



REPUBLIC OF KENYA



**In re Estate of Samuel Munyau Nguku (Deceased) (Succession Cause 1138 of 2007) [2022] KEHC 14235 (KLR) (Family) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14235 (KLR)

**REPUBLIC OF KENYA**

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

**FAMILY**

**SUCCESSION CAUSE 1138 OF 2007**

**AO MUCHELULE, J**

**OCTOBER 26, 2022**

**IN THE MATTER OF THE ESTATE OF SAMUEL MUNYAU NGUKU (DECEASED)**

**BETWEEN**

**MONICA MUTONO ..... APPLICANT**

**AND**

**FRANCIS KIMANI KARIUKI ..... RESPONDENT**

*(Judgments were delivered by Justice Luka Kimaru on the March 10, 2011 and Justice M Muigai on the April 3, 2017.)*

**RULING**

1. The deceased Samuel Munyau Nguku died intestate on May 19, 1995, and left Kakuzi/Gituamba/Block 11/177 measuring about 4 acres as his only property. In the judgment dated March 10, 2011 in Succession Cause No 290 of 1997 at Nairobi, Justice L Kimaru found that the applicant Monica Mutono and the respondent Francis Kimani Kariuki had each bought 2 acres of the parcel. It was ordered that each party gets the portion in a certificate of confirmation.
2. In the judgment delivered on April 3, 2017 in the instant proceedings Justice MW Muigai reiterated that position.
3. In either cause, the evidence by the applicant was that she had bought three acres from the deceased, and not two acres as found. Either court did not accept her evidence.



4. The complaint by the applicant, as contained in the recent application dated October 20, 2019, is that she stands to lose one acre if the two decisions are left to stand. In her own words, she stated as follows:-

- “ 5. That the matter proceeded for hearing twice before two different judgments but dealing with two different issues over the same subject matter and judgments were delivered by Justice Luka Kimaru on the March 10, 2011 and Justice M Muigai on the April 3, 2017.
6. That the two judgments were not favourable to me as the orders issued are to cede on (1) acre.....to the respondent Francis Kimani Kariuki.
7. That there is an error and several inconsistencies apparent on the face of the record regarding the facts leading to the delivery of the two judgments.”

5. The application was brought under sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* and orders 22, 40 and 51 of the *Civil Procedure Rules* seeking the review of the two judgments.

6. The response by the respondent was that the application was fatally defective, frivolous, vexatious, misconceived and an abuse of the process of the court. His case was that the two judgments could not be reviewed as there was no error on their face. Secondly, the applicant was seeking the rehearing of the dispute between them, the decisions having gone against her in each case. Thirdly, that there was inordinate delay in bringing the application, and that the delay was not excusable.

7. There were written submissions by counsel for the applicant in which she sought to justify her request for review. The respondent’s counsel filed written submissions in rebuttal. I have considered what each side had to say.

8. Order 45 rule 1 of the *Civil Procedure Rules* provides 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.”

9. The decision by Justice Luka Kimaru was delivered on March 10, 2011 and that by Justice MW Muigai was on April 3, 2017. The application was brought on October 30, 2019. This was about 8 years after the first judgment and over 2 years after the second judgment. The applicant’s counsel relied on the decision in *Utalii Transport Company Limited and 3 others v NIC Bank & another* [2014] eKLR to argue that what is inordinate delay depends on the facts of each case. On the other hand, the respondent cited several cases to say that the delay herein has not only inordinate but was also not explained. They include *Wambui Ngatia v Lydia Muthoni* [2010] eKLR where a delay of 5 years was found to be inordinate; *Godfrey Wanjala Wafula & another v Jairus Wakhungu Mulinda* [2020] eKLR in which



- a delay of two years that was not explained was found to be inordinate; and *Hussein Gurakhan & another v Market Mansion* [2018] eKLR in which the delay of 6 months was found to be inordinate.
10. There was no attempt on the part of the applicant to explain the delay. I determine that she took far too long to bring the application to review the two judgments.
  11. Secondly, the applicant was simply aggrieved by the two determinations that found that she bought 2 acres, and not 3 acres. Being asked to reverse the two determinations would have the effect of this court sitting on appeal over the decisions. This court would have no jurisdiction to hear and determine this application for review, given the facts of the matter (*National Bank of Kenya Limited v Njau* [1996] KLB 469 (CAK)).
  12. A review ought not to be an appeal in disguise whereby an erroneous decision is reheard and corrected. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR, it was observed that a review is only for patent error where without any elaborate argument one could point to the error and say that there is a substantial point of law which stares one in the face, and there could be no two opinions entertained about it; a clear case of error apparent on the face of the record ought to be made out.
  13. A review is not an opportunity for a party to introduce new evidence, or new arguments, when they had an opportunity to produce the same in court during the hearing of the matter at hand. As was stated in *Francis Origo & another v Jacob Kimali Mungala*, EA Civil Appeal No 149 of 2001,  

“.....an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal.”
  14. In conclusion, the application is not only misconceived but is also without merit. It is dismissed with costs.

**DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF OCTOBER 2022.**

**AO MUCHELULE**

**JUDGE**

