



**Estate of Daniel Kago Macharia alias Daniel Kago alias Kago Mukore
alias Daniel Kago Mukore (Deceased) (Succession Cause 2859 of 2012)
[2022] KEHC 11259 (KLR) (Family) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2859 OF 2012
AO MUCHELULE, J
JULY 27, 2022**

BETWEEN

BLAISE MUCHINA KAGO APPLICANT

AND

GLADYS WAMBUI KAGO 1ST ADMINISTRATOR

ESTHER WANJIKU KAGO 2ND ADMINISTRATOR

MERCY NDATA KAGO 3RD ADMINISTRATOR

RULING

1. The background of this case is that the deceased Daniel Kago Macharia alias Daniel Kago alias Kago Mukore alias Daniel Kago Mukore died intestate on the September 27, 2012. He left several properties. On the basis that he left four houses and several children, a joint grant of letters of administration intestate was on June 3, 2019 issued to his three widows Gladys Wambui Kago, Esther Wanjiku Kago and Mercy Ndata Kago. They are the respondents. On March 2, 2020 a judgment was delivered distributing the estate to the beneficiaries.
2. The application at hand is dated April 4, 2022 and brought by Blaise Muchina Kago (the applicant) who is a son of the deceased with the late Jesinta Njoki Mwaura. She was the deceased's third widow. The application sought the review, variation and setting aside of the judgment. The grounds were that:-
 - a) there were pertinent issues omitted which altered the direction that the judgment took;
 - b) the right to a hearing was breached;



- c) the advocates on record opted to proceed on the basis of written submissions without the express instructions of some of the beneficiaries who wanted to be heard orally;
- d) some of the beneficiaries were ignorant of what was going and seek to be given a second chance;
- e) the estate was distributed in a biased manner and against the wishes of some family members and against the wishes of the deceased;
- f) by previous arrangement some of the beneficiaries had settled on some of the parcels which the distribution has now affected;
- g) the trial and judgment were not fair and exhaustive; and that
- h) if review is not afforded the applicant will be irreparably affected as he is being removed from parcels he had settled on.

The supporting affidavit generally reiterated the grounds.

3. The application was opposed by the 1st and 2nd respondents who, among other things, pointed out that the applicant had appealed against the judgment and unsuccessfully tried to obtain stay of the decree arising from the judgment. In the supporting affidavit by the applicant, he had alleged that the two respondents were never wives of the deceased and that, consequently, the judgment had benefitted people who were never beneficiaries of the estate of the deceased. The respondents pointed out that the parties had by consent acknowledged that the deceased had left four widows who included them. They pointed to the affidavit that the applicant had on February 4, 2015 sworn in these proceedings stating as follows in paragraph 2:-

“That I am fully aware that my late father had 4 wives as follows:-

- (a) First wife - Esther Wanjiku – 2 children
- (b) Second wife – Gladys Wambui – 3 children
- (c) Third wife – Jacinta Njoki – 4 children
- (d) Fourth wife – Mercy Nduta – no child with the deceased.”

4. I should straightaway point out that by the time of the hearing of this cause, parties knew what case each side had spelt out through pleadings. The parties were bound by their pleadings, and the court was bound to decide the cause on the basis of those pleadings, and nothing more (Independent Electoral and Boundaries Commission & another – v- another Stephen Mutinda Mule & 3 others [1014]eKLR). The applicant had committed himself to the fact that the deceased had left four widows who included the 1st and 2nd respondents, and that each had children. The judgment reflected this position in so far as the beneficiaries of the estate of the deceased were concerned.
5. The respondents in their response and written submissions to this application pointed out that at the time of the hearing of this cause each party was represented. The applicant was then represented by the firm of Irungu Mwangi, Nganga T.T & Co. Advocates. At the time directions were taken for the hearing of the cause, all counsel, including the applicant’s counsel, agreed that the dispute was going to be determined on the basis of sworn affidavits and written submissions. The parties therefore agreed on how they wanted the dispute to be heard. That agreement became a contract from which the applicant



cannot be allowed to resile. It was held in *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1982]KLR 485 that –

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”

There was no application made to set aside the consent entered into on October 7, 2011 that stated that the distribution of the estate of the deceased should proceed on the basis of sworn affidavits and written submissions.

6. The jurisdiction to review an order or judgment is provided under order 45 rule 1 of the *Civil Procedure Rules* which states as follows:-

“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.”

7. It is clear that, before filing the instant application the applicant had preferred an appeal against the judgment in question. The appeal has not been heard and determined. The provision does not allow him to do this. The applicant cannot be allowed to avail himself of the two remedies at the same time. He cannot appeal to the Court of Appeal and, while the appeal is pending determination, seek the review of the same decision before this court. In *Multichoice (Kenya) Ltd v Wananchi Group* [2020]eKLR, the Court of Appeal held that:-

“Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal.”

The appeal herein has not been withdrawn. It is pending hearing and determination.

8. What is clear is that the applicant was aggrieved by the judgment of this court. He was perfectly entitled to appeal. However, he has not come by any new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be provided by him at the time of the judgment. He has not pointed to any mistake or error apparent on the face of the record, and neither has he demonstrated any sufficient reason or ground upon which the court can order the review of the judgment delivered on March 2, 2020.
9. The result is that I dismiss the application with costs.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2022.



A.O. MUCHELULE
JUDGE

