



REPUBLIC OF KENYA



**In re Estate of Nkuraru M’Twamwari (Deceased) (Succession Cause
261 of 2006) [2022] KEHC 14059 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14059 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 261 OF 2006
EM MURIITHI, J
OCTOBER 21, 2022**

BETWEEN

ROONEY MUGAMBI APPLICANT

AND

MARGARET KARAMANA PETITIONER

RULING

1. By a Notice of Motion dated April 9, 2021 pursuant to Section 73 of the *Probate and Administration Rules*, Section 47 of the [Law of Succession Act](#) and all other enabling provisions of the law, the applicant seeks review, setting aside of the judgment of this court and absolute revocation of the grant dated 26/1/2007; and declaration of all subsequent orders resultant of execution of the grant as null and void.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Rooney Mugambi, the applicant herein, sworn on November 20, 2011. He avers that there was a mistake on the face of the record, as the court held that the applicants were entitled to half share, while leaving Jackson Kiogora uncatered for. He avers that they featured Land parcel No. Kiirua/ruiiri/1103 in their out of court negotiations yet, when the judgment was read, it introduced land parcel No. KIIRUA/RUIRI/6987, which has brought about confusion. He avers that the two parcels are neither habitable nor comparable to NYAKI/MUNITHU/199 in location and value. He avers that the applicants are unwilling to accept either of the parcels, and wants the court to review its decision and/or entirely revoke the grant.
3. The petitioner, Margaret Karamana Mburunga, opposed the application vide her replying affidavit sworn on 22/7/2021. She contends that the deceased was only survived by 2 daughters, and Jackson Kiogora was born way after the demise of the deceased herein. She feels that the applicants ought to have appealed against the decision of the court instead of abusing the court process by filing the instant application. She contends that the issue of comparison in value of Kiirua/Kuiiri/6987 and



Nyaki/Munithu/199 has been settled by the valuation reports on record. According to her, the court is *functus officio* and the application is *res judicata*.

4. The applicant swore a supplementary affidavit on 3/8/2021 in response to the petitioner's replying affidavit, faulting the court for including Jackson Kiogora as a son of Zipporah Nthama M'Mwithiga instead of giving him his share as one of the children of the deceased. He denies the contention that the application is *res judicata* or the court *functus officio*.
5. In his submissions filed on 27/8/2021, the applicant urges that his application for review is hinged on the omission of Jackson Kiogora, which is an error apparent on the face of the record. He urges that the effect of that error is to deny the said Jackson Kiogora of an equal share of his father's estate. He urges that it would be prejudicial to have the applicants equally share Kiirua/Ruiri/6987, measuring ¼ acres instead of Nyaki/Munithu/199 measuring 1¾ acres. He is also questioning the authenticity of the two valuation reports, which he urges may have been tampered with in favour of the petitioner.
6. The petitioner urges that the said Jackson Kiogora failed to prove dependency as required under section 29 of the *Law of Succession Act*, and the application ought to be dismissed. She faults the applicant for failing to show how impractical or prejudicial the orders sought to be reviewed were. Reliance is placed on *Palmy Company Limited v Consolidated Bank of Kenya Limited* (2014) eKLR, *Re Estate of the Late M'Ithigai Muchangi (Deceased)* (2020) eKLR and *Re Estate of Samson Iringo Nkubitu (Deceased)* (2019) eKLR to support those submissions.

Analysis and determination

Application of review

7. As in every application for review, an applicant is required to establish to the satisfaction of the court any one of the following three main grounds as stipulated under Order 45 Rule 1 of the *Civil Procedure Rules*, namely:
 - i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or
 - ii. That there was a mistake or error apparent on the face of the record; or
 - iii. That sufficient reasons exist to warrant the review sought. In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.”
8. The ground of review raised by the applicant herein is the erroneous inclusion of one Jackson Kiogora, as a child of Zipporah Nthama (deceased), yet he was a son to the deceased, and he was entitled to his distinct share of the deceased estate. That inclusion is what the applicant terms as an error apparent on the face of the record. The applicant also alleges confusion in the parcel of land the court was referring to. He is uncertain whether the court was talking about L.R No. Kiirua/Ruiri/1103 or 6987. That alleged uncertainty does not exist because the only parcel of land mentioned in the impugned court ruling is Kiirua/Ruiri/6987. The valuation report and the official search refer to Kiirua/Ruiri/6987 measuring ¼ acres. The court, *vide* the impugned ruling, noted that although the grant had been obtained fraudulently by concealment of material facts, it would serve no purpose to revoke it, as Nyaki/Munithu/199, had already been transferred to an innocent purchaser for value.
9. While a trial court is not *functus officio* on an application for review, the jurisdiction for review is limited under Order 45 of the *Civil Procedure Rules* and case law thereon, among others, 45202 *Mwibiko*



Housing Company Ltd v Equity Building Society [2007] eKLR where the Court of Appeal (Tunoi (as he then was), Bosire & Deverell, JJA.) held:

“It is trite law, and we reiterate, that 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 of review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. *See Nairobi City Council vs. Thabiti Enterprises Ltd* [1995-98] 2EA 251 (CAK).”

See also this Court’s decision in *Gauku Mohamed v. Gitonga Mohamed* Meru HC P&A 294 of 1996 of October 19, 2022.

Res judicata

10. The second limb prayer no. (b) in the Summons dated April 9, 2021 seeking an order that “the grant dated 26/01/07 hitherto obtained through fraud be revoked absolutely” is clearly *res judicata* having been determined between the same parties in this Cause by the court by the decision of April 14, 2020 where the Court held:

“

- “9. The grounds for the revocation of grant are set out in section 76 of the *Law of Succession Act*. The applicants have proved that the proceedings to obtain the grant were defective; the grant was obtained fraudulently and by means of untrue allegation of fact essential in point of law. The fact that they may have been born to different fathers, that in itself does not impair or affect their mother’s right to half share of the estate property to which they are entitled. The grant cannot stand.

....

19. In view of the foregoing, revoking the grant will serve no purpose....”

Conclusion

11. The applicant is seeking a different view of the matter from that taken by the Court (Mabeya, J.) in the Judgment of April 14, 2020. The issues of the relative values of the assets distributed to the respective beneficiaries and the entitlement of the 6th applicant to inherit the deceased as son of the deceased, besides the children of Zipporah Nthama, deceased, are profound issues the conclusion on which, if the court erred, may be remedied upon an appeal on the merits.
12. It would only be an error on the face of the record if the court in its impugned decision had already found the said Jackson as a child of the deceased and yet failed to provide for him. In the ruling, the court does not make any mention of the said Jackson as a child of the deceased. The applicant’s contention now must be that the court made a wrong decision and erred in failing to find that Jackson was a child of the deceased entitled to a share of the estate alongside his two sisters. That is a question for the appeal court.
13. It would appear that there was a parcel of land LR No. Kiirua/Ruiru/1103 which the Petitioner by her affidavit sworn on 4th March 2019 said “I have now purchased LR No. KIIRUA/RUIRI/1103



to give to the applicants. Annexed and marked MKM1 is a copy of the Agreement.” In the ruling of 14/4/2020, without mentioning the parcel of land Kiirua/Ruiri/1103 as it had mentioned in the ruling of 10/4/2019, the Court ruled that –

“19. In view of the foregoing, revoking the grant will serve no purpose. The petitioner has proposed that the property she bought ie. Kiirua/Ruiri/6987, measuring $\frac{1}{4}$ acre be given to the applicants in lieu of their share in the estate property would notes that the applicants’ share in the estate property would have been equivalent to 0.3 ha (0.741 acres). The petitioner did not disclose the value of the latter property.”

There is no mention of the share of Jackson Kiogora, alleged son of the deceased, or of the property Kiirua/Ruiri/1103 allegedly bought by the Petitioner “to give to the applicants.” If the Court made an error in the identification of the heirs and the distribution of the deceased’s estate, it is an error in conclusion of law and apprehension of evidence which in accordance with caselaw authorities should be subject of appeal rather than review of the decision.

14. Accordingly, this Court finds that bringing in the parcel of land LR. No. Kiirua/Ruiri/1103, and making provision for Jackson Kiogora, who was allegedly omitted from distribution, would in essence be tantamount to re-distributing the estate, and not an error on the face of the record within the meaning of the review procedure. The Court, therefore, finds that no proper case for review has been made to warrant the exercise of the court’s limited powers of review.
15. Consequently, for the reasons set out above, the application dated 9/4/2021 is declined. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 21ST DAY OF OCTOBER, 2022.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S Leonard K. Ondari & CO. Advocates for the Applicant.

M/S Kiautha Arithi & CO. Advocates for the Respondent.

