



In re Estate of Anne Chepngalo Chebii (Deceased) (Succession Cause 47 of 2013) [2022] KEHC 14037 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 47 OF 2013
RN NYAKUNDI, J
OCTOBER 21, 2022**

BETWEEN

SIMON KOSGEI LIMO PETITIONER

AND

ELIJAH KISHOIN SONGOK OBJECTOR

RULING

1. Before me for determination are summons dated May 18, 2022 by the petitioner/applicant in which he seeks orders that: -
 1. The honourable court be pleased to review and set aside its ruling dated May 11, 2022.
 2. Costs of the application be in the cause.
2. The application is premised on grounds that: -
 - a. The judgment is contradictory.
 - b. The judgment of the honourable court failed to take into consideration the interest of the creditor who had purchased 4 acres from the deceased.
3. The application is further supported by the affidavits of Simon Kipkosgei Limo, Rael Jepkurgat Kishoin, Grace Wamboi Kitali and Evalyne Chekoke Limo all dated May 18, 2022.
4. The applicant's case is that this Court on May 11, 2022 delivered a ruling on the deceased's estate. The applicants' allege that Simon Kipkosgei Limo, the petitioner herein bought 4 acres from the deceased's in parcel of land known as Tapsagoi Settlement Scheme/65 measuring 32.74 acres.
5. The applicants contend that this court directed that the estate be distributed in accordance with paragraph 2 and 6 of the affidavit of Elijah Kishion Songok. The applicants maintain that the proposal by Elijah Kishion Songok is at variance. The applicants further deposed that the said proposed mode



of distribution does not cater for a (9) metre road but a (6) metre road. That the width proposed by the county surveyor is (9) metres and the acreage of the road is 0.580 acres.

6. The applicants' contend that since the land is not the same as some sections are swampy while others are arable then the distribution should have factored the same. The applicants propose that each beneficiary gets two (2) parcels of land one on the arable portion and the other one on the swampy portion. That the arable land is about 17 acres.
7. The applicants urged court to review and set aside its ruling and issue another ruling taking into account the aforementioned.
8. The 1st applicant/petitioner filed written submissions dated July 29, 2022 which I have read and need not to reproduced here.
9. The application is unopposed.

Determination

10. The applicant herein is seeking for review of a ruling that was delivered by this court on May 11, 2022. the said ruling confirmed the grant that was issued on August 8, 2013 and directed that the deceased's estate be distributed in terms of paragraph 2 and 6 of the affidavit deponed by Elijah Kishioni Songok dated December 20, 2021.
11. application for review is governed by section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the [Civil Procedure Rules](#).
12. Section 80 of the [Civil Procedure Act](#) provides as follows: -
 13. 80. Any person who considers himself aggrieved-
 - (a) by a decree or order from which an appeal is allowed by this act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this act, May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
14. Order 45 rule 1 of the [Civil Procedure Rules](#), 2010 provides as follows: -
 15. 45 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”



16. A clear reading of the above provisions shows that Section 80 gives the power of review while order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds-
- a. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - b. on account of some mistake or error apparent on the face of the record, or
 - c. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.
17. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc application No 317 of 2018 John M Mativo Judge culled out the following principles from a number of authorities: -
- i. A court can review its decision on either of the grounds enumerated in order 45 rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in order 45 rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in order 45 rule 1 must be taken into consideration. section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in order 45 rule 1.



- x. The power of a civil court to review its judgment/decision is traceable in section 80 *CPC*. The grounds on which review can be sought are enumerated in order 45 rule 1.
18. 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.
19. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.
20. In the present case it is clear that there no error apparent on the face of the record. What the applicant is raising requires examination and argument. He argues that he bought (4) acres from the deceased which land forms part of the deceased's estate and wants that the said portions be excised from the estate before distribution is done. He further contends that some sections of the suit property being parcel of land known as Tapsagoi Settlement Scheme/65 are swampy whereas others are arable land and hence the proposed distribution should factor in the same. These to me are in fact issues that touch on the administration of land and land ownership which fall within the jurisdiction of the Environment and Land Court. Be as it may the issues being raised by the applicant and would require tendering of evidence and calling of witnesses which this court cannot do at this juncture. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.
21. At this point it is worth noting that review is not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of appellate jurisdiction, which is not permissible.
22. For the reasons stated above, the summons dated May 18, 2022 are hereby dismissed and given the circumstances of this case, there will be no orders as to costs.
23. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 21ST DAY OF OCTOBER, 2022.

.....

R. NYAKUNDI

JUDGE

