



In re Estate of Dorcas Wairimu Ngure (Deceased) (Succession Cause 90 of 1998) [2023] KEHC 22569 (KLR) (25 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22569 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 90 OF 1998
RN NYAKUNDI, J
SEPTEMBER 25, 2023
IN THE MATTER OF THE ESTATE OF DORCAS WAIRIMU NGURE (DECEASED)
AND
IN THE MATTER OF APPLICATION FOR REVIEW OF RULING OF
HONOURABLE JUSTICE R. NYAKUNDI DELIVERED ON 24/4/2023**

BETWEEN

DAVID KIBUTHIA NGURE 1ST PETITIONER

SAMUEL IKUNDO NGURE 2ND PETITIONER

AND

GADSON NGURE KAMAU RESPONDENT

RULING

1. By a Notice of Motion dated 23/5/2023, the Objector/Applicant seeks orders that:
 1. Spent.
 2. Spent.
 3. This Honourable Court be pleased to review and/or set aside its Ruling and Order of 24/4/2023.
 4. Upon granting prayer (3) above this Honourable Court be pleased to issue directions and /or finding in regards to the Applicant's summons for revocation of grant dated the 24/6/2021 as the Court may deem fit and just in the interest of justice.
 5. That costs of this application be in the cause.



2. The application is premised on the grounds therein and is further supported by the affidavit sworn by Gadson Ngure Kamau on 23/5/2023.

The Objector's/Applicant's Case

3. The Applicant deposed that vide Summons for Revocation and or Annulment of Grant dated 24/6/2021, he applied for the revocation of the Amended Grant of Letters of Administration intestate granted to the Respondents herein on 1/11/2006, confirmed on the 22/5/2007 and amended on the 21/7/2014.
4. The Applicant further deposed that he made the said application in respect of the estate of his late mother one Florence Njeri Ngure who was a beneficiary in the estate herein.
5. The Applicant contends that at paragraph 4 of his Affidavit in support of the said Summons for Revocation, he had stated that he had obtained the grant of representation of the estate of his mother. However, the Court vide its ruling of 24/4/2023 found that he did not have locus to apply for the revocation of grant on behalf of the estate of Florence Njeri Ngure for reasons that he had not yet applied to an administrator of the estate of the said Florence Njeri Ngure. The Applicant maintains that vide Eldoret High Succession Cause No. 54 of 2005; In the Estate of the late Florence Njeri Ngure, he had applied for and obtained the Certificate of Confirmation of Grant to the estate of Florence Njeri Ngure. That however at the time of filing the Summons for Revocation of Grant, his Advocate Mrs. Linah Kigen (now deceased) informed him that she could not obtain the Certificate of Confirmation of Grant issued to him since her efforts to obtain a copy from the Court's registry turned futile as the registry officials kept informing her that the file could not be traced.
6. The Applicant further deposed that upon the demise of his then Advocate, Mrs. Linah Kigen, he instructed the firm of Kigen W.J & Co. Advocates to take over matter. The Applicant added that his current Advocate on record has since obtained the Certificate of Confirmation of Grant that was issued to him with respect to his late mother's estate.
7. The Applicant maintains that at the time of filing the Summons for Revocation of Grant, he could produce the Certificate of Confirmation of Grant with respect to the estate of Florence Njeri Ngure due to circumstances that were beyond his control.
8. According to the Applicant, there is an error apparent on the face of the record by the Court for having not considered the fact that he had indicated that he had obtained letter of representations with respect to the estate of Florence Njeri Ngure.
9. The Applicant further deposed that in line with Order 45 Rule 1 and 2, this Court is clothed with the jurisdiction to review its orders.
10. The Applicant maintains that he stands to suffer great loss and prejudice should this application be disallowed.
11. The application is opposed.

The Respondents' Case

12. The Respondents opposed the application vide the affidavit sworn by David Kibuthia Ngure on 29/6/2023.
13. The Respondents contend that this instant application is an afterthought, mischievous and an abuse of the process of this Court.



14. According to the Respondents most of the Applicant's averments are complete falsehoods cleverly designed to mislead this Court into falling prey to the Applicants' selfish and unfounded demands.
15. The Respondents' deposed that one Jacob Kangombe left behind 44 acres to be distributed between Dorcas Wairimu Ngure and Silva Wambui Ngure in the ratio of 25: 20 acres respectively. That after going to the Land Control Board Dorcas Wairimu was allotted 26.5 acres and Silvia Wambui Ngure was allocated 18 acres. The Respondents further deposed that Dorcas has never had 80 acres of land and that the Applicant has no tendered any evidence of the same.
16. The Respondent's further deposed that before her demise, Dorcas Wairimu Ngure had already disposed part of the land and distributed the remaining between her children whereas Florence Njeri who is the Objector's /Applicant's mother was allocated 50 by 100 ft in (burnt Forest Settlement Scheme) and a ¼ acre in (Kapkoros Group Farm 10492 LRN). That after the demise of their mother Dorcas Wairimu Ngure they surrendered the whole parcel of land 10492 LRN (Kapkoros Group Farm) to the Objector/Applicant herein as part of his inheritance.
17. The Respondents further deposed that their late sister Florence Njeri Ngure sold her share of land Plot Number 6/48 Burnt Forest Township to Kamau Muiruri. That their late mother was Dorcas Wairimu Ngure was buried in her estate while Florence Njeri Ngure who is also deceased was buried elsewhere since she was a married woman.
18. The Respondents admit that the late Florence Njeri Ngure was one of the beneficiaries of the estate herein but contend that she was not an administrator and that she had already gotten her share before the demise of deceased and that there is no grant indicating that she was supposed to receive (4) acres.
19. According to the Respondents' the Objector's/Applicant's exhibited marked as GNK-1 is null and void since it is unknown to them and that the Objector is a son to the late Florence Kamau Ngure and cannot be an administrator in the estate herein as he is a grandson to the deceased and the deceased's children are still alive.
20. The Respondents want the ruling by this Court to be upheld.

Analysis and Determination

21. From onset it must be noted that the power of review is available only when there is an error apparent on the face of the record.
22. For purposes of clarity 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.
23. Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -
 - 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.”
24. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows: -



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.”

25. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR it was held: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it 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 unreasonable delay.”

26. *Sarder Mohamed v. Charan Singh Nand Sing and Another* (1959) EA 793 where the High Court held that Section 80 of the [Civil Procedure Act](#) conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

27. Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608, had this to say:-

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

28. In *Tokesi Mambili and others Vs Simion Litsanga* the Court held as follows: -
 - i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.



- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.
29. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -
- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
30. In the present case, the Applicant wants the Court to review its ruling delivered on 24/4/2023 wherein the Court held that the Objector had no locus to apply for the revocation of grant on behalf of the estate of his mother Florence Ngure as he had not applied to be an administrator in his mother's estate. For this reason, the Applicant contends that there is an error apparent on the face of the record as he had stated in the affidavit in support of the Summons for revocation dated 24/6/2021 that he had obtained the grant with respect to his late mother's estate. The Applicant further contends that due circumstances that were beyond his control at the time he could not produce the Certificate of Confirmation of Grant with respect to his mother's estate at the time of filing the said Summons for



Revocation. The Applicant maintains that at the time his then Advocate could not obtain a copy of the said Certificate but the same has now since been obtained by his current Advocate on record.

31. I have carefully perused the impugned ruling and it is clear that the Court herein observed as follows;

“Being a grandchild of the deceased, in order to determine whether he has locus in this matter, the provisions of section 29 and 28 of the Law of Succession Act provide as follows;

28. In considering whether any order should be made under this part, and if so what order, the court shall have regard to -

- (a) The nature and amount of the deceased's property;
- b) Any past, present or future capital or income from any source of the dependant;

29. For the purposes of this Part, “Dependant” means –

- a) , and the children of the deceased whether or not the wife or wives, or former wife or wives maintained by the deceased immediately prior to his death;
- b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

The Objector had not provided anything to show that he meets any of the above requirements therefore cannot purport to have been excluded as a beneficiary of the estate.”

32. In view of the foregoing, it is clear that the Applicant herein did not have anything to show that he met the prerequisites of being classified as a grandchild for purposes of Succession. From onset I must mention that parties are bound by their pleadings and it is trite law that he who alleges must always prove. At the time of filing the Summons for Revocation of Grant herein the Applicant did not have anything to show that he had locus to sue of behalf of the estate of the late Florence Njeri Ngure. Save for mentioning in passing that he had obtained the grant of representation of the estate of his late mother he did not tender any evidence to that effect. At this particular juncture it is noteworthy to mention that Courts are not in the business of prosecuting matters on behalf of litigants and that litigants have the sole responsibility of prosecuting their case.

33. Does the Certificate of Confirmation of grant in this matter thus qualify as discovery of new and important matter or evidence which was not within Applicant's knowledge or could not be produced at the time when the order to be reviewed was made. The answer to that in my view is no, from the Applicant's pleadings it evident that the issue of the Certificate of Conformation was well within the Objector's knowledge and thus cannot qualify as discovery of new and important matter or evidence within was not within his knowledge.



- 34. In the end, the Applicant has failed to demonstrate that there was mistake or error apparent on the face of the record and/ or any sufficient reason to enable this Court review/ or set aside its ruling delivered on 24/4/2023.
- 35. Accordingly, the Applicant’s application dated 23/5/2023 is without merit and is hereby dismissed with costs to the Respondents.
- 36. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF SEPTEMBER 2023

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R. NYAKUNDI
JUDGE

