



REPUBLIC OF KENYA



**Kihoria v Biruri; Maina (Interested Party) (Succession Cause  
113 of 2006) [2023] KEHC 22827 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22827 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 113 OF 2006  
RN NYAKUNDI, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**ROSEMARY WANGARE KIHORIA ..... APPLICANT**

**AND**

**MARGARET NJERI BIRURI ..... RESPONDENT**

**AND**

**PETER RUO MAINA ..... INTERESTED PARTY**

**RULING**

1. By a Notice of Motion dated 21<sup>st</sup> December, 2022 the Applicant Rosemary Wangare Kihoria, seeks the following orders:
  1. Spent.
  2. Spent.
  3. That the judgment of the Court dated 30<sup>th</sup> September, 2021 be reviewed, varied and or set aside.
  4. That the Court may make such orders as it deems fit and expedient to grant.
  5. That costs be provided for.
2. The application is premised on the grounds therein and it is further supported by the affidavit of Rosemary Wangare Kihori dated the same date.



## The Applicant's Case

3. The Applicant deposed that she is the 2<sup>nd</sup> Wife of the deceased herein. That their marriage was blessed with three issues namely;
4. The Applicant further deposed that she was sued by one Peter Ruo Maina and the Respondent herein. Subsequently, the parties herein went for mediation vide Mediation Cause No. 55 of 2021.
5. The Applicant maintained that as a result of the said mediation, an alleged settlement was arrived which was later adopted as the judgment of the Court. She later applied for review so as to correct information about a plot number.
6. The Applicant contends that she still aggrieved as she may have not been able to vindicate her issues through the firm of M/s Songok Advocate.
7. The Applicant further deposed that she and the deceased had established their matrimonial home in Kanyanyaina Location 9/934 before shifting to Uasin Gishu way back in 1959 where she joined her co-wife and the deceased at Kambi Somali. She later moved to Lemock Yamumbi where she lived in one Muzungu's house for seven (7) years and because the farm was bought, she later moved to the new matrimonial home that was established in Uasin Gishu/Block 14 (Chaania) 1543 measuring 6 acres.
8. The Applicant further deposed that the deceased lived with his two wives on the said farm until his death and was also buried thereon. The Applicant also maintains that the fact that title deed is in her co-wife's name does not disinherit her from her matrimonial home.
9. The Applicant further raises issue with the conduct of the mediator herein Mr. Magare (now judge). She alleges that he didn't listen to her protests during the said process.
10. The Applicant also raises issue with parcel of land located in Murang'a Kanyanyaine Location 9/394. She maintains that the same is her home land and that sale to one Peter Ruo Maina was illegal and should be declared so. The said farm the Applicant maintains was sold by one of the daughters belonging to the 1<sup>st</sup> house was even subject to Court proceedings which rendered the said sale null *ab initio*. The Applicant accuses the mediator for bringing back the said Peter Ruo Maina to the proceedings herein whereas the decision by the High Court regarding the said sale has never been set aside, varied or reviewed. The Applicant maintains that the property herein belongs to the deceased's estate and thus open for distribution as such.
11. The Applicant further deposed that in the second mediation agreement the property known as Eldoret Municipality Block 14/1609 was given to the second house which does not exist in the registry map and has no title.
12. The Applicant maintains that the property known as Nakuru Bahati Wendo Block 1/128 measuring 10 acres belongs to both houses with each house entitled to 5 acres. The Applicant does not dispute Wanjiku Kaigwara 1 acre share in the estate. The Applicant further maintains that the 4 acres in Nakuru ought to be shared equally between the two households. The Applicant further contends that it was wrong for the mediator to force a comparison between the (4) plots in Nakuru and Kitale with Eldoret Municipality Block 7/103 which plot is not legally divisible.
13. The Applicant contends that property known as Eldoret Municipality Block 14 (Chaania) 1604 has a title but does not exist on the ground and in the map. The Applicant further contends that the parcel of land known as Eldoret Municipality Block 14 (Chaania)/1609 was given to the second house but was later changed to 1604 which ought to be shared equally between the two houses.



14. The Applicant also contends that the judgment by Hon. Justice S.M Githinji, overlooked parcel of land known as Eldoret Municipality Block 7/103, thus making it difficult for parties to seek a remedy whereof. The Applicant wants the said judgment reviewed for the said reasons.
15. With regard to parcel of land known as Eldoret Municipality Block 7/103. The Applicant maintains that it was directed in the mediation and subsequent judgment that the same be shared equally between one Mr. Biruri Bihoria and Mr. James Mwaura. The Applicant contends that the Uasin Gishu County by laws does not appreciate a 1/16 acres title in the Central Business District or anywhere within its jurisdiction and thus the title that exists is one title jointly owned by the two parties. According to the Applicant there is need to remove this kind of loophole in the judgment.
16. The Applicant further contends that during his lifetime the deceased had constructive Will that dictated how his estate ought to be distributed upon his demise. The Applicant maintains that it was the deceased's wishes that the property in Nakuru Bahati Wendo Block 1/128 be divided between the two households. That the four plots fully developed be distributed equally between the two households with each house being entitled to (2) units thereof. The Applicant is aggrieved by the decision of the mediator to keep all the (4) units of the plots herein with the first house and forcing a comparison with Eldoret Municipality Block 7/103 which was not tenable. The Applicant wants the Court to conduct a ground visit so as to appreciate the issues being raised herein.
17. The Applicant maintains the all the aforementioned properties that were given to the first house in accordance with the mediation agreement and the subsequent judgment all have title deeds unlike the parcel of land known as Eldoret Municipality Block 7/103 given to the second house,
18. The Applicant further seeks that the judgement at paragraph 23 be amended to read 6 metres and not 6 feet. The Applicant also is aggrieved with the judgement at paragraph 24 which gave the property known as block 15/1534 to the first house without an equivalent provision for the second house
19. The Applicant contends that Eldoret Municipality Block 14/1539, bare land was given to her household whereas the first house was given fully developed plots being Eldoret Municipality Block 14/1540, 1537 and 1538.
20. The Applicant is also aggrieved by the decision in view of parcel of land known as Kapsaret/Kapsaret/Block 1 (Yamumbi) 582. The Applicant maintains that the said decision was unfair to the second house. The Applicant also deposed that no direct resolution was ever arrived at on the unregistered plot in Kambi Somali. That the mediator only directed that they collect rent without any clear directives on the issue of ownership of the said plot.
21. The Applicant also alleges that she raised issue with the mediator regarding several machines that had been sold by the first house but the mediator chose to ignore her concerns.
22. The Applicant further contends that several properties forming part of the estate herein were excluded by the mediator herein and thus the judgment herein whereas they form the integral part of the deceased's estate.
23. The Applicant further deposed that there was also need to set aside properties that would cover transactional costs for processing the respective title deeds which was not done.
24. The Applicant maintains that estate of the deceased herein had been substantially been distributed by the deceased and thus the mediator's award was made contrary to the works of the deceased thus the judgment.



25. According to the Applicant, the issues raised herein are substantial issues of law that cannot be ignored as they go to the root of the law and the distribution of the estate herein. The Applicant maintains that even if the judgment herein was to be left as sound and without mitigation, certain conditions remain to be fulfilled which are not enforceable.
26. The Applicant maintains that this is not a Court of final resort and that the Court herein can therefore review its own judgment. The Applicant contends that the mediator herein was biased and thus seeks that the judgment herein be reviewed. The Applicant further maintains that although there must be an end to litigation, justice should not be erred or side-stepped.

### **The Respondent's Case**

27. The application is opposed by the Respondent vide her Replying affidavit dated 16<sup>th</sup> March, 2023.
28. The Applicant is a daughter of the deceased and a representative of the first house.
29. The Applicant deposed that the application herein is misconceived, frivolous, scandalous and an abuse of Court process for reasons that; the cause herein has been heard and determined, the issue of distribution of the estate was resolved through a mediation settlement, that a similar application seeking to set aside the mediation settlement agreement was proffered and determined by the Court *vide* its ruling of 17/5/2022 and that having made the election to review the mediation settlement agreement after its adoption by the Court as a decree, the Applicant is estopped by the doctrine of *res judicata*.
30. The Respondent contends that the Applicant herein has already taken advantage of the decree of this Court by taking over her share of the estate but is by design frustrating the heirs from the first house from taking over their shares and utilizing them.
31. The Respondent maintains that the complaint against the Interested Party herein and what was awarded to him was similarly settled by the ruling of this Court that was issued on 17/5/2022 which the Applicant has never reviewed or appealed against.
32. The Respondent deposed that by her conduct of filing endless applications, the Applicant is frustrating the members of the first house and rendering the implementation of the Court's grant and the Confirmation Certificate impossible.
33. In view of each of the beneficiary's share being known, the Respondent urged the Court to demand that the estate herein be wound up.

### **Analysis & Determination**

34. From onset it must be noted that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.
35. In *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR the Supreme Court summarized the principles for an application for review as follows: -
  - 66.

- (31) Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:



- (i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.
- (ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- (iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- (iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- (v) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- (vi) The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
  - (a) as a result a wrong decision was arrived at; or
  - (b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

36. The High Court has a power of review, but such power must be exercised within the framework of Section **80** *Civil Procedure Act* and Order **45** Rule **1**. Section **80** of the *Civil Procedure Act* provides as follows: -

80. 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

37. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows: -

45 Rule 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”



38. A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds-
- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
  - (b) on account of some mistake or error apparent on the face of the record, or
  - (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.
39. The Applicant has stated array of issues which she found to be unsatisfactory in the said judgment that she wishes that they be reviewed by the Court herein. From the Applicant’s averments there is no doubt that the issues she raises surrounded the distribution of the estate herein. A cursory look at the said issues clearly indicates that the Applicant was not pleased with the outcome of the mediation settlement therein.
40. In my view if the Applicant was dissatisfied with the mediation settlement agreement and the subsequent adoption by the Court as its judgment, she should have instituted an appeal instead of filing this instant application.
41. The grounds cited herein clearly do not qualify to be grounds for review to bring the Applicant’s application within the ambit of the grounds specified in Order 45 Rule 1. Nothing in case law and legal text calls for any other conclusion in answer to the issues raised by the applicant save to decline the remedies under review jurisdiction of this court. As to the length of the period for which this probate has been left to circulate within our legal system is to say the least not a quest for justice. There is obvious attraction for dependants and beneficiaries to continue agitating for equal or equity rights to the intestate estate but it is all a limitation argument and not in accordance with those provisions on distribution in the succession act. It seems to me that the analysis advanced by the applicant runs into severe difficulties given the various decisions made by High Court on this same subject matter. I respectively take issue with the scheme of litigating and re- litigating of probate matters fashioned as a new cause of action whereas the issues are substantially the same. In the present case there is no action worthy to be inked by this court in the form of a remedy. The consequential order in regard to this individual motion is to have it dismissed in its entirety with costs to the respondent

**DELIVERED, SIGNED AND DATED AT ELDORET THIS 27TH DAY OF SEPTEMBER 2023**

.....

**R. NYAKUNDI**  
**JUDGE**

