



REPUBLIC OF KENYA



KENYA LAW

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**In re Estate of Domic Kinuthia Nunwa alias Kinuthia Noonwa alias
Kinuthia Ngongwa alias Kinuthia Nunua (Deceased) (Succession Cause
774 of 1999) [2022] KEHC 13909 (KLR) (Family) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 774 OF 1999

M THANDE, J

SEPTEMBER 23, 2022

**IN THE MATTER OF THE ESTATE OF DOMINIC KINUTHIA NUNWA ALIAS
KINUTHIA NOONWA ALIAS KINUTHIA NGONGWA ALIAS KINUTHIA NUNUA**

BETWEEN

NANCY WAMAITHA 1ST APPLICANT

VIRGINIA WAMBUI 2ND APPLICANT

AND

HANNAH MURUGI KIMANI KINUTHIA 1ST RESPONDENT

VERONICA GATHONI NGUGI 2ND RESPONDENT

PETER NJUGUNA 3RD RESPONDENT

RULING

1. The applicants herein seek by a notice of motion application dated 31.8.21, stay of execution, review and setting aside of the orders of Ougo, J. of 31.1.18. The grounds upon which the Application is premised are set out in the supporting affidavit of Virginia Wambui (Virginia) sworn on even date.
2. Briefly, the background of the matter is that Dominic Kinuthia Nunwa alias Kinuthia Noonwa alias Kinuthia Ngongwa alias Kinuthia Nunua, the deceased in respect of whom the proceedings herein relate, died on 12.10.03. The record shows that the deceased was polygamous and had 3 wives. The 1st wife Elizabeth Wanjiru had no child but took in Peter Njuguna the 3rd Respondent, a grandson of her co-wife who took care of her until her demise. The 2nd wife Mariam Wanja was blessed with 2 sons who were survived by their widows, the 1st and 2nd respondents herein. The 3rd wife Nancy Wamaitha (Nancy) was blessed with 4 children. A grant of letters of administration in respect of the estate of



the deceased was on 8.9.05, issued to the Nancy and her daughter Virginia Wambui., the Applicants herein and confirmed on 18.9.06. Pursuant to an application by the Respondents, Kimaru, J. (as he then was), in a judgment of 26.11.10, revoked the certificate of confirmation of grant and the mode of distribution therein was set aside. The court found that the family of the deceased which comprised of 3 houses, had not agreed on the distribution of the estate which was skewed in favour of the applicants' family. The learned Judge directed parties to file further affidavits indicating their preferred mode of distribution.

3. By a ruling of 31.1.18, Ougo, J. ordered that the estate of the deceased be distributed as follows:
 - i. The houses of the 2nd and 3rd wives of the deceased were to share the following properties equally:
 - Title No. Kiganjo/Kiamwangi/283
 - Title No. Ithanga/Ngelelia Block 1/240
 - 8 shares in Mathare Investments Properties Limited
 - L. R. No. 13166 (undivided share)
 - Witeithie Nguteithie Plot No. 93
 - Livestock
 - ii. Nancy Wamaitha Kinuthia to get 350 shares, dividends and bonuses in Standard Chartered Bank Ltd.
 - iii. Nancy Wamaitha Kinuthia to pay the 2nd house a sum of Kshs. 50,000/= being their share from KPLC compensation.
4. It is this order that the respondents seek to have stayed, reviewed and set aside. In her affidavit, Virginia stated that the distribution as ordered by the court will result in unequal and inequitable sharing of the properties owing to the number of units in each house. In particular, Virginia stated that Peter Njuguna, a grandson of the deceased is bound to have double inheritance. This is because he was given a portion of L. R. No. 13166 by his grandfather for taking care of him and is also a beneficiary under his mother who belongs to the 2nd house. Further, they claim that the 2nd house has 2 units namely, Hannah Murugi Kimani Kinuthia (Hannah) and Veronica Gathoni Ngugi, who are widows of the sons of the 2nd wife Miriam Wanja, who is herself deceased. The 3rd house has 5 units namely Nancy, the surviving widow and her 4 children who include inter alia, Virginia. In view of this, the distribution ordered by the court will result in a smaller and unequal share for the 3rd house. She contended that the properties should be divided into 8 equal shares in line with the provisions of section 40(1) of the [Law of Succession Act](#).
5. Virginia admits that there has been a delay in filing the present Application which was occasioned by the illness of her brother's wife who was diagnosed with cancer in 2018. In 2019, she needed a hip replacement and chemotherapy thereby depleting their financial resources which they could have otherwise spent in filing the application. She further stated that the effects of Covid-19 contributed to the challenges they already had. According to Virginia, there is good and sufficient cause for review of the said orders.
6. The Application is opposed vide a replying affidavit sworn on 14.12.21 by Veronica Gathoni Ngugi (Veronica). She averred that the Application is an afterthought and an abuse of the Court process, given that the impugned ruling was delivered almost 4 years ago. She accused the applicants of laches. The applicants have always been represented by counsel in the proceedings who was present when the



ruling was delivered. They now seek to appeal the decision through the back door. Veronica contended that the issues raised in the present Application were dealt with in the application for revocation of the grant and the proposed mode of distribution was rejected by the court.

7. Virginia further stated that after the ruling, the applicants have summoned the respondents to several forums and offices including the provincial administration to subdivide the estate in their own way. Their application for land control board consent to subdivide Title No. Kiganjo/Kiamwangi/283 into 8 equal portions contrary to the ruling of the Court was stopped by the Respondents' advocates' letter to the land control board. In view of the foregoing, the excuse given for the delay is laughable, and farfetched as the applicants have for 4 years been trying to have their own mode of distribution implemented. They have therefore come to court with unclean hands. The respondents urged that the Application be dismissed with costs.
8. The law relating review of orders is set out in Order 45 of the [Civil Procedure Rules](#) 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.
9. By dint of Rule 63 of the [Probate and Administration Rules](#), Order 45 of the [Civil Rules](#) is applicable herein, being a succession matter. Rule 63(1) provides:

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 Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (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.
10. The law allows an aggrieved party to apply for review of an order on the basis of recovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at the time the order was made. A mistake or error apparent on the face of the record is another ground upon which the court can allow review of an order. The court may also review an order for any other sufficient reason. The law further requires that an application for review, no matter the grounds, must be without unreasonable delay.
11. An order for review is discretionary and an applicant must persuade the Court that it is deserving of such order by demonstrating the elements set out in the law. In the present case, the applicants have not told the court that they have discovered any new and important evidence which was not within their knowledge or available at the time the order made. They have also not told the Court that there is a mistake or error apparent on the face of the record.
12. The court notes that the impugned ruling was delivered on 31.1.18 and the Application herein is dated 31.8.21, a period of about 3 years and 8 months. This is by no means a reasonable period, and there had



been inordinate delay, a fact admitted by the applicants. The explanation proffered by the applicants for the unreasonable delay is that their sister in law was diagnosed with cancer and her treatment depleted their resources.

13. The respondents opposed this explanation dismissing it as laughable. They provided evidence that the Applicants were actively engaged in matters of the estate during the intervening period between the ruling and the filing of the present Application. Exhibited is a letter dated 9.4.19 by the Respondents' advocates to the Chairman Gatundu Land Control Board. The letter cautions the Board against approval of the subdivision into 8 portions proposed by the applicants, of Title No. Kiganjo/Kiamwangi/283 instead of 2 equal portions as per the ruling of the court. There is also a letter by the chief of Kiamwangi location dated 8.3.21 summoning the respondents in connection with the subdivision of the said property pursuant to a complaint by the Applicants. All this was before the filing of the present Application. This evidence was not controverted by the Applicants. The activities of the Applicants are not indicative of a family preoccupied with the serious illness of one of their own and overburdened with the attendant financial obligations. Accordingly, the court finds that the reason given by the applicants for the delay in filing the present Application is hollow and rejects the same.

14. In light of the foregoing, the court cannot exercise its discretion in favour of the applicants. In this regard, I find guidance in the holding in *Aviation Cargo Support Limited v St. Mark Freight Services Limited* [2014] eKLR where the Court of Appeal the Court stated:

For the court to exercise its discretion in favour of an applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable.

15. As indicated herein, the explanation by the Applicants for the inordinate delay is not persuasive and they have also not demonstrated any efforts made to come to Court as soon as practicable.

16. Further, the Applicants have not demonstrated the existence of any of the stipulated grounds for review under Order 45 of the *Civil Procedure Rules*. What the Applicants contend is that the distribution ordered by the Court in its impugned ruling is erroneous in that it is contra to section 40(1) of the *Law of Succession Act* which provides:

Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

17. It is common ground that the deceased was polygamous. Section 40(1) stipulates that the estate of a deceased intestate shall be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children. This position was restated by the court in the case of *Irene Mabuti Gitari v Zacharia Njege Gitari* [2017] eKLR relied on by the applicants and also in the case of *Catherine Nyaguthii Mbauni v Gregory Maina Mbauni* [2009] eKLR where the Court of Appeal stated:

In the end, the view we take in the application of section 40 to the estate of the deceased is that the net intestate estate of the deceased should be shared out at the ratio 3:5 which reflects the number of units in the two houses of the deceased.



18. While the applicants' contention that the distribution as ordered by the court is inequitable may be a good ground for appeal, it cannot sustain an application for review. The issue cannot be examined by this court in exercise of its original jurisdiction and may only be examined on appeal. In so finding, I am guided by the holding in *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR where the Court of Appeal stated:

It seems clear to us that the appellant, in basing his review application on the failure by the court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus (sic) officio and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts.

19. My view is that the Application does not meet the threshold set out in Order 45 Rule 1 of the *Civil Procedure Rules* to warrant the grant of the orders sought. It follows therefore that the prayer for stay of execution of the orders in the impugned ruling and distribution of the said estate cannot be granted.

20. In the premises, and for the reasons stated, the court finds that the Application dated 31.8.21 lacks merit and the same is hereby dismissed. This being a family matter, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23RD DAY OF SEPTEMBER 2022

M. THANDE

JUDGE

In the presence of:-

.....for the Applicants

.....for the Respondents

.....Court Assistant

