



REPUBLIC OF KENYA



**Nyambura v Ndegwa (Miscellaneous Application E001 of 2022)
[2022] KEHC 13101 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS APPLICATION E001 OF 2022**

FN MUCHEMI, J

SEPTEMBER 22, 2022

**APPLICATION FOR WITHDRAWAL OF SUCCESSION CAUSE 8 OF
2020 FROM SENIOR PRINCIPAL MAGISTRATES COURT AT RUIRU**

**IN THE MATTER OF THE ESTATE OF THE LATE STEPHEN
WAKARUGA NDEGWA ALIAS STEPHEN KARUGA GATHANDI
ALIAS REV. STEPHEN KARUGA GATHANDI ALIAS JAMES JACOB**

ALIAS STEPHENSON

AND

**TRANSFER TO THE CHIEF MAGISTRATES COURT AT NYERI
FOR TRIAL AND DISPOSAL**

BETWEEN

FRACIAH KIBUGU NYAMBURA PETITIONER

AND

LAZARUS KIBUI NDEGWA OBJECTOR

(Originating from Succession Cause No. 8 of 2020)

RULING

Brief facts

1. This is a ruling on two separate applications dated January 6, 2022 and April 2, 2022.
2. This application dated April 2, 2022 brought under section 80 of the *Civil Procedure Act* and order 45 rule 1(a) and 2(1) of the *Civil Procedure Rules* seeking for orders of review made on March 8, 2022 and that Succession Cause No 8 of 2020 do proceed in the Principal Magistrate Court at Ruiru where it was stopped and transferred to the Chief Magistrate Court in Nyeri.



3. In opposition to the application, the respondent has filed a statement of grounds of opposition dated May 24, 2022.

The Applicant's Case

4. It is the applicant's case he filed his replying affidavit on March 3, 2022 opposing the application to have the succession cause transferred from the principal magistrate's court in Ruiru to the chief magistrate's court in Nyeri. He further states that the court registry had already acknowledged receipt of payment of the court fees and stamped his copies however, the said replying affidavit was not placed before the court. Moreover, when the matter came up for hearing on March 8, 2022, the applicant states that he was experiencing internet problems and therefore he was unable to communicate to the court his side of the story. He further states that he served the respondent's advocates with his replying affidavit. As such, he urges the court to review the said orders of March 8, 2022 and transfer the suit back to the principal magistrate's court in Ruiru to take off from where it was stopped.

The Respondent's Case

5. The respondent contends the application dated 2/4/2022 has been overtaken by events as the orders have been executed. Moreover, the respondent states that the applicant served the petitioner's advocates at 7.22pm on March 8, 2022, long after the matter had been disposed of.
6. The respondent further states that the applicant does not name the rest of the beneficiaries nor has he annexed the authority to agitate on their behalf. In any event, the respondent avers that the deceased's properties are not in Nairobi and further that the deceased died in the United Kingdom.
7. The respondent further states that the applicant has two pending applications in the cause which have not been disposed of. Furthermore, the respondent states that the applicant cannot challenge her capacity to petition for the administration of the estate of her late husband and distribute the same to persons entitled thereto who would be determined at the confirmation of the grant. As such, the respondent states that the application lacks merit and ought to be dismissed with costs.

Whether the application has merit.

8. 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.



9. 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 is 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.
10. This application, it is contended that the applicant filed his replying affidavit on March 3, 2022 but it was not placed before the court when the application came up for hearing. I have perused the court record and noted that the replying affidavit was indeed filed on March 3, 2022. However the same was not placed in the court file for consideration by the court. The application dated January 6, 2022 was allowed because there was no opposition as the court file was by then. I have also perused the court proceedings and noted that during the hearing the applicant's counsel mentioned that the respondent was present in virtual court platform but he was inaudible and therefore could not raise his concerns.
11. Under article 50 of the *Constitution*, the applicant has a right to be heard which right cannot be taken away. It is clear that it was not the fault of the applicant that his replying affidavit was not placed in the file. It is also the position borne by the record that the applicant had a problem with technology at the time of hearing. For these reasons, I allow the application for review. The orders made on March 8, 2022 are hereby set aside with no orders as to costs.
12. The court will then proceed to examine the application dated January 6, 2022 and the replying affidavit of the applicant herein with a view of determining the same.
13. I do not find it necessary to give the parties a hearing date since their respective materials in regard to the application are contained in this file.
14. The application dated January 6, 2022 sought for orders of transfer of Ruiru Succession Cause No 8 of 2020 to Nyeri Chief Magistrates court. The grounds relied on are that:-

The estate of the deceased comprises of properties situated in Nyeri county and further that the Ruiru Principal Magistrate court lacks jurisdiction to determine the case. The assets listed in Form P&A were grossly undervalued and some assets were left out.
15. The applicant is one Mr Mindo the counsel for the applicant who deposes that he perused the petition before the Ruiru court and noticed that a number of properties were not included and that the assets in the petition were greatly undervalued. He avers that the Ruiru Principal Magistrate lacks the pecuniary jurisdiction to determine the cause. Based on the assessment of Mr Mindo and his client, the disclosed properties are valued not less than Kshs 6,000,000/=. The petitioner is currently in the United Kingdom and has authorised her counsel to lodge this application.
16. The counsel further states that the chief's letter was done by the area chief Githurai while the deceased died in the United Kingdom with his ancestral home situated in Nyeri county.
17. The application was opposed by the respondent on grounds that it is not true that the petitioner encountered any difficulties in prosecuting the succession cause before Ruiru court. Further that the petitioner who is the wife of the deceased had concealed the death of the deceased and that she buried him at Naromoru in Nyeri county without the family's participation. The respondent is the objector in the Ruiru PM succession cause whereas he was not informed of the filing of the cause.
18. The respondent further states that the petitioner swore falsehoods in the succession petition that she was the only beneficiary while the truth is that the deceased has children from another relationship. These issues prompted the respondent to file an objection in the cause.



19. The respondent states that the listed properties cannot exceed the value of Kshs 10.9million. If the matter is transferred to Nyeri court, it will be costly for the objector because he will have to be travelling to Nyeri. He states that if the matter is transferred, the petitioner should meet his costs of travel and accommodation.
20. In a rejoinder, the petitioner states that her capacity to file the petition cannot be challenged. Further that it is not denied that most of the deceased's property are situated in Nyeri county. The deceased did not die at Ruiru or Nairobi but died in the United Kingdom.
21. The law on transfer of cases is provided for under section 18 of the *Civil Procedure Act* which has been imported into the *Succession Act* through Rule 63 *Probate & Administration Rules*. It provides:-
- (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 order 5, rule 2 to 34 and orders 1, 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.
 - (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.”
21. The applicant is the petitioner herein and it is not denied that she is the widow of the deceased in the cause. On the other hand, the objector is the brother to the deceased who has already filed an objection in the said cause. The objection has not yet been determined. He has listed four (4) children of the deceased whom he says has not been included in the petition. It has not been indicated whether the children are adults or minors. But whatever the case, any party interested in the succession cause has a right to ventilate their issues to court for determination. This can be done at any stage before or after confirmation of grant.
22. The applicant relies on two main grounds for transfer:-
- That the properties of the deceased are situated in Nyeri county.
- That the deceased died in the United Kingdom but his ancestral home is within Nyeri county. The other issues of some assets of the deceased being left out; the petition requiring amendment are not material to this application. The assets can be included in the cause and amendment done in the cause whether at Ruiru or Nyeri. The issue of lack of pecuniary jurisdiction by the Ruiru Senior Principal Magistrate is not convincing since no valuation report has been annexed to this application.
23. The respondent has not denied that the deceased's ancestral home is situated in Nyeri and that his properties are located in the same county. Having died in the United Kingdom, these are two good reasons to file or to have this case disposed of in Nyeri. I do not think that any prejudice will be caused to the respondent if the cause is transferred to Nyeri. The petitioner being the widow of the deceased has a bigger voice on this issue since she has priority over the respondent under section 66 of the *Succession Act*. However, the respondent will have his objection heard and determined in either Ruiru or Nyeri.
24. The chief's letter dated July 6, 2021 states that the deceased hailed from Gura sub-location in Othaya where his parents also live. It seems that the deceased has nothing that relates to Ruiru or Githurai. It has not been said that the deceased ever lived in Ruiru. Both parties in this application agree that the deceased lived in the UK before he died.



25. Based on the foregoing, I am of the considered view that this application has merit and it is hereby allowed. The Ruiru Succession Cause No 8 of 2020 shall be transferred to Nyeri Chief Magistrate Court for disposal.

26. Each party to meet their own costs of this application.

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

