



**In re Estate of Gathogo Wagacha alias Gathogo Wagacha Gathogo (Deceased)
(Succession Cause 80 of 2017) [2022] KEHC 12354 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 80 OF 2017**

CM KARIUKI, J

JULY 29, 2022

**IN THE MATTER OF THE ESTATE OF GATHOGO WAGACHA ALIAS
GATHOGO WAGACHA GATHOGO –(DECEASED)**

BETWEEN

MARY GATHONI GATHOGO APPLICANT

AND

CHRISTOPHER CAXTON GATHOGO KARIUKI RESPONDENT

RULING

1. The applicant is seeking via application dated February 21, 2021 orders of stay of orders of December 20, 2021 and enjoining of:
 - i. Peter Mungai Ngugi,
 - ii. Erick Gaitungu Mwangi,
 - iii. Elizabeth Njoki Mwangi and
 - iv. Ann Wangui Waweru.Plus, orders for reviewing and /or setting aside of orders of December 20, 2021 and costs.
2. The same is supported by grounds namely; that the applicants are a registered owners or beneficial owners of parcels No Land Nyandarua Milangine 5701, 5705 and 5699 which are subdivision of parcel No Nyandarua/Milangine 139 being *bona fide* purchaser from petitioner No 1 The orders impugned cancelled all above subdivisions of land 139 thus violated scale of natural justice and also court lacked jurisdiction to do cancel titles as court did in this case. The applicants right to properties were also violated.
3. The application is supported by affidavit of all the applicants sworn on February 21, 2022.



4. The application is opposed in a replying affidavit for Mary Gathoni Gathogo sworn on May 20, 2022.
5. The parties were directed to canvass application via submission but only applicant filed the same.

Applicant Case And Submission

6. The applicant case is that prior to orders of June 25, 2019, Wendo J ordered or directed the surveyor to partition suit land between warring parties on the ground and after she was addressed by surveyor on resultant report on survey, she made orders on June 25, 2019 in terms that:

“Having heard the surveyor; it is my view that no subdivision can be completely satisfactory to both parties. It is a matter of give and take and it should be an equitable subdivision. The surveyor considered the economical use of the land. Subdividing the land into four parts in orders for both parties to access the tarmac and the river is not economical. The subdivision will not only affect the applicant and respondent, but the future use of the land. For that reason, I am persuaded that the cross method which the surveyor had adopted is the best way to have the land subdivided. The surveyor said that there is an access road for the one who get the river side”.
7. There was no appeal and/or review of the said orders and the 1st petitioner proceeded to engage a surveyor, pay the necessary costs and further engage the Deputy Registrar in the signing of the mutation forms and eventual issuance of title deeds as per the green card supplied by the Land Registrar.
8. While all this was going on, the respondent was well aware but chose to keep off and remain uncooperative. She did not even file any complaint with the Land Registrar. However, she has ensured that the 1st Petitioner and the *bona fide* purchasers do not enjoy quiet use and possession of the legally acquired title deeds. There is even an application for injunction pending before this Honourable court and criminal cases against her children pending before the Magistrate’s Court at Nakuru over malicious damage of the purchaser’s crops of their properties.
9. All the purchasers lawfully purchased their respective portions from the 1st petitioner and they were issued with clean title deeds.
10. The orders issued on December 21, 2022 depart from the principles of natural justice for the reason that the applicants’ title deeds were cancelled without affording them an opportunity to be heard. Certainly, the applicants are interested in protecting their right own and enjoy private property and the honourable court should have considered their interests before making the drastic orders to cancel their title deeds.
11. Thus, applicants submit that, since there was no appeal to said orders of 2019, the subsequent order by this court cancelling purchasers’ titles ought to be reviewed.
12. Reliance is made on the Supreme Court case of *Hussein Khalid and 16 others v Attorney General & 2 others* [2020] eKLR stated the principles on review of a court’s own decisions as follows:
 - i. The judgment, ruling, or order, is obtained, by fraud or deceit:
 - ii. The judgment, ruling or order, is a nullity, such as when the court itself was not competent:
 - iii. The court was misled into giving judgment, ruling or order, under a mistaken belief that the parties had consented thereto:



- iv. The judgment or ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.
13. The applicants contend that the orders issued on December 21, 2021 were obtained by deceit, the court lacked the requisite jurisdiction to cancel titles and the honourable court departed from the principles of natural justice by failing to afford the applicants an opportunity to be heard.
14. Section 13(2) of the *Environment and Land Court Act* No 19 of 2011, confers jurisdiction upon the Environment and Land Court to hear and determine all disputes relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and any other dispute relating to environment and land.
15. In the present succession cause, no fraud was alleged and/or proved to warrant this honourable court to cancel the applicant's titles which were resultant of a process specifically sanctioned and supervised by honourable court. On this reliance is made on the case of *Santuzza Bilioti alias Mei Santuzza (Deceased) v Giancarlo Falasconi* [2014] eKLR where the learned judge held as follows:
- “This cannot be the case as the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased's property is being fraudulently taken away by no-beneficiaries such a where the property is being sold before a grant is confirmed”.
16. In the circumstances of this case, a decree (certificate of confirmation of grant) was issued and the estate subdivided in accordance with the direction of this honourable court with the mutation forms being executed by the Deputy Registrar as follows;
- i. Nyandarua/Milangine/5324 - 12 ½ acres - Mary Gathoni Gathogo
 - ii. Nyandarua/Milangine/5325 - 2 acres - Jane Waitherero Gichuhi
 - iii. Nyandarua/Milangine/5326 - The area forming part of the homestead (P1)
 - iv. Nyandarua /Milangine 5327 - 12 ½ Acres -Christopher caxton Gathogo Kariuki
17. Upon the issuance of the certificate of confirmation and further upon execution and registration of the Mutation Form, this honourable court became functus official. For that reason, the orders issued on December 21, 2021 were issued when this honourable court lacked jurisdiction and was *res judicata*.
18. There was no citation of any wrong doing on the part of the bona fide purchasers and their title deeds are beyond reproach. Thus, court invited to review orders issued on December 21, 2021 and pronounce itself on the legal issues herein above raised and proceed to review the said orders in the interest of justice and fairness noting the great expense that the 1st petitioner and the applicants have incurred and the irreparable damage they have been forced to bear as a result of the said orders.

Respondent case and arguments

19. The respondent case is set out in her replying affidavit .That the parcel of land registration number Nyandarua/Milangine/139 was subdivided, a forwarding letter from the Ministry of Land, physical planning clearly illustrated the subdivision and entries were made into the green cards reflecting the same .Thus, this court delivered a ruling dated April 29, 2015 cancelling all the titles arising from the subdivision of LR Nyandarua/Milangine/139 and as such the land reverted into the names of the late Gathogo Wachanga alias Gathogo Gachanga.



20. That a decree was issued which eliminated the order for the cancellation of the title arising from the subdivision. That her advocates on record did an application dated January 17, 2020 seeking for review of the ruling.
21. That court after hearing of the application issued another ruling dated February 1, 2020 wherein court directed that a decree be issued that will include an order that the title deed obtained by Caxston on December 7, 2007 was procured fraudulently and illegal and therefore cancelled.
22. That subsequently court delivered another ruling on December 20, 2021 declaring that all titles arising from subdivision of Nyandarua/Milangine/139 be cancelled and the suit land to revert to the names of Christopher Gathogo Kariuki for distribution.
23. That a report by the Ministry of lands and Physical Planning on the suit land dated June 28, 2021 as directed to the Deputy Registrar confirmed the acreage of the land and the appropriate method of subdivision among the beneficiaries.
24. That the applicants were very much aware of this suit and it, having been before this honourable court for a while, they cannot act in a manner insinuating that they have just learnt about the outcome.
25. That nevertheless, the applicants have not explained to this honourable court the reasons for inordinate delay and as such the court must not allow them benefit from their indolence.
26. That she equally informed by her advocates on record about the maxims of equity wherein she was told that equity aids the vigilant and not the indolent.
27. That this is a succession cause and the applicants cannot be made party to this suit as they are not beneficiaries to the estate of the deceased whatsoever.
28. That their claim is against the parcel of land registration number LR Nyandarua/milangine/139 wherein they claim to be the registered /beneficial owners.
29. That it is therefore apparent that this is a matter involving land which should be filed under the Land Environment Court and not under a Succession Cause.
30. That alternatively the applicants can file a suit under breach of contracts against the parties who sold the claimed property hence make it a Civil Suit.
31. That however, and without prejudice to the foregoing, the interested parties cannot be the legal owners of the alleged property as the title to the property had earlier on been cancelled hence the sellers did not have the capacity to transfer title to the applicants.
32. That the title deeds to the applicants were issued on 2020 after the ruling of cancellation of the titles arising from the suit land hence making the transaction null and void.
33. That she was not a party to the illegal transactions hence the applicants' application in this forum is incurable defective.

Issues analysis and determination

34. After going through the application, supporting and opposing affidavits, I find the issues are; whether the applicant has met the threshold for grant of orders for review and what is the orders as to costs?



35. Review of decisions of a probate court is governed by rule 63 of the *Probate and Administration Rules*, which provides as follows: -

“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.”

36. In *John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another* [2016] eKLR, the court cited rule 63 of the *Probate and Administration Rules*, and then stated as follows:

“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*.”

37. 4. It is, therefore, clear that any party seeking review of orders, in a probate and succession matter, is bound by the provisions of Order 45 of the *Civil Procedure Rules*.

38. The substantive provisions of Order 45, state 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) ...”



7. Order 45 provides for 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 successfully apply for review, secondly, 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.
8. The applicant herein grounds his application on an error or mistake apparent on the face of the record.
39. 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 vs 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.”
40. In *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR, it was said:
- “... a review may be granted whenever the court considers that it is necessary to correct an 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 for 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 law cannot be a ground for review.”
41. The court went on to say-
37. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 rule 1 of the *Civil Procedure Rules* and section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.



38. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.”
42. From the above, it is clear that the error the subject of the application ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long-drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.
43. By a ruling dated April 29, 2015 the court cancelled all the titles arising from the subdivision of LR Nyandarua/Milangine/139 and as such the land reverted into the names of the late Gathogo Wachanga alias Gathogo Gachanga.
44. By the time of order of partitioning of the land on the ground on June 25, 2019, the titles in issue had no validity as the aforesaid order of April 29, 2015 had not been impugned by the intended applicants thus as of now, they do not have valid titles nor locus to join as beneficiaries in the matter. They have no claim on estate but only as against Caxston who had purported to sell to them the estate property.
45. This court impugned ruling/orders of the December 20, 2021 were precipitated by the surveyor resultant report on the work he did on the ground. The court visited suit property in presence of the warring parties and their advocates by consent and the government surveyor who had done previous work plus Land Registrar who took the court to the width and breadth of the entire land and a subsequent report was made which informed court in issuing orders impugned.
46. The surveyor report of June 28, 2021 indicated that the fairest mode of sharing on the ground was Hybrid method (Cross-cum longitudinal method) as both sides would access tarmac road and river unlike the cross method which gave Caxston tarmac road side and Mary Gathoni Gathogo riverside which was very steep and with no access to tarmac road. This was confirmed to the court on the ground by same surveyor on June 28, 2021 during site visit.
47. For the interest of justice, the court just re-adjusted the way the sharing of the land on the ground was to be undertaken without any party being prejudiced. The applicants are at liberty to get their shares they bought from Caxston from the portions of lands which will go to his share of the estate or they enforce their contracts against him.
48. Thus, court finds no merit in the instant application and dismisses the same with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 29TH DAY OF JULY 2022.

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CHARLES KARIUKI

JUDGE

