informed that the said order could not be executed as the land parcel had to be identified. Therefore the applicant urged this court that



it was in the interest of justice for the court to amend the said order to include the particulars of the parcel being Ngandori/Ngovio/1512.

15. As I have already stated in this ruling, the statutory grounds upon which orders for review can be granted 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.
16. 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 Vs CRBD Bank Limited* [2011] 2 EA 395]. The court has perused the record and more specifically the orders issued on October 03, 1996 and indeed, it finds that the title of the land/ estate was not specified.
17. Having read and understood the application for review by the applicant herein, it is trite that indeed the court made orders on October 03, 1996 directing that the grant confirmed on April 011992 be revoked and all the subsequent distribution of the deceased's estate. That all the purported distribution of the deceased's net intestate estate be revoked and further, that the order be served upon the relevant land registrars for cancellation from Land Register and purported transfers, dealings whatsoever in the net intestate estate of the deceased herein.
18. However, this court having perused the record herein, asks itself whether the orders sought herein can be granted having in mind that the same derive their validity from a ruling issued by the court on October 03, 1996? I say so for the reason that indeed the same calls for a review but in the same breadth, the court takes cognizance of the fact that the application herein has been brought very late in the day. It remains unclear why the applicant chose to sit on the orders of the court, the same having been issued over twenty six years ago.
19. However, though the *Limitation of Actions Act* prescribes periods for limitations of actions and arbitrations, the actions to which that statute applies do not include succession causes, or, at any rate, causes or actions governed by the *Law of Succession Act*. It covers such matters as actions founded on contracts and torts, actions to recover land and rent, actions to recover money, actions in respect of trust property or movable property of a deceased person, and related causes. In short, it envisages ordinary civil suits brought within the framework of the *Civil Procedure Act* and Rules. It does not envisage the special proceedings governed by such statutes as the *Law of Succession Act (In re Estate of Josephine Magdalena Motion (Deceased))* [2016] eKLR).
20. In the same breadth, this court is also alive to the fact that the *Limitation of Actions Act* does in some provisions provide for actions in respect of property of a deceased person. However, what these provisions envisage are ordinary suits, often referred to as administration suits, filed by administrators or beneficiaries in respect of estate property seeking a variety of reliefs. The Act sets time limitations for the bringing of such administration suits. Those provisions have nothing to do with reliefs that are created by the *Law of Succession Act*, and that are brought within the framework of the *Law of Succession Act*. [See *In re estate of Devchand Lagdir Shah (Deceased)* [2018] eKLR].
21. Further, the 3rd, 4th and 5th residents opposed the application herein by submitting that the same was brought against deceased persons. That the 1st and 2nd respondents herein are already dead and therefore, the same rendered the application incompetent. It is important to note that the application herein seeks for recourse in regards to the estate of the deceased and not against the 1st and 2nd respondents as individuals. The applicant seeks to have this court review its ruling dated October 03, 1996 and amend the same to include Land Parcel No. Ngandori/Ngovio/1512 for cancellation with



all resultant numbers to effect the execution of the said order. [See *Monica Wangari Njiiri & 4 Others Vs Eunice Wanjiru Igamba & Another* [2016] eKLR.].

22. Further, this court’s primary duty is to ensure that the estate of the deceased devolves to the rightful beneficiaries and which jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime. [See *In re estate of Kirae Muyaweru alias Kirai Muyaweru (deceased)* [2020] eKLR].

23. As a consequence of the above, I reach a determination that:

The application herein is has merits and the same is allowed in terms of prayer 2 of the Notice of Motion dated February 21, 2022.

Each party to bear its own costs.

It is so ordered.

Delivered, dated and signed at Embu this 31st of May, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents

