



**In re Estate of Ahmed Ladha (Deceased) (Family Appeal 44 of 2019)
[2022] KEHC 17158 (KLR) (23 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 44 OF 2019
JN ONYIEGO, J
DECEMBER 23, 2022
IN THE MATTER OF THE ESTATE OF AHMED LADHA(DECEASED)**

BETWEEN

HASHAM AHMED 1ST APPELLANT

MOHAMED HASSAN AHMED 2ND APPELLANT

AND

FIROZ SIDIK 1ST RESPONDENT

ZAFAR FAKIR 2ND RESPONDENT

ALTAAF ABDULKARIM 3RD RESPONDENT

*(Being an appeal from the ruling of Sheikh Juma Ali Abdalla bon.
Principal Kadhi Mombasa delivered on 8th November 2019 in KCSC
No. 52 of 2015 Firoz Sidik & 2 others vs Hasham Ahmed & another)*

JUDGMENT

1. The deceased herein Ahmed Ladha died intestate on October 17, 1969. On the 9th March 2015, the Respondents herein in their capacity as grand children to the deceased filed a Succession Petition in respect of the estate of the deceased seeking determination of the estate, heirs to the deceased and distribution of the estate. The Respondents who also indicated that their fathers were Sidik Ahmed, Fakir mohamed Ahmed and Abdulkarim Ahmed who were sons of the deceased claimed that they were entitled to inherit from their grandfather.
2. According to the petition, the deceased was survived by;
 - a. Sidik Ahemed-son (now deceased but left children)
 - b. Ayub Ahmed – son (deceased but left children)



- c. Abdulla Ahmed –son (now deceased but left children)
 - d. Fakir mohammed Ahmed –son (now deceased but left children)
 - e. Hassan Ahmed-son
 - f. Mohamed Hussein Ahmed-son
 - g. Abdulkarim Ahmed- son (now deceased but left children)
 - h. Sherbanu Ahmed –daughter (now deceased but left children)
3. Among the assets listed as comprising the estate were;
- a. Plot Nos.MSA/XXXIII/26,14,21,22and 24
 - b. Plot No. MSA/XXX/12
 - c. Plot No. MSA/XIX/193
 - d. Cash in Habib Bank kshs 1,077, 827
 - e. Cash in Imperial bank kshs 2,279,082
 - f. Cash in imperial bank Kshs 548,736
 - g. Deposit of Kshs 362,000 at Rent disputes tribunal
4. The Petition was heard and a Judgment delivered on the 20th August, 2015 by Hon. Abdulhalim H. Athman (Principal Kadhi). Consequently, the properties of the estate, the beneficiaries(heirs) and their shares were determined. However, the Principal Kadhi reserved the aspect of distribution and instead directed that the estate be valued and the parties herein give a proposal on distribution of the same.
5. From the proceedings of the court, the judgment delivered on the 20th August, 2015 was to be amended to correct errors apparent on the face of the record with regard to the list of beneficiaries and assets. The said amendments were made *vide* the Ruling dated 28th January, 2016. In that ruling, the hon. Kadhi stated that the funds in the various bank accounts had not been declared for purposes of distribution. He went further to state that plot number MSA /block XIX/193 although registered in the name of the deceased and all his children (sons) except his daughter was to be treated as the sole property of the deceased alone unless it was shown by the children that they contributed in the purchase of the property.
6. According to the court record, after the court gave its Ruling on 28th January, 2016, the matter came up for directions on the 29th February, 2016 where parties herein were given more time to negotiate and file their proposals on the mode of distribution of the estate. Thereafter, the Court set the date of hearing of the proposal for the 3rd May, 2016. The Counsel for the Respondents herein was in attendance but there was no appearance for the Appellants. The court noted that the Respondents herein had filed their proposal and made the orders that: -
- i. The Respondents to get property No. Mombasa/blockxxxiii/24
 - ii. The Sherbanu family to get property No. Mombasa/blockxxxiii/14
 - iii. The Abdulkarim family to get property No. Mombasa/blockxxxiii/12
 - iv. The Sidik family to get property No. Mombasa/blockxix/193



- v. Properties
 - a. Mombasa/blockxxxiii/21 (30 Million)
 - b. Mombasa/blockxxxiii/22 (40 Million) be sold by private treaty or public auction at not less than the valued price.
 - vi. Estate beneficiaries issued with properties to pay the difference of the value or be paid the same by the estate.
 - vii. The two properties may be advertised for sale and the cost of the same may be from the estate account.
 - viii. Mention on 02.08.2016.
7. As a result of the order issued on the 3rd May, 2016, the Appellants on the 20th May, 2016, filed an application dated 9th May, 2016 and sought to set the aforementioned order aside. The court on 23rd May, 2016, *ex-parte*, issued orders that status quo be maintained and the application was set down for hearing. The Application was heard, and a Ruling delivered on 23rd March, 2017 wherein the court dismissed the said application and upheld the orders issued on the 3rd May, 2016.
8. Meanwhile on the 30th August, 2018, there were claims relating to the dispute of extracted decree with one having 12 orders and the other 10 orders. From the record, it is not clear how the two decrees came about. The 1st Respondent on the 27th September, 2019 filed an application requiring his Counsel, Mr. Simiyu to deposit Kshs. 2,000,000.00/= with the court as was ordered and further that an order be issued to the Land Registrar Mombasa to transfer plot No. Mombasa/block xix/193 to the family of Sidik Ahmed (deceased), particularly in the names of Firoz Sidik Ahmed and Mohamed Nazir Sidik, who were administrators of the deceased's estate.
9. The application was heard and on the last mention dated on the 16th October, 2019, a Ruling date was set for the 25th October, 2019. However, before the court could retire to write the scheduled Ruling, the Appellants filed an application under a Certificate of Urgency dated 16th October 2019. The accompanying Notice of Motion was brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#) as well as Order 9 Rule 9; Order 12 Rule 7 and Order 45 Rule 1 of the [Civil Procedure Rules, 2010](#). The application sought for orders that: -
- i. This Honourable Court do Certify this application as urgent.
 - ii. This Honourable Court do grant the Interested Parties leave to appoint Messrs Aboubakar, Mwanakitina & Compnay Advocates to act for them in place of A.A Mazrui & Compnay Advocates.
 - iii. This Honourable Court do set aside its two decrees both alleged to have been made on the 30th August, 2018, given by the Court on the 14th September, 2018
 - iv. This Honourable Court do set aside the distribution of the deceased's estate made in accordance with the decrees made on 30th August, 2018 and undo all consequent transaction and restore the estate back to where it was before the alleged Decrees.
 - v. Costs of this application be provided for.



10. The application dated 27th September, 2019 and 16th October, 2019 were heard together and a Ruling was delivered on the 8th November, 2019 whereby the former was allowed while the latter was dismissed only to the extent that the two decrees were established to be irregular. However, the court refused to interfere with the mode of distribution.
11. Being dissatisfied with the decision of the court delivered on the 8th November, 2019, the Appellants filed the Appeal herein and sets forth the following grounds;
 - a. The learned trial Kadhi erred both in fact and law in dismissing the Notice of Motion application dated 16th October, 2019 despite setting aside the decree of 30th August, 2018 which was the main prayer of the said application.
 - b. The learned trial Kadhi erred both in fact and in law in contracting himself by making a finding that the appellant had failed to satisfy the requirements of Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 and in particular by determining that the appellants did not demonstrate that they had discovered new evidence which was not within their knowledge neither did they demonstrate the existence of an error apparent on the face of the record but the said Kadhi went ahead and set aside the said decrees on the fact that there were no proceedings to indicate that the court sat on 30th August, 2018 and that they do not agree with the judgment of 28th January, 2016 which is a clear demonstration of discovery of new evidence and or an apparent error on the face of the record.
 - c. The learned trial Kadhi erred both in fact and in law in finding that the judgment was pronounced on the 20th August, 2015 and that there was an order issued on 4th May, 2016 and that there was a ruling of 23rd March, 2017 which reinstated the orders of 4th May, 2016 and thereby restored the estate to where it was before the questionable decrees were issued which meant that the estate had already been distributed by the said judgment and order while knowing that: -
 - i. The judgment of 20th August, 2015 only determined the estate, the heirs and their shares and did not in any way distribute the estate of deceased.
 - ii. The Ruling of 20th January, 2016 is alleged to have been made by consent of the parties by their advocates yet no written consent was indeed recorded in court.
 - iii. In any event, even if there was such a consent, the court did not have the jurisdiction to alter the substance of the judgment on the basis of a consent of the parties.
 - iv. The order issued on 4th May, 2016 is not predicated on any application and no proceedings reflect arguments and or consent giving rise to the said orders.
 - v. The Ruling delivered on 23rd May, 2017 went beyond the prayer in the application that gave rise to the ruling and in fact added additional orders which were ignored in the ruling of 8th November, 2019.
 - d. The learned trial Kadhi misapprehended, misapplied and or misunderstood the provisions of Section 80 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 by failing to find that the Kadhis Court had no jurisdiction to determine ownership of Plot No. Mombasa/block xix/193 among other reasons.
 - e. The learned trial Kadhi erred both in fact and in law in failing to be guided by the procedure formulated in the *Civil procedure Rules*, 2010 and consequently caused a miscarriage of justice.



12. Lastly, the appellants asked this court for orders that the Ruling delivered on the 8th November, 2019 be set aside and the application dated 16th October, 2019 be allowed. When the matter came up for directions, parties agreed to dispose of the appeal through written submissions.
13. The appellants through the firm of M/s Aboubakar, Mwanakitina & Company Advocates filed written submissions dated 4th May, 2022. Counsel submitted that the court erred when it allowed the prayer to set aside the irregular decrees but dismissed the application.
14. On ground two, three, four and five, the appellants' Counsel submitted that they had proved the existence of an error apparent on the face of the record and discovery of new evidence when they showed that the Ruling of 28th January, 2016 was not made by consent of parties as alleged and that the orders of 4th May, 2016 were not predicated upon any application or proceedings that were before the court. The Appellants added that the trial court lacked jurisdiction to determine the questions of ownership of title of Mombasa/Block xix/193. Lastly, it was submitted that the trial court was functus officio after the delivery of Judgment on the 20th August, 2015 and all orders issued thereafter were irregular.
15. The Respondents through the firm of M/s Lawrence Obonyo Legal Advocates, submitted that the Appeal herein lacked merit and should be dismissed with costs. They indicated that they had no issue with the irregular decrees being set aside. The Appellants Counsel on ground 1 and 2 indicated that the Kadhi rightly dismissed the request for setting aside of the distribution of the estate as the earlier orders of 4th May, 2016 and 23rd March, 2017 had not been Appealed against. Learned counsel added that the proper way to challenge the distribution of the estate was by way of Appeal. In that regard, the court was referred to the holding in the case of *Republic v Public Procurement Administrative Review Board & 2 Others* [2018] eKLR where the court held that the proper procedure to correct a judge's misapprehension of procedure of substantive law is through an Appeal.
16. It was counsel's submission that grounds 3 of the Appeal was a new point on appeal and that in any case the appeal herein ought not have arisen as the appellants had exhausted their right of Review. The court was referred to the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR where the court made a finding that once an order of the court has been reviewed, that same order cannot be Appealed against. It was submitted that the Appellants had already challenged the orders of the court by way of review through an application dated 9th May, 2016. The said application was dismissed and the court upheld the mode of distribution that was made on the 3rd May, 2016 and an order issued on the 4th May, 2016.
17. It was further submitted that the question of Mombasa/Block XIX/193 had been determined and it was not the Ruling on review that made a determination on the question of ownership. To the Respondents, the Ruling of 28th January, 2016 established that Mombasa/Block XIX/193 was part of the deceased's estate. The Respondents indicated that the Appellants were aware of the mode of distribution of the property herein and could not therefore claim that there was a discovery of new evidence as required under Order 45 of the *Civil Procedure Rules*. In that regard the court was referred to the case of *Nasibwa Wakenya Moses v University of Nairobi & another* [2019] eKLR where it was held that a party seeking review orders must show to the court that the evidence was indeed not within his knowledge or could not be produced by him at the time when the decree was passed.
18. Mr. obonyo went further to submit that the trial court followed the laid down procedure of the law and the appeal herein should not be allowed for being incurably defective and incompetent. The Respondents sought for the appeal to be struck out for the reasons that the valuation report by Value Consult referred to in the Ruling of 28th January, 2016 was omitted and that the typed proceedings



after 23rd July, 2017 have not been reflected as there are gaps not filled. To buttress the importance of a proper record of appeal, the respondents relied on the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2015] eKLR, where the court held that without a record of appeal a court cannot determine the subject appeal. The court went further to state that without requisite documents the appeal is incompetent and defective.

19. Counsel further submitted that the Record of Appeal was filed out of time without leave of the Court. That the Record of Appeal was to be filed on the 15th November, 2019 but it was instead filed on the 1st November, 2021. The Respondents relied on the case of Civil Appeal (Application) No.226 Of 2010 *Julia Wanjiru & 4 others v Jacinta Wairimu Njoroge* [2013] eKLR, where the Court of Appeal stated that the failure to file a record of Appeal within the prescribed time rendered the Appeal as being defective.

Determination

20. I have considered the record of appeal and rival submissions by both counsel. The only issue which crystallizes for determination is whether the honourable Principal Kadhi misdirected himself in dismissing the appellants' application for review dated 16th October 2019.
21. The crux of the appeal herein is the dismissal of the review application by the Kadhi, despite it being allowed partly. I have carefully perused the record of appeal and more particularly the application dated 16th October, 2017 wherein the two orders/ decrees that were alleged to have been made before the Hon. Khamis Ramadhani, on the 30th August, 2018 were annexed to the supporting affidavit of Mohamed Hussein Ahmed.
22. I must agree with the Hon. Kadhi Abdallah that the impugned decree issued by hon. Kadhi Khamis was without origin nor anchored on any court proceedings. The orders are very strange as they were allegedly made on the 30th August, 2018 but at the end they are indicated to have been given by the court on the 23rd March, 2017, then issued on the 14th September, 2018. I have further perused the record and confirm that there were no such proceedings on the 30th August, 2018.
23. On ground two of the Appeal, it is important to mention that the Appellants had requested for the redistribution of the estate based on the damage they claimed that the irregular orders had caused. The Appellants acknowledged that the court on the 23rd of March, 2017 made a Ruling distributing the estate and it was their case that the irregular decrees had altered the said order to the effect that: -
- i. Plot No. Mombasa/Block XXXIII/14 was vested in the Shebani family which order was not made on 23rd March, 2017
 - ii. Plot No. Mombasa/BlockXXX/12 was vested in the Abdulkarims's family which order was not made on 23rd March, 2017.
 - iii. The Petitioner's advocates were ordered to deposit Kshs. 2,000,000/- in their custody in account at Diamond Trust Bank belonging to Ahaaf Abdulkarim and Mustaq Abdulkarim which is contrary to the order of 23rd March, 2017 requiring all payments be made to court.
 - iv. Similarly, the Sidik family was ordered to deposit Kshs. 4, 6750,000/- to the same account contrary to the orders of 23rd March, 2017.
 - v. The Registrar of Lands Mombasa was directed to effect transfer which were not ordered on the 23rd March, 2017



24. To determine whether to grant an order setting aside the distribution of the estate, the trial court relied on Order 45 Rules 1 and 2 of the *Civil Procedure Rules*, 2010 which provides: -

1. Application for review of decree or order [Order 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 a review of judgment to the court which passed the decree 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 on which he applies for the review.
2. To whom applications for review may be made [Order 45, rule 2.]
 - (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.
 - (2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.
 - (3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

25. This above provision does require that a party must show or prove that the discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay. In the case of *Francis Njoroge vs Stephen maina Kamore* (2018) e KLR the court had this to say;

“Therefore, Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist:-



- (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
 - (b) There was a mistake or error apparent on the face of the record; or
 - (c) There were other sufficient reasons; and
 - (d) The application must have been made without undue delay.
26. It is incumbent upon the applicant to show that the elements set out under order 45 rule 1 of the CPRS were established.
27. In the instant case, the Appellants have mentioned the changes that the two irregular decrees made that were contrary to the orders of the court that were given on the 23rd March, 2017. I have looked at their application and annexure thereof. I have not seen where it is shown that the two irregular orders were acted upon by any party. This court therefore, agrees with the finding of the trial court that there exists a Judgment dated 20th August, 2015 together with two Rulings dated 28th January, 2016 and 23rd March, 2017 that duly show how the estate had been distributed and they are still valid as they have not been set aside. To that extent there was no discovery of any new evidence or matter or facts or mistake or apparent error on the face of the record.
28. On the third, fourth and fifth Grounds of Appeal, it is my finding that the question of review of the Rulings dated 28th January, 2016, the order issued on 4th May, 2016 and 23rd March, 2017 as well as the question on ownership of Mombasa/Block XIX/193 were not raised before the trial court and they therefore amount to new points being raised on Appeal. It is trite law that an appellate court has discretion to determine a new point on appeal. The Appellate court is only cautioned from taking new points of appeal that had not been pleaded or if all the facts bearing on the new point have not been elicited in the court below.
29. The reading of the Application dated 16th October, 2019 shows that the Appellants did not have an issue with any previous orders of the court other than irregular orders/decrees that they had complained of and had asked that the court set aside any distribution that had occurred due to the said irregular orders/decrees which was allowed. To introduce other issues that were not the subject of the review application before the trial court is irregular and therefore fresh appeals which are time barred and brought through the back door.
30. On whether the trial court bestowed upon itself jurisdiction to determine the question of title to land for the property known as Mombasa/Block XIX/193, I find that the trial court simply mentioned that there existed two previous decisions that established that the property was part of the estate and the question of ownership was already determined in another file. The appellants should have challenged that particular ruling when it was made. In any event, this was not an issue for determination in the application dated 16th October 2019.
31. The Appellants have further insisted that the proceedings that were conducted after the delivery of the judgment of 20th August, 2015 were un-procedural as the court had become functus official. Similarly, just like grounds no. 3 and 4, this issue was not raised for determination before the trial court and it is therefore not open for determination. In any event, in the said judgment, distribution was deferred till parties submitted proposals. There is nothing wrong in hearing necessary interlocutory applications after judgment. That is why courts entertain even stay of execution orders applications.



32. In the case of In Civil Appeal 33 of 1984 *Nyangau v Nyakwara* (1985)eKLR, the court of appeal had occasion to consider the effects of raising an issue on appeal for the first time. The Court made reference to its earlier decision in Kenya *Commercial Bank Ltd vs James Osebe* CA 60 of 1982 where Hancox JA said: -

“The difficulty I have felt in acceding to Mr Soire’s submissions is that in none of the cases in question did the point taken for the first time on appeal go to jurisdiction. In the recent case of *Balchin v Buckle* (Times) June 1, 1982 (a case relating to the (hitherto overlooked) non-registration of a covenant) it was held that where the right of appeal is statutory it is to be confined to points of law raised before and decided by the trial judge.

33. In the case (*Kenya Commercial Bank Ltd -vs- James Osebe* (*supra*) Stephenson, LJ said:

It (has) been clear for nearly a century and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been subject of argument and decision in the county court.

34. It is therefore my finding that if the Appellants had any problems with the decisions they have referred to in this Appeal, they ought to have challenged them through Appeal as they raise factual and evidential issues that must be examined by the courts. It is trite law that a review application not substitute an appeal hence when the appellants chose the route of review instead of an appeal, they cannot now turn round and start arguing an appeal that is time barred.

35. To conclude, it is important to mention that the trial court erred when it dismissed the application dated 16th October, 2019 yet he had partly allowed the application. In a nut shell, the impugned ruling did not generally and wholesomely dismiss the application of 16th October 2019 as purported by the appellant. It was partly allowed and partly disallowed. The success part relates to the approval that the mode of distribution prior to the introduction of the irregular decree was intact hence no need to interfere with it as nobody had ever challenged that arrangement.

36. In view of the above, it is my finding that the appeal dated 16th November, 2022 is not merited hence the same is dismissed. Regarding costs, this is a family matter. Each party to bear own costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DECEMBER 2022

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J.N.ONYIEGO

JUDGE

