



REPUBLIC OF KENYA



**In re Estate of Kamau Magu Waweru (Deceased) (Succession Cause 298 of 2006)  
[2022] KEHC 13347 (KLR) (Family) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13347 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 298 OF 2006  
MA ODERO, J  
SEPTEMBER 23, 2022**

**IN THE MATTER OF THE ESTATE OF KAMAU MAGU WAWERU (DECEASED)**

**BETWEEN**

**LUCY WANJIKU KAMAU ..... APPLICANT**

**AND**

**JAMES KAIRANGA GATHIGI ..... RESPONDENT**

**RULING**

1. Before this Court for determination is the summons dated 25<sup>th</sup> July 2021 by which the Applicant Lucy Wanjiku Kamau seeks the following orders:-
  - “1. THAT the order of January 15, 2019 be reviewed and set aside and/or vacated.
  2. THAT the cost of this application be provided for.”
2. The application which was premised upon order 45 *Civil Procedure Rules*, Rule 49 and 73 of the *Probate and Administration Rules, Law of Succession* Cap 180 Laws of Kenya, was supported by the affidavit of even date sworn by the Applicant.
3. The Respondent James Kairanga Gathigi opposed the application through his Replying Affidavit dated August 10, 2021. The Application was canvassed by way of written submissions. The Applicant filed the written submissions dated May 17, 2022 whilst the Respondent relied upon his submissions dated June 2, 2022.



## Background

4. This succession cause related to the estate of Kamau Magu Waweru (hereinafter referred to as ‘the Deceased’) who died intestate on 2<sup>nd</sup> August 2000. Vide a Ruling delivered on March 31, 2016. Hon Lady Justice Muigai revoked the Grant which had been issued to James Kairanga Gathugi (the Respondent herein), which Grant had been confirmed on April 22, 2003.
5. Upon revoking the confirmed Grant which had been issued to the Respondent the court proceeded to make the following orders:-
  - “3. The court issues a new/fresh grant to the children of the deceased jointly as administrators as follows:-
    - a. Lucy Wanjiku Kamau (Applicant)
    - b. Esther Wairimu
    - c. Wanene Kamau
  4. The Administrator shall determine what sums the Respondent paid to their father and what portion of land if at all he is entitled to from the suit property.
  5. The administrators shall in consultation with all beneficiaries and dependents of the deceased’s estate discuss, agree and determine on the mode of distribution of the suit property amongst the beneficiaries.
  6. The subdivisions and transfer of the suit property L.R. Ndeiya/Makutano/213 are revoked and no further subdivision, transfer alienation or disposal of the suit property and its subdivision to 2 parcels L.R. Ndeiya/Makutano/1551 and Ndweiya/Makutano 1552 shall be done until further orders of the court.
  7. In the event of any challenge or disagreement each party is at liberty to apply to court.
  8. Each part to bear its own costs.”
6. The Respondent then filed an application dated November 13, 2017 seeking to set aside the judgment of March 30, 2016, in which the applicant and two (2) others had been appointed as Administrators of the estate of the Deceased.
7. In response to the Respondents application the Applicant filed a preliminary objection dated June 20, 2018. The court directed that the Notice of Preliminary Objection was to be heard first. Thereafter on November 21, 2018 the Applicant was served with a Notice to show Cause why the suit should not be dismissed.
8. On November 27, 2018 both parties attended court. The court directed that the application dated November 13, 2017 and the notice of Preliminary Objection dated June 20, 2018 would be argued together. The hearing was set for January 15, 2019.
9. On the hearing date of January 15, 2019 counsel for the Respondent was in court. However, there was no appearance for the Applicant. The court finding that the hearing date had been given in the presence of both parties proceeded to allow the application dated November 13, 2017 and directed that the summons for Revocation of Grant would be heard on March 6, 2019.



10. The Applicant avers that on January 30, 2019 her advocate was served with a hearing notice for the summons for Revocation of Grant together with a copy of the orders issued by the court on January 15, 2019. According to the Applicant the matter was not on the cause list of January 15, 2019 and that is why neither she nor her Advocate were present in court on said date. The Applicant now prays that the orders made on January 15, 2019 be vacated.
11. The Respondent opposed the application. The Respondent maintained that the hearing date of January 15, 2019 had been taken in the present of both parties. That on that hearing date there was no appearance in court for the Applicant. The Respondent submits that this application having been brought several months after the determination of the application dated November 13, 2017 is a mere afterthought and ought to be dismissed.

### **Analysis and Determination**

12. I have carefully considered this application, the Replying Affidavit filed by the Respondent as well as the written submissions filed by both parties. The only issue for determination is whether the court should review and/or set aside the orders made on January 15, 2016.
13. Order 45 Rule 1 of the [Civil Procedure Rules](#) provides for the circumstances under which an order/ Decree of court may be reviewed 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.

14. Therefore in order to merit a review of an order the following conditions must be met:-

- “(a) There must be discovery of a new important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- (b) There was a mistake or error apparent on the face of the record; or
- (c) there were other sufficient reasons; and
- (d) The application must have been made without undue delay”.

15. The Applicant alleges that there existed an error apparent on the face of the record. She argues that the court failed to recognize the fact that she had not been served with the hearing date of January 15, 2019 and proceeded to deal with the matter in the absence of counsel for the Applicant.
16. The applicant argued that failure by the court to realize that she had not been served with notice of the hearing date is an error apparent on the face of the record. In *Nyamongo & Nyamongo – vs – Kogo*



(2001) EA 17 the court in discussing what constitutes an error on the face of the record, rendered itself as follows:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a 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 a long drawn 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for a review though it may be one for appeal.”

17. The Indian Supreme Court in the case of *Aribam Tuleshwar Sharma v Aribam Pisabak Sharmal* observed that it has to be kept in view that an error apparent on the face of record must be an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. (own emphasis)
18. Finally on this point Mativo J in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR stated that:-

“The term “mistake or error apparent” by its very connotation signifies an error which is evident per se form 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.*” (own emphasis)
19. I have carefully perused the record in this matter, I note that the hearing date of January 15, 2019 was given by their court on November 27, 2018 in the presence of both sides. Contrary to the Applicants allegation that the matter was not cause listed on January 15, 2019 the record clearly indicates that the court did sit on that date and counsel for the Respondent was present.
20. On the other hand there was no representation for the Applicant despite the fact that the hearing date had been taken by consent. Indeed this fact was noted by the trial Judge in allowing the application of November 13, 2017. I therefore find that there was no need for the Applicant to be served with a hearing notice when the hearing date had been taken by consent. Accordingly, I find that there is no error apparent on the face of the record and I decline to review the orders made on January 15, 2019.
21. Finally I note that the orders which the Applicant is seeking to review were made way back in January 2019. This application was filed on July 25, 2021 almost 2½ years after the said orders were made. This application was not filed in a timeous manner and I do agree with the Respondent that the same is a mere afterthought.
22. In conclusion I find no merit in this application. The summons dated July 25, 2021 is hereby dismissed in its entirety. The Applicant is directed to meet the costs of this application.

**DATED IN NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2022.**

.....



**MAUREEN A. ODERO**

**JUDGE**

**SUCCESSION CAUSE NO. 298 of 2006 RULING Page 3**

