



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Joseph Oyola Ongata (Deceased) (Succession Cause 35 of 2014) [2023] KEHC 19151 (KLR) (26 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 35 OF 2014
RE ABURILI, J
JUNE 26, 2023**

IN THE MATTER OF

**JESCA ATIENO OYOLA 1ST APPLICANT
PAMELA AWINO MIYUMO 2ND APPLICANT**

RULING

1. The Notice of Motion dated 9th February 2023 filed by the 1st Administrator Pamela Awino Miyomo seeks for review of the Ruling of 14th March 2022 on distribution of the estate of the deceased Joseph Oyola Ongata.
2. The grounds upon which the application is predicated are that (1) whereas the court in confirming the grant awarded land parcel No. East Gem/Nyamninia/348 to the second house, it is evident that this parcel was never part of the estate of the deceased and that the parcel in question belongs to a stranger, one Anyango Opot, as per the Certificate of Official Search annexed as Exhibit PAM to the applicant's supporting affidavit.
3. Further, that this parcel was in the first instance never listed in the petition for grant as one of the assets of the estate of the deceased hence it ought to be expunged from the list of assets of the deceased.
4. The second prayer is for an order that all reference to land parcel No. East/Nyamninia/1456 be corrected to read East Gem/Anyiko/1456 as the description thereof was erroneous and that the described title does not exist hence it is not part of the estate of the deceased and is therefore not available for distribution as was given to the 2nd house which feels disinherited for being awarded a non-existent parcel of land.
5. The 3rd prayer is that the award of land parcel No. East Gem/Nyamninia/456 to the first House in whole be reviewed and the same be redistributed between the 1st and 2nd house equally, who both have their homesteads thereon hence the 2nd house would be disinherited if the parcel is left to the 1st house along.



6. The fourth prayer is that this court do make a determination as to the distribution of funds held with the Public Trustee, in the sum of Kshs.504,607.45 as he court did not in distributing the estate of the deceased, pronounce itself on the mode of distribution of the funds held with the Public Trustee.
7. The Applicant asserts that there are errors apparent on the face of the record in the impugned ruling which give sufficient grounds for the court to review its Ruling on distribution of the deceased's estate so that a redistribution of the property to both houses be carried out.
8. The application is further supported by an affidavit sworn by the Applicant herself reiterating the prayers and grounds thereof and urging this court to grant the prayers sought.
9. The application is opposed by the 1st Administratrix Jesca Atieno Oyola who swore a replying affidavit on 11th April 2023 deposing that prior to the deceased's demise, the Applicant herein was not a resident and had not been a resident on the parcel No. Gem/Nyamninia/456 for a number of years.
10. That the Applicant enjoys vexing the Respondent/1st Administrator and her family and that the application is not made in good faith but intended to permanently exclude her peace and that the applicant and her children are not residents in the so called homestead and have never been residents there for the last two decades and that instead, she has a homestead and is established at Anduro within Siaya Township Ward.
11. That the application and supporting affidavit do not disclose or demonstrate a discovery of any new and important matter or evidence which due diligence could not have discovered and further, that no mistake nor error apparent on the face of the record is disclosed. Finally, that litigation must come to an end.
12. The Application was canvassed by way of written submission. Only the Applicant filed written submissions. The Respondent relied on the Replying Affidavit. In the written submissions, the Applicant relied on several authorities to support her prayers for review which is expressly brought under the Provisions of Order 45 of the [Civil Procedure Rules](#).
13. On the distribution of an asset not belonging to the deceased, reliance was placed on the case of *Re Estate of Malal (Deceased)* (2019) eKLR where the court held that such asset as does not belong to the deceased is not available for distribution to the deceased's rightful heirs hence, it must be expunged from the list of assets. Further reliance was placed on [Re Estate of Gitere Kabura](#) (2020) eKLR.
14. The Applicant therefor prays that parcel No. East Gem/Nyamninia/348 be expunged from the list of assets distributed to the beneficiaries so that this court can award another parcel, instead, to the 2nd house so that the said 2nd house is not disinherited or disadvantaged.
15. On the 2nd prayer that Land parcel described as East Gem/Nyamninia/1456 as given to the 2nd house does not exist and that the correct description is East Gem/Anyiko/1456, it was submitted that this court is empowered to correct the description under Order 45 Rule 1(b) of the [Civil Procedure Rules](#), 2010 and Rule 63 of the [Probate and Administration Rules](#).
16. On the redistribution of land parcel No. East Gem/456 between the 2nd houses equally since the two widows have their homesteads thereon, it was submitted, relying on [Scolastica Ndululu Sura v Agnes Nthenya Sura](#) [2019] eKLR citing [Mary Rono v Jane Rono & Another](#) that the court's mandate is to ensure a fair distribution of the estate of the deceased. Further, that pursuant to Rule 73 of the [Probate & Administration Rules](#), this court has inherent power to make such orders as may be necessary for the ends of justice to prevent abuse of the process of the court.



17. It was submitted that award of the family home entirely to the 1st house defeats the spirit of equitable and fair distribution envisioned by the courts of law hence this court should set aside the award of this parcel and re distribute it equally between the two houses.
18. On the Kshs.504,607.45 which is held by the Public Trustee, it was submitted that whereas the court distributed all other assets of the deceased, it did not address itself on the funds held by the Public Trustee which is still a point of contention between the two houses.
19. Reliance was placed on *Re Estate of Stanley Mbungu M'itonga (Deceased)* (2020) eKLR where the court, in similar circumstances held that the funds held by the Public Trustee be divided equally among all the deceased's surviving children.
20. The Applicant concluded on her submissions that the errors substantially prejudiced the fair distribution of the estate of the deceased between the two houses hence this court should exercise discretion and review the Ruling on distribution as rendered by Justice F.A. Ochieng (as he then was).

Determination

21. I have considered the application for review of the Ruling of 14th March 2022 and the grounds and affidavit in support, the opposing affidavit and the submissions filed by the applicant; as well as the applicable law or the subject. The main issues for determination is whether the application is merited on each of the prayers sought.
22. Before delving into the merits of each prayer, it is important to answer some legal questions that are apparent. The first question to consider is whether the *Civil Procedure Act* and Rules apply to in succession proceedings. The answer to this key question is found in Rule 63 of the *Probate and Administration Rules* which provides that:
 - “ 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.
23. The court in *John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another* [2016] eKLR cited Rule 63 of the *Probate and Administration Rules* and stated as follows regarding the applicability of Order 45 of the *Civil Procedure Rules* to the Succession matters:
 - “ As stated above, 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.”

24. Accordingly, I find that the application herein which is expressly brought under Order 45 Rules 1,2 and 3 of the Civil Procedure Rules as well as Rule 73 of the Probate and Administration Rules, is properly before the court.

25. The next important question is whether the application meets the threshold for review under Order 45 of the Civil Procedure Rules, which is the procedural provision implementing section 80 of the Civil Procedure Act.

26. Order 45 of the Civil Procedure Rules provides that:

“ 1.

(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. ...

27. Order 45 thus provides three circumstances under which an order for review can be made. To be successful, the applicant must demonstrate to the court that there has been 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. A party may also successfully apply for review, if he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.

28. The question is whether, in this case, the applicants have met any of the conditions set out in order 45.

29. It should however be noted that a mistake or an error apparent on the face of the record in the context of Order 45 of the Civil Procedure Rules will neither invite an argument nor call for a decision whether the court correctly interpreted or applied the law, as a proper forum for such arguments would be an appellate court. The Court of Appeal in National Bank of Kenya v Njau (1995 -1988) 2 EA 349 (CAK P. 253 stated as follows:

“ A review may be granted whenever the court considers that it is necessary to correct and 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 of 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 the law cannot be a ground for review.” (emphasis – added).

30. It follows from the above decision of the Court of Appeal that this court cannot purport to review the decision of the previous Judge unless there is an apparent error on the face of the record or that there is fresh evidence discovered which could not have, with due diligence, been discovered at the time when the Ruling was made; or that there is other sufficient reason that would ordinarily warrant a review of the Judgment or ruling.
31. Applying the above principles to this case, on the 1st prayer that land parcel No. East Gem/Nyamninia/348 apportioned to the 2nd house does not exist hence it was an error on the part of the court to award the same, I must first highlight that in all cases of Succession, any property listed as forming part of the estate of the deceased must be correctly described and listed in the Probate and Administration P&A 5 form filed together with the petition for grant and its estimated value given.
32. I have perused the P&A 5 dated 12th February 2014 signed by both Petitioners. I do not find any property of such description listed as East Gem/Nyamninia/348. The only place where this parcel was listed was in the objector’s written submissions listing it as a property in the second category acquired in 2007 but no certificate of official search was availed to demonstrate that the property was registered in the name of the deceased. That property by description is not even found in the Affidavit of counterproposal to the mode of distribution filed by Jessica Atieno Oyola sworn on 6th April 2021. I however observe that there is a property which was described variously at different times which in the objector’s submissions is East Gem/Nyamninia/1438 and at another time Pamela Awino Miyumo describes it as East Gem/ Nyawara/ 1438 and in the Certificate of confirmation of grant it was described as East Gem/Nyamninia/1438 as awarded to the 1st house. No specific claim by the applicant has been laid to this property s described variously.a
33. In addition, apart from the summary of the Ruling and the Certificate of Confirmation of grant issued on 14th June 2022 which gives that described property to the 2nd house, the body of the Ruling itself does not provide the basis upon Parcel No. East Gem/Nyamninia/348 was listed as being part of the estate of the deceased.
34. Assuming that this property though not registered in the deceased’s name as at the time of his demise was nonetheless acquired by the deceased in 2007, and the beneficiaries herein know of this fact and wanted it to be awarded to the 2nd house, this court would have no issue as the administrators can process the title and eventually have it transferred to the second house without any issue. However, for now, as the property as described is not registered in the name of the deceased, it cannot be part of the list of assets available for distribution by the court.
35. The applicant has indeed availed copy of search certificate showing that the parcel of land known as East Gem/Nyamninia/348 does not in any way form party of the estate of the deceased and therefore its inclusion and distribution to the second house was an error apparent on the face of the record. I agree that there is an apparent error on the face of the record which error must be corrected and the correction thereof is by expunging and I hereby expunge from the list of assets of the deceased’s estate the property erroneously included in the distribution and described as East Gem/Nyamninia/348.
36. Having so expunged the said property from the list, although the Applicant asks this court to award her another parcel of land in the place of the expunged property, I am unable to find any legal or factual basis for the prayer as it has not been shown that the awarding to her by the court of the property which



was not part of the list of assets available for distribution did disinherit or prejudice her in any way. I say so because as at the time that this property was listed in the proposals for distribution of the estate of the deceased by the objector, no official search was availed to show who the registered owner thereof was. The inclusion of that property in the distribution therefore, was in my view, a slip of the pen by the learned judge and is amenable for correction by way of deletion and not to be interpreted to mean that the inclusion thereof had the effect of disinheriting the applicant.

37. This is fortified by the fact that the learned Judge did give reasons why he awarded the respective houses and beneficiaries the respective assets and there was no reason given for the award of this non-existent asset to the 2nd house.
38. Accordingly, I only allow the 1st limb of the prayer and expunge the asset from the list and certificate of confirmation of grant.
39. On the second prayer that Land Parcel No. East Gem/Nyamninia/1456 be corrected to read East Gem/Anyiko/1456, as the description was erroneous and that the described parcel does not exist, there is no dispute that the property listed as forming part of the estate of the deceased is East Gem/Anyiko/1456 and assigned to the 2nd house, as per the proposed mode of distribution and in P&A 5 dated 12th February 2024.
40. Accordingly, I find that the description by the court in the impugned Ruling was erroneous. The same is reviewed and corrected to read East Gem/Anyiko/1456.
41. On the 3rd prayer that the award of land parcel No. East Gem/Nyamninia/456 wholly to the 1st house to the exclusion of the 2nd house was erroneous as the 2nd widow has a house on it hence it should be redistributed equally between the 2 houses to avoid disinheriting the 2nd house, I have considered that prayer and obviously, the applicant is challenging the merits of the Ruling which awarded the asset to the 1st house exclusively. She is claiming that her homestead is also on this land. That prayer is vehemently opposed by the Respondent who swore an affidavit deposing that the Applicant has her own homestead elsewhere in Anduro, Siaya Township Ward.
42. On whether the award of the property in question which is a homestead, to the 1st house was by mistake or an error apparent on the face of the record and therefore capable of being reviewed through a redistribution by this court at this stage, In *Muyodi v Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243 the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record and stated as follows:

“In *Nyamogo & Nyamogo v Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is 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 long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal.”[emphasis added]

43. The Court in the above case accorded no particular definition for an error apparent on the face of the record, stating that it would vary with each particular case. However, in an earlier Tanzanian case of



Chandrakant Joshibhai Patel V R (2004) TLR, 218, it was held that an error stated to be apparent on the face of the record:

“...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions”.

44. In my view, that prayer for re distribution of the asset is not one that can amount to mistake or an error apparent on the face of the record or even a discovery of a new or important matter nor is there sufficient reason for that prayer. It is an issue of the merits of the decision of the Judge which cannot be reviewed by this court. If the Applicant was aggrieved by the decision of the Judge, she had the opportunity to appeal with leave of the court and not to seek for review simply because this court is likely to give a different decision from what the previous judge exercising competent and concurrent jurisdiction as this court gave. I find the prayer not fitting in the realm of review. I decline it and dismiss it.
45. On the fourth prayer for distribution of the funds held with the Public Trustee being Kshs. 504,607.45, the Respondent was silent on this aspect and I observe that apart from Kshs.700,000 which Donald is said to have received from the Public Trustee, nothing else was mentioned about there being any balance of the funds held by the Public Trustee. However, the Applicant has annexed to her supporting affidavit a statement issued by the Public Trustee showing that the deceased's estate as at 1st February 2023 had Kshs. 504,607. 45 after paying Kshs. 650,000 to Donald Otieno Oyola minus administration expenses.
46. As the funds held by Public Trustee form part of the estate of the deceased, and considering that cash at bank, pension and gratuity though the source not disclosed were distributed equally between the two houses and as Donald already received his share of Kshs.650,000/= and land parcel No. East Gem/ Nyamninia/1130, I allow the prayer for review and order that the Kshs.504,607.45 held by Public Trustee shall be included in the list of assets available for distribution to the 2 houses and shall be shared equally between the two houses.
47. In the end, this application for review substantially succeeds as stated above.
48. Consequently, the Ruling of 14th June 2022 on distribution of the estate and confirmation of the grant is reviewed and is set aside and substituted with the order expunging from the assets property known as East Gem/Nyamninia/348; correctly describing the asset East Gem/Anyiko/1456 instead of East Gem/ Nyamninia/1456 and inclusion of funds Kshs.504,607.45 held by the Public Trustee in the list of assets and distributing it equally between the 2 houses.
49. For the above reasons, a fresh rectified and amended Certificate of Confirmation of grant shall issue with the above amendments.
50. As nothing else is pending, subject to the administrators complying with the provisions of section 83 of the *Law of Succession Act* on giving an accurate and true account of the estate administration within six months of today, this file is closed.
51. Each party shall bear their own costs of this application.
52. I so order

Dated, Signed and Delivered at Kisumu this 26th Day of June, 2023

R. E. ABURILI

JUDGE

