In re Estate of Muchangi s/o Ngotho alias Muchangi Ngotho (Deceased) (Succession Cause 390 of 2010) [2022] KEHC 13163 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13163 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION CAUSE 390 OF 2010

FN MUCHEMI, J

SEPTEMBER 22, 2022

IN THE MATTER OF THE ESTATE OF MUCHANGI S/O NGOTHO ALIAS MUCHANGI NGOTHO (DECEASED)

RACHEAL WAMBUI MUCHANGI.....APPLICANT

VERSUS

LAWRENCE WACHIRA MUGO.....1ST RESPONDENT

MICHAEL MUCHANGI NDUATI.....2ND RESPONDENT

RULING

Brief facts

1. The application dated July 17, 2020 is brought under rules 43 & 49 of the *Probate & Administration Rules* and sections 1A, 1B, 3A, 99 and 100 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules* seeking for orders to set aside, vary and/or review the ruling delivered on July 29, 2011. In the alternative, the applicant seeks for rectification of the grant confirmed and issued on July 29, 2011.

2. In support of the application, the 1st respondent filed a replying affidavit sworn on March 29, 2021.

3. The 2nd respondent filed a replying affidavit sworn November 18, 2021 and filed on May 5, 2021.

The Applicant's Case

4. It is the applicant's case that the ruling was delivered on July 29, 2011 which determined and distributed the estate of the deceased. The applicant states that the decision is unfavourable and also unenforceable as the estate property Land Reference No Iriaini/Kiaguthu/148 measuring approximately 5.7 acres was distributed amongst the three children as follows:

    a. Rachel Wambui Muchangi – 1.9 acres

    b. Michael Ngotho Muchangi (deceased who was first substituted by his widow Grace Wambui Ngotho and recently Wilson Maina Ngotho was substituted for Grace) – 3 acres

c. Ephraim Ngatia Muchangi (deceased and who was substituted by his son Lawrence Wachira Mugo) – 2.7 acres

5. From the foregoing, the applicant contends that the allocations measure about 7.6 acres whereas the property on the grounds measures 5.7 acres. As such it is impractical to execute the orders of the court. The applicant further contends that one of the beneficiaries, Ephraim Ngatia Muchangi, swore an affidavit in support of the summons for revocation of grant dated November 4, 2012 that the grant was useless and inoperative and deponed that the grant could not be executed as it were.

6. The applicant further states that the court in determining the application for revocation of grant, opined that the grant as it appears is impractical and proceeded to rely on section 38 of the *Law of Succession Act*. Furthermore, the applicant contends that the orders issued by Sergon J erroneously provided for as a spouse and not as a daughter of the deceased. The applicant contends that her rights as a daughter of the deceased cannot be subjected to any conditions as imposed by the decision rendered on July 29, 2011. She further contends that she is a dependant of the deceased but by virtue of the impugned orders she was provided for a life interest in the property in the same manner as provided for a spouse under the Succession Act. As such, the applicant urges the court to review and/or vary the orders and grant the beneficiaries their share of the estate without any conditions.

7. The applicant further states that if the court is inclined and/or amenable to rectifying and/or amending the grant, she proposes that the three beneficiaries equally share the estate of the deceased in the property known as Land Reference No Iriaini/Kiaguthu/148 measuring approximately 5.7 acres.

8. The applicant contends that since the ruling delivered on April 9, 2020, she has seen unknown people visiting the suit property and searching for beacons. She is apprehensive that the respondents have engaged agents to assist them in disposing off the suit property which she contends will be detrimental to her interests. Moreover, the applicant contends that she has lived on the property for many years without any interruptions from third parties and it will be unfair if the respondents dispose of their interests without the instant application been determined. As such, the applicant prays that the court allow her application and states that the respondents do not stand to suffer any prejudice if the orders sought are not granted.

9. The 1st respondent supports the application and reiterates that the ruling delivered on July 29, 2011 contains grave errors and thus cannot be enforced and thus as the grant stands, it is useless and inoperative. The 1st respondent supports the contention by the applicant to have the ruling dated July 29, 2011 reviewed and/or set aside and the estate be shared equally amongst the three beneficiaries.

The 2nd Respondent's Case

10. It is the 2nd respondent's case that the ruling delivered on July 29, 2011 has never been appealed against. The 2nd respondent further states that one of the beneficiaries, one Ephraim Ngatia Muchangi, brought summons for revocation of grant dated November 9, 2021 which was dismissed on April 9, 2020 and the court indicated that it cannot exercise appellate jurisdiction over its own decisions.

11. The 2nd respondent contends that the intention of the court in delivering the ruling was that it did not anticipate the partition of the land until the demise of the life interest holder in order to safeguard her interest. Moreover, the 2nd respondent contends that the instant application does not meet the required threshold for review and/or stay of execution. As such, the application is unmerited and bad in law and the 2nd respondent prays that it be dismissed with costs.

12. Parties hereby disposed of the application by way of written submissions. A summary of their rival submissions is as follows:-

The Applicant's Submissions

13. he applicant states that the deceased died on November 20, 1988 and the grant of letters of administration were issued to Michael Ngotho Muchangi and Rachael Wambui Muchangi on July 16, 2010. The deceased was survived by numerous dependants and three children who are Michael Ngotho Muchangi, Ephraim Ngatia Muchangi and Rachael Wambui Muchangi. Two of the children and beneficiaries of the estate of the deceased are deceased namely Ephraim Ngatia Muchangi and Michael Ngotho Muchangi who have been substituted by Lawrence Wachira Mugo and Wilson Maina Ngotho respectively. The applicant submits that she is the only surviving child of the deceased while the respondents are claiming from the estate as personal representatives of the deceased beneficiaries.

14. The applicant further submits that the estate herein was determined on July 29, 2011 where the court granted a share of the suit property to the two beneficiaries Michael Ngotho Muchangi and Ephraim Ngatia Muchangi with the applicant been granted only a life interest in the same. The applicant further submits that being dissatisfied with the decision of the court, Ephraim Ngatia Muchangi moved the court vide the summons for revocation of grant dated November 4, 2012 which culminated in the ruling delivered on April 9, 2020.

15. The applicant submits that she is the sole administratrix of the estate of the deceased as her co-administrator, Michaal Ngotho Muchangi passed away and he was substituted by Grace Wambui Ngotho and later Wilson Maina Ngotho. To support her contention, she relies on the case of *Julia Mutune M'mboroki v John Mugambi M'Mboroki & 3 others* [2016] eKLR and submits that an administrator cannot be substituted by way of merely filing an application for substitution but one has to follow the process under the *Law of Succession Act* and the Probate and Administration Rules. She further contends that on May 4, 2022, the 2nd respondent's counsel orally submitted that Michael Ngotho Muchangi (deceased) had been replaced with Grace Wambui Ngotho (deceased) and later Wilson Maina Ngotho. It was further submitted that although the said substitutions were allowed in court, the same were in respect of substitution in their capacity as beneficiaries and not as administrators. Further, the applicant contends that the 2nd respondent cannot claim to be an administrator in two estates in a matter that is being litigated. As such, the applicant prays that the court find that she is the remaining administratrix in the estate.

16. The applicant submits that she primarily seeks that the orders issued by the court on July 29, 2011 be set aside, varied and/or reviewed. The applicant further submits that the manner in which the estate property was distributed exceeds the total acreage of the land. Further, the applicant takes issue with the life interest in land allocated to her contrary to the provisions of the law. The applicant submits that she is a daughter of the deceased yet the court in rendering its decision erroneously awarded her a life interest contrary to section 38 of the *Law of Succession Act*. The applicant submits that the learned Judge in the ruling delivered on April 9, 2020 recognized the error.

17. The application submits that rule 63 of the *Probate and Administration Rules* allows the court to review, rectify and remedy orders made by the court that are in error and that she does not seek to appeal against the decision but rather a review of the same. It is further argued that the court in its decision dated July 29, 2011 erroneously assumed that she was a spouse of the deceased whereas in actual fact she is a daughter of the deceased.

18. The applicant submits that the orders sought in the instant application are advantageous to the 2nd respondent as the confirmed grant bears the names of deceased beneficiaries and thus the 2nd

respondent cannot enforce the same without the grant been rectified. In any effect, the applicant contends that the grant needs to be rectified given the grant bears the names of the two deceased beneficiaries. To support her contention, she relies on the decision of the *Estate of M'mburugu M'rimeria alias Mburugu Rimberia (Deceased)* [2021] eKLR.

19. The applicant further states that the 2nd respondent has not shown that he is likely to suffer any prejudice should the orders sought be granted. The applicant contends that all the beneficiaries were children of the deceased and as such, no party has priority over the others. It is further argued that is thus unjust and unfair that she was not provided for as a child of the deceased pursuant to section 38 of the *Law of Succession Act*. Therefore in the interests of justice, she prays that the court distribute land reference number Iriaini/Kianguthu/148 equally amongst the three beneficiaries.

20. The applicant submits that since the instant matter is a family matter, each party ought to bear its own costs.

The 2nd Respondent's Submissions

21. The 2nd respondent submits that in his summons for confirmation, Michael Ngotho Muchangi proposed to distribute Land Reference Number Iraini/Kiaguthu/148 measuring 5.7 acres as follows:-

    a. Michael Ngotho Muchangi – 3 acres

    b. Ephraim Ngatia Muchangi – 2.7 acres

    c. Rachael Wambui Muchangi – life interest.

22. The applicant herein filed an affidavit of Protest to the proposals made by Michael Ngotho proposing to share the land among the three children of deceased in equal shares with each getting 1.9 acres. The matter proceeded to hearing by way of written submissions and a ruling was delivered on July 29, 2011 whereby the court dismissed the protest and the grant was confirmed in terms of the summons for confirmation of grant.

23. The 2nd respondent submits that no appeal was lodged by any party but Ephraim Ngatia Muchangi filed summons for revocation of grant on November 9, 2012. The summons was dismissed on April 9, 2020 and thereafter the applicant herein then filed the instant application.

24. The 2nd respondent contends that the instant application lacks merit, is unmerited and bad in law as the court is functus officio and avers that the applicant ought to have filed an appeal instead.

25. The 2nd respondent contends that the impugned ruling does not contain any errors or omissions and sections 1A, 1B, 3A, 99 and 100 of the *Civil Procedure Act* in not applicable either. The only provision of the *Law of Succession Act* that allows importation of the provisions of the *Civil Procedure Act* and its rules is rule 63 of the *Probate and Administration Rules* which the applicant did not invoke. Further rule 49 of the *Probate and Administration Rules* does not apply in an application for review either. To support his contentions, the 2nd respondent relies on the case of Nakuru, Succession Cause No 391 of 2020 *Abdallah Muhammed A Kasinde & 2 others v Anthoney Ngetich Seurey & another*. As such, the 2nd respondent submits that the application is incompetent for invoking the wrong provisions of the law.

26. The 2nd respondent further submits that on merits, the application lacks the same. The power to entertain an application of review is imported by rule 63 of the *Probate & Administration Rules*, however the applicant did not invoke the same. The 2nd respondent relies on order 45 of the *Civil Procedure Rules* and the case of Kakamega Succession Cause No 446 of 2011 In the matter of the *Estate*

of Kimaiyo s/o Shibeyi alias Kimaiyo Shibeyi (deceased) and submits that the applicant does not meet the threshold to warrant a review of the ruling as there is no error on the face of the record nor has the applicant shown that there is new and important evidence that has come about after due diligence. The 2nd respondent contends that the applicant ought to have lodged an appeal against the impugned ruling as the court became functus officio. The 2nd respondent further submits that the court in delivering its ruling did not anticipate that the land would be sub divided during the lifetime of the applicant. The court anticipated that the applicant would enjoy 1.9 acres freely until her demise and the two sons to share the land equally. As such, the 2nd respondent contends that the ruling is enforceable.

27. The 2nd respondent relies on section 76(e) of the *Law of Succession Act* and submits that the grant became useless and inoperative through the death of Michael Ngotho Muchangi. As such, the court has to appoint other administrators which the 2nd respondent states has not been done. The 2nd respondent states that it is not true that upon the death of one administrator, the surviving one automatically assumes the administration. The grant ought to be revoked and new administrators must be appointed. However, the 2nd respondent contends that that does not affect the distribution of the estate whether it is complete or not. He relies on the decision in Nyeri High Court Succession Cause No 69 of 1999 In the *Estate of Ndegwa Nginga; John Munene Muriuki & another v Alice Wambui Ngari & 11 others* and submits that the old grant can be revoked and a new one issued without affecting the distribution already done.

28. The 2nd respondent submits that the applicant ought to be condemned to pay costs as she has dragged him to court after 9 years when she clearly knew she ought to have lodged an appeal against the decision of the court instead of filing the instant application. As such, the 2nd respondent submits that the application lacks merit and prays that it be dismissed with costs to him.

Issues for determination

29. After careful analysis of the pleadings of both parties the primary issues for determination are:-

    a. Whether the applicant has met the threshold for the grant of orders of setting aside or for review of the ruling delivered on July 29, 2011.

    b. In the alternative, whether the grant ought to be rectified.

Analysis and Decision

Whether the applicant has met the threshold for the orders of review

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

> Save as in the Act or in these Rules otherwise provide, ad 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.

31. This principle was enunciated in the case of *John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge* [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 as wet out in order 45 of the *Civil Procedure Rules*.

32. Order 45 of the *Civil Procedure Code* sets out the parameters for an application for review as follows:-

> Rule 1 (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 order made or made the order without unreasonable delay.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case which he applies for the review.

33. It then follows that order 45 provides for three circumstances under which an order for review can be made. 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. Secondly, the applicant must demonstrate to the court that there are some mistakes 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.

34. In the instant application, the application contends that the ruling dated July 29, 2011 contains errors as the estate land measures 5.7 acres yet according to the distribution as per the court will amount to 7.6 acres. As such, the applicant contends that as the grant stands it cannot be enforced. She further contends that she is a daughter of the deceased and the court provided for her as a spouse which is contrary to section 38 of the *Law of Succession Act*.

35. I have perused the court record and noted that it is important to lay out the genesis of the matter. The deceased herein died intestate on November 20, 1998 and the issued letters of administration

intestate were issued to Michael Ngotho Muchangi and Rachael Wambui Muchangi. One of the administrator's, Michael Ngotho Muchangi, filed summons for confirmation of grant dated July 21, 2010 to which Rachael Wambui Muchangi filed a protest disputing the distribution of the property as outlined by her co-administrator. The court confirmed the grant of letters of administration intestate on July 29, 2011 and distributed the property in line with the deceased's wishes as follows:-

a. Michael Ngotho Muchangi – 3 acres

b. Ephraim Nduati Muchangi – 2.7 acres

c. Rachael Wambui Muchangi- 1.9 acres life interest.

36. Being aggrieved by the decision of the court, Ephraim Nduati Muchangi filed summons for revocation of grant dated November 9, 2012. The court dismissed the application on April 9, 2020. The applicant now seeks to review the court's ruling dated July 29, 2011. The applicant ought to demonstrate some error or mistake on the face of the record. Are the errors the applicant alludes to errors on the face of the record? Are the errors self-evident to require an elaborate argument to be established? The Court of Appeal in *National Bank of Kenya Ltd v Ndungu Njau* Civil Appeal No 211 of 1996 (UR) held as follows:-

> " 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. "

37. Similarly in *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR the court stated:

> 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 provisions of law cannot be a ground for review.

38. The court went on to say:-

> 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 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 purposes 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. 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.

39. Evidently, from the above, it is clear that the error 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. The contentions raised by the applicant go to the root of the distribution and alter the distribution of the estate which will amount to this court sitting on appeal on its decision. Notably, the court on April 9, 2020 made the same sentiments after listening to the application for summons for revocation. It is clear from the ruling that the parties had raised valid concerns before the court stated that it cannot exercise appellate jurisdiction over its own decisions. The court further noted that the appropriate course the applicant ought to have lodged an appeal against the decision of the court delivered on July 29, 2011.

40. Having considered all the foregoing, I hereby find that this application has not passed the test for review as set out under order 45 of the *Civil Procedure Rules*.

Whether the court ought to rectify the grant

41. Rectification of grant is provided for in Section 74 of the *Law of Succession Act*, Cap 160 Laws of Kenya and rule 43(1) of the *Probate & Administration Rules*. Section 74 provides as follows:-

> Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.

42. Rule 43(1) provides:-

> Where the holder of the grant seeks pursuant to the provisions of section 74 of the *Act* rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time and place of death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was made.

43. Thus, rectification of grant of letters of administration is limited to matters set out in section 74 of the *Act*. These matters specifically refer to corrections of error which the court may order without changing the substance of the grant. These include errors in names, description of any person or thing or an error as to the time or place of death of the deceased or the purpose for which a limited grant was issued. An error which is envisaged under the section is a mistake which may occur on the face of the grant like typing errors in names of persons or things.

44. The issue of rectification of grant has been addressed in various decisions in the High Court which I have considered here as persuasive authorities.

45. In the matter of the *Estate of Hasalon Mwangi Kahero* [2013] eKLR

> " An error is essentially a mistake. For the purposes of section 74 and rule 43, it must relate to a name or description or time and place of the deceased's death, or the purpose of a limited grant. Is an omission of a name or in the description of a thing an error? It would be an error if say, a word in the full name of a person is omitted or a word or number or figure in a description is omitted. But where the full name of a person or a full description of a thing or property is omitted, it would be stretching the meaning of the word "error" too far to say that that would amount to the error or mistake envisaged in section 74 and rule 43."

46. Similarly in *In the Matter of the Estate of Geoffrey Kinuthia Nyamwinga (Deceased)* [2013] eKLR:-

> " The law on rectification or alteration of grants is section 74 of the *Law of Succession Act* and rule 43 of the Probate and Administration Rules....What these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out the time or place of the deceased's death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general....
>
> Where a proposed amendment of a grant cannot be dealt with under the provisions of section 74 of the *Law of Succession Act*, the applicant ought to approach the court under order 44 of the Civil Procedure Rules. A review under order 44 of the Civil Procedure Rules may be sought upon discovery of new and important matter or on account of some mistake or error apparent on the face of the record, or for any sufficient reason. The applicant in this case should have moved the court under this provision-order 44 of the Civil Procedure Rules on account of some mistake or error apparent on the face of the record and on the ground that there exists a sufficient reason for review of the certificate of the confirmation of the grant."

47. The applicant seeks to have the grant rectified to replace the names of the deceased beneficiaries with their legal representatives. In my view, the applicant is a bit mixed up between the provisions of rectification of grant and the procedure applicable where an administrator dies provided for in different sections of the Act. The legal representatives of the deceased must have taken beneficiaries out limited grants of letters of administration ad litem for purposes of taking over the roles of their deceased relatives in this cause. In this regard the applicable law as relates to the procedure or position upon death of an administrator is provided for in section 81 of the *Law of Succession Act* which provides:-

> Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all powers and duties of the executors or administrators shall become vested in the survivors or survivor of them.
>
> Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with him.

48. In this regard, I do find that the parties herein ought to have moved the court appropriately by virtue of section 76(e) of the *Act* for the court to appoint a new administrator on grounds that the grant had been rendered useless and inoperative upon death of the two administrators.

49. In regard to the distribution, the applicant ought to have appealed against the ruling that seems to have put her in a disadvantaged position.

Conclusion

50. I have analysed the material presented to me by the parties in this application, as well as their respective submissions. I am of the considered view that this application has no merit and is hereby dismissed.

51. Due to the nature and facts of this case, I hereby order that each party meets their own costs.

52. It is hereby so ordered.

DATED AND SIGNED AT NYERI THIS 22ND DAY OF SEPTEMBER, 2022.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 22ND DAY OF SEPTEMBER 2022