



In re Estate of Margarita Mwita Machera (Deceased) (Succession Cause 595 of 2014) [2023] KEHC 26691 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26691 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
SUCCESSION CAUSE 595 OF 2014
RPV WENDOH, J
DECEMBER 20, 2023**

BETWEEN

GATI MAROA WANGERA 1ST OBJECTOR

ESTHER MBONE 2ND OBJECTOR

AND

LUCAS MWITA MACHERA 1ST PETITIONER

NYANSWI MWITA HABABU 2ND PETITIONER

RULING

1. The Notice of Motion for determination is dated 2/7/2022. The application has been brought by Gati Maroa Wangera and Esther Mbone (the applicants). They seek the following orders: -
 - a. Spent;
 - b. That this court be pleased to correct the evident error arising from an accidental omission in the order dated 7/6/2022 and/or judgement dated, signed and delivered 26/5/2022;
 - c. That upon grant of prayer no. 2 above, the court proceed to correct paragraph 3 at page 8 of the judgement dated 26/5/2022 to read “the deceased had 1/5 share in the parcel of land L.R. Bukira/Buhiringera/101 in lieu of L.R. Bukira/Bwisaboka/221 and/or include the orders requested in the county surveyor’s letter dated 30/5/2022 and filed in court on 19/7/2022 in the court orders dated 7/6/2022;
 - d. Costs of this application be in the cause.
2. The application is based on the grounds on its face and is supported by the affidavit of Charles Mogire Ayienda, Counsel for the applicants. Counsel deposed that the estate of Margarita Mwita Machera (the deceased) comprise 1/5 share of L.R. Bukira/Buhiringera/101 and not L.R. Bukira/Bwisaboka/221



- as indicated in this court's judgement of 26/5/2022; that L.R. Bukira/Buhiringera/101 has not been subdivided into five equal portions each for the registered owners including the 1/5 share of the estate of the deceased; that this court ordered that the County Surveyor do visit the land and subdivide it.
3. It was further deposed that the County Surveyor may not implement part 4 of this court's orders for the reasons stated in the County Surveyor's letter of 30/5/2022; that unless the County Surveyor's concerns are included in the court order dated 7/6/2022, he may not be able to fully implement the same as ordered; that the respondents will not suffer any prejudice if the application is allowed as prayed.
 4. The application was opposed. Joash Momanyi Nyagwencha, Counsel for the respondents filed a replying affidavit dated 21/9/2022. Counsel deposed that the respondent has preferred an appeal by filing a Notice of Appeal; that to review the judgement, will be akin to writing a new judgement; that it is because of the said errors that his clients have preferred an appeal; that subdividing the suit land into five (5) portions was not a prayer by any of the parties in this suit; that registration of the five (5) portions will be granting new orders; that what is proposed by the County Surveyor who was not a party to this suit, is trying to write a judgement on behalf of the court; that there is no error apparent on the face of the judgement to be reviewed; that the estate in question is that one of the deceased and not others hence the court has to restrain itself from other persons' estates or properties. Counsel further submitted that the order of 7/6/2022 is not annexed to the application.
 5. Both parties filed their respective submissions. The applicants filed in court their written submissions dated 7/6/2023 on 9/6/2023. It was submitted that this court's judgement delivered on 26/5/2022 has an error apparent on its face regarding the particulars of the land parcel number from which the estate of the deceased emanates; that the suit parcel of land is referred to "221" in lieu of "101." It was stated that part 4 of the court's orders dated 7/6/2022 may not be executed and/or implemented by the County Surveyor Migori County without this court's further orders.
 6. The applicants submitted that their application is for correction of an apparent error on its face and this court is seized with the discretionary powers to grant the orders; that the orders being sought are crucial in implementation of part 4 of this court's orders. It was further submitted that there is no stay of execution of the orders pending the determination of the intended appeal. The applicants asked this court to grant the orders as prayed.
 7. The respondents filed in court their written submissions dated 29/6/2023 on 6/7/2023. The respondents submitted that the applicants have invoked the provisions of Sections 99 and 100 of the *Civil Procedure Act*; that the applicants are asking the court to issue orders that were not prayed for; that the issues require argument and deliberation and not mere correction of an error on the judgement; that the applicants want the court to have L.R. Bukira/Buhiringera/101 subdivided into five portions; that this was not part of the issues raised in the case and such an issue cannot be raised in the disguise of seeking clarification of an error pursuant to Section 99 of the *Civil Procedure Act*.
 8. It was further submitted that the estate of the deceased comprises of 1/5 of L.R. Bukira/Buhiringera/101 and an order to subdivide the entire portion is introducing new issues and parties to the case. It was contended by this court making a determination on what was proposed by the County Surveyor who was not even a party to this proceedings will amount to the applicant writing a new judgement on behalf of the court in contravention to Section 99 and 100 of the *Civil Procedure Act*. The respondents urged that the application dated 26/7/2022 is not merited and it should be dismissed with costs.
 9. I have carefully considered the application, the response thereto and the written submissions by both parties.



10. An application for review of this court's judgement is anchored under Section 80 of the [Civil Procedure Act](#) which allows a party who is aggrieved by a judgement to apply to the court for review. Section 99 of the [Civil Procedure Act](#) limits the trial court to amend and/or review its judgement where there are clerical or arithmetical mistakes in judgements, decrees, or orders, or errors arising from any accidental slip or omission.
11. Order 45 Rules (1) and (2) of the Civil Procedure Rules sets out the grounds upon which an application for review will be founded. They are as follows: -
 - a. A decree in which no appeal is allowed;
 - b. There is discovery of new and important matter which after exercise of due diligence was not within the applicant's knowledge;
 - c. There was a mistake or an apparent error on the face of the record;
 - d. There are other sufficient reasons;
 - e. The application must be made without unreasonable delay.
12. The land parcel in dispute in this succession cause was Land Parcel No. Bukira/Buhiringera/101 (suit land). The title of the suit land is clear that the deceased held 1/5 share. This was the finding of this court which has not been varied and/or set aside.
13. Admittedly, at page 8 paragraph 3 of this court's judgement, this court held:-

“ the deceased had 1/5 share in the suit parcel of land L.R. Bukira/Bwisaboka/221”
14. The above finding was a slip and/or a clerical error on the part of this court. I have understood that this is what the applicants want to be rectified and it is prayer no. 3 in their application. Section 99 of the [Civil Procedure Act](#) allows for correction of clerical errors in judgements and this is one of those instances. The judgement of this court dated and delivered on 26 /5/2022 at page 8 paragraph 3 of this court's judgement is rectified to read:-

“ the deceased had 1/5 share in the suit parcel of land L.R. Bukira/Buhiringera/101”
15. I have considered the letter from the County Surveyor dated 3/5/2022. The County Surveyor states that for ease of implementation of this court's order number (iv) to visit the suit land and subdivide it among the two beneficiaries, he would require an amendment of the others in the following terms:-
 - i. That the County Surveyor to visit the land referred to as Bukira/Buhiringera/101 and cause partition of the said land into 5 equal portions, by way of mutation survey.
 - ii. That the County Land Registrar to register each of the new five (5) subsequent parcel numbers borne out of the partition, to their respective registered beneficiaries.
 - iii. That the County Surveyor to further cause partition of the parcel borne out of the initial partition in bullet 1, whose share is pegged on Margarita Nyamohanga Mwita - Deceased into two portions measuring 2.45 Ha each and issue new parcel numbers.
 - iv. That the County Land Registrar to cause registration of the new parcels borne out of portion in bullet 3, to the respective beneficiaries as has been determined by the court;
 - a. Gati Maroa Wangera.



b. Nyanswi Mwita Habuba

16. I have understood the above request from the County Surveyor to be in furtherance of implementing the order of subdivision of the suit land to the beneficiaries and cause registration of the respective suit parcels of land borne out of the subdivision in their respective names. I do not see how that is meant to change/amend the judgement and the resultant orders of 26/5/2022. It is not possible to determine 1/5 of the suit land without first carrying out a survey of the whole suit parcel of land. It is only the portion of the beneficiaries of the estate of the deceased that was to be subdivided further and each of them to be given their respective certificate of title. This was the import of order numbers iii and iv of this court's orders in the judgement of 26/5/2022. The request by the County Surveyor will not touch on the estate of other deceased persons as alleged by the respondents. I find that the further orders to be made on account of the County Surveyor's letter dated 30/5/2022 to be necessary.
17. I find merit in the application dated 26/7/2022 and the following orders do issue: -
- i. Paragraph 3 at page 8 of the judgement dated 26/5/2022 is amended in the following terms: -
“the deceased had 1/5 share in the suit parcel of land L.R. BUKIRA/BUHIRINGERA/101”
 - ii. The County Surveyor to visit the land referred to as BUKIRA/BUHIRINGERA/101 and cause subdivision of the said land into 5 equal portions, by way of mutation survey.
 - iii. The County Land Registrar to register each of the new five (5) subsequent parcel numbers borne out of the subdivision, to their respective registered beneficiaries.
 - iv. The County Surveyor to further cause subdivision of the parcel borne out of the initial portion in (i), whose share is pegged on Margarita Nyamohanga Mwita - Deceased into two portions measuring 2.45 Ha each and issue new parcel numbers.
 - v. The County Land Registrar to cause registration of the new parcels borne out of subdivision in (iii), to the respective beneficiaries as has been determined by the court;
 - a. Gati Maroa Wagera.
 - b. Nyanswi Mwita Habuba.
 - vi. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 20TH DAY OF DECEMBER 2023

R. WENDOH

JUDGE

Judgment delivered in the presence of

N/A for the Objectors/Applicants.

Mr. Matolo for the Petitioners/Respondents.

