



**In re Estate of Owiti Olala (Deceased) (Succession Cause 435 of 2015)
[2023] KEHC 24277 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
SUCCESSION CAUSE 435 OF 2015
KW KIARIE, J
OCTOBER 24, 2023**

BETWEEN

**MAURINE ADHIAMBO (SUING ON BEHALF OF ATIENO
OWITI) APPLICANT**

AND

ROSE ANYANGO MAENDE RESPONDENT

AND

JARED MOENGA MAKORI INTERESTED PARTY

RULING

1. Jared Moenga, the interested party moved the court by way of Notice of Motion dated April 4, 2023 under order 45 rule 1 (a) order 51 rule 1 of the [Civil Procedure Rules](#) and sections 3, and 3A of the [Civil Procedure Act](#). He is seeking the following orders:
 - a. That this honorable court be pleased to certify this Application urgent and hear the same *ex parte* in the first instance.
 - b. That this honorable court be pleased to grant a stay of execution of the orders emanating from its Ruling delivered on March 9, 2023 pending hearing and determination of this application.
 - c. That this honorable court be pleased to enjoin the interested party/applicant in this suit.
 - d. That this honorable court be pleased to review her Ruling delivered on March 9, 2023 with a view of pronouncing itself on the entitlement of the interested party/applicant who is an innocent purchaser for value and who procured registration and title for LR West Kasipul/Kodera/Karabach/19xx out of LR number West Kasipul Kodera/Karabach/xxx.
 - e. That costs of and incidental to this application be provided for.



- f. That this honorable court be pleased to grant any other or further relief as it may deem fit to grant in the interest of justice.
2. The application was based on the following reasons:
 - a. That there is a mistake apparent on the face of the record in that, though the evidence was adduced in court to the effect that “a stranger” had procured registration and title for LR number West Kasipul/Kodera/Karabach/19xx, as an innocent purchaser and good consideration which he paid to the petitioner/respondent, who was at all relevant and material times of the sale and transfer transactions, the duly registered proprietor of LR number West Kasipul/Kodera/Karabach/8xx, The honourable court never made any procurement [sic] in relation to the entitlement of the interested party/applicant and/or his registration and the title he was duly issued and/or the consideration he paid to the petitioner/respondent and/or the obligation of the petitioner/respondent and/or the administrator of the estate of the deceased to the interested party/applicant as a *bona fide* purchaser for good consideration.
 - b. That the interested party/applicant bought a distinct, clearly delineated parcel of land and subsequently proceeded to follow all due processes in procuring registration and Title for his land including carrying out a search for the land which he found to be in the name of the petitioner/respondent, making applications to the land control board for consent for both subdivision and later for transfer and executing a transfer leading to acquisition of registration as proprietor and issuance of a Title Deed for his land LR Number West Kasipul Kodera/ Karabach/19xx.
 - c. That as an innocent purchaser for good consideration, the interested party applicant is entitled to partake in the distribution of estate if the deceased as the petitioner/respondent indulged in transfer transactions as a duly registered proprietor of the parent land and the interested party/ applicant had no way of knowing of any other entitlement in respect of third parties including the objector/respondent as there was no notice of any interest or right.
 - d. That the interested party/applicant believes and pleads that he should not suffer for mistakes which could have been resolved after Gazettement in respect of the instant succession was made and/or before the petitioner/respondent became the registered proprietor of the land comprising the estate of the deceased LR number West Kasipul Kodera/Karabach/8xx.
 - e. That at the time of purchasing his LR No Kodera/Karabach/19xx, LR.West Kasipul/Kodera/ Karabach/8xx had no encumbrance or restraint, at all, that could have served as a notice to the interest party/applicant.
 - f. That it is proper, fit, just, fair, reasonable, necessary and in the interest of justice to grant the orders sought herein considering the circumstances of all the matters.
3. Pursuant to the impugned ruling dated March 9, 2023, Rose Anyango Maende has filed an application for the confirmation of the grant and indication she was satisfied with the ruling.
4. Order 45 Rule 1 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.
- (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.
5. When applying for review to a court, it is crucial to clearly state the grounds for the review in the Notice of Motion. This requirement was emphasized by the Court of Appeal in the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR. Failure to do so will result in the application being dismissed. The Court stated that proper disclosure of the grounds for review is essential for a party to convince the court that the application is valid. This is what the Court said:
- On an application for review, it is particularly necessary that the application should disclose in the body of the Notice of Motion the ground or grounds on which the review is being sought.
- Although this in our view was a fatal omission, yet in the broad interest of justice we asked Mr Njuguna to say on which ground under Order XLIV he had argued the said Notice of Motion in the superior court and he replied that he had sought the review on the ground that there was a mistake or error apparent on the face of the record of the superior court.
- In the instant case, the applicant has not indicated which ground or grounds he is pegging his application for review as envisaged under order 45 1 (b) of the *Civil Procedure Rules*.
6. Secondly, it is important to note that the applicant was not involved in the subject matter of the disputed ruling. Despite requesting to be included as an interested party, it would have been more appropriate for him to seek party status before submitting the review application.
7. Assuming that the applicant was a party or had been given leave to be enjoined as an interested party, a review has a very narrow opening to address 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. A review does not entertain new issues which had not been canvassed before the order was made. In the instant application, the applicant has introduced entirely new issues.
8. The gist of the impugned ruling was that one of the beneficiaries had been left out in the distribution. This is why a fresh distribution was ordered. If any party was aggrieved by this finding, the recourse was to appeal. Since the applicant herein was not a party, he could equally not appeal. His claim lies elsewhere. I need not say more.
9. I therefore dismiss the application with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF OCTOBER, 2023.

KIARIE WAWERU KIARIE



JUDGE

