In re Estate of Murunga Nalwelsie (Deceased) (Succession Cause 3 of 2022) [2025] KEHC 3013 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3013 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

SUCCESSION CAUSE 3 OF 2022

REA OUGO, J

MARCH 13, 2025

IN THE MATTER OF THE ESTATE OF MURUNGA NALWELSIE (DECEASED)

BETWEEN

JAMIN MURUNGA ..... APPLICANT

AND

GEORGE MASINDE MURUNGA ..... 1ST RESPONDENT

ELIUD SIUNDU MURUNGA ..... 2ND RESPONDENT

ERNEST MASIKA MURUNGA ..... 3RD RESPONDENT

RAYMOND WAFULA MURUNGA ..... 4TH RESPONDENT

PROTUS WANYONYI MURUNGA ..... 5TH RESPONDENT

RULING

1. Jamin Murunga(the applicant) filed the application dated 18.12.2023. The applicant seeks the court be pleased to recall, review and set aside its ruling delivered on the 29th of September 2023 and reinstate the substantive cause for hearing of the protestor's evidence. The application is supported by grounds on the face of the application and the affidavit of Jamin Murunga dated 18.12.2023. The grounds on the face of the application are that; there exists a mistake of an error apparent on the face of the record, the implementation of the ruling will be challenging because the acreage of the estate in the ruling does not tally with the acreage on the ground implementation of the ruling is likely to cause irreparable damages, the implementation of the ruling will also be too expensive for the parties, implementation of the ruling will also pity families upon families and is likely to start quarrels among families who have otherwise coexisted since time immemorial, it will be in the interests of justice family members be allowed to adduce their evidence, the evidence alluded to will enable this court arrive at a more convenient, comfortable and therefore acceptable decision, the application is not inordinate and it has been made without unreasonable delay and that nobody is likely to suffer prejudice.

2. The applicant depones as follows: he substituted one Stephen Nalwelsie, who died in 2020, as one of the administrators. His father was Rabson Wegesa Murunga. He has obtained a grant of letters of administration of the estate of Stephen Nalwelsie and forwarded the same to his lawyer. The lawyer told him that the court had substituted his deceased father and that he had been made one of the administrators. Since then, he has not gotten any information. Later, he learnt that the matter had been heard and determined. The lawyer left out crucial evidence that could have helped the court. Some of the sons of the deceased are still alive and they are ready to appear before the court. The omission of the protestors' evidence has occasioned a big miscarriage of justice. In distributing the estate, the court exceeded the size of the land by one acre in Ndivisi/Ndivisi/ 501 (parcel no. 501), and in Ndivisi/Ndivisi/ 541 (parcel number 541) the court left out 5 acres unaccounted for. The court also allocated land to beneficiaries who are deceased. He has attached copies of the certificates of death of Stephen Kinaile Nalwelsie, Rabson Wegesa Murunga and Charles Munyefu Murunga. Rabson his late father, bought the whole share of George Masinde Murunga's 5 acres of parcel no. 501. In the Ruling, George was awarded 2 acres out of parcel number 501 and 2.5 acres out of parcel number 541. George, therefore, got 4.5 acres, a double portion despite having sold his portion to his late father. Most beneficiaries and their families have buried their loved ones at their current locations, and effecting the Ruling will greatly affect the parties. The respondents are pushing for the implementation of the Ruling, this will cause irreparable loss. Allowing the evidence to be adduced will demonstrate that at the time of the deceased's death, he had apportioned land parcel to his 4 sons 11.75 acres plus 4 acres to his uncle Zebedayo Mangeni which the whole family accepted. The minutes of 23.3.20003, which he attached show how the family agreed on how to subdivide both parcels of land numbers 501 and 541. He also exhibited the affidavit of Edward Wanyonyi Nalwelesie. In a further affidavit dated 7.6.2024, the applicant states he wishes to correct some of the information. The grant he obtained is in respect of Stephen Kiniale Nalwelesie, not his father Rabson Murunga. Ms Stiuma was not acting for the late Stephen Kiniale. He represents himself as the son of Rabson, who was the son of the deceased and the interest of the late Stephen Kiniale.

3. The application was opposed by the objectors who filed grounds of opposition, stating as follows;

    i. There is no notice of change of Advocates nor Notice of Appointment to enable BS & Advocates to appear in this instant case.

    ii. The application has no foothold, a nonstarter and grand frivolity as it does not fit in Section 76 of *Law of Succession Act* which precludes the application of Section 80 of the *Civil Procedure Act* and Rules thereunder.

    iii. The Application is mere legal adventurism, vexatious and solely meant to obstruct justice.

    iv. Onus Probandi- the burden of proof on the shoulder of the alleger. The question on acreage is not supported by any Certificate Copy of the Register and yet 99 acres is in the original cause where the acreage was posted by Donald Bulimo Kapten Esq then trading as D.B Kapten & Kraido Advocates as Counsel to the Petitioner Charles Munyefu Murunga(one of the Administrator)

    v. Failure to serve the application upon M/s Situma & Co. Advocates represented by Robert Kundu Esq is Mala Fides.

4. Ernest Masika Murunga, one of the joint administrator's, depones as follows in his affidavit dated 15.6.2024; the applicant is his nephew. He does not understand how he became the administrator of his Uncle Stephen Kiniale, who has 4 wives and 9 children. The applicant lacks capacity as he is not within the sixth consanguinity. The applicant was aware of the proceedings, and he chose to hide only to

show up after a full determination, then cherry-picking so called mistakes and errors. The application ought to have been accompanied by a certified copy of the register showing the exact acreage of parcels numbers 501 and 541. Blaming Mr. Kundu is neither here nor there. The annexures relied on by the intended proposed applicant/ interested party, Jamin are apoplectic and laden with an underbelly vice of mendacity in that they are abstracted from the final ruling of the court.

5. The application was canvassed by way of oral submissions. Mr Kapten, for the applicant, submitted the following: the acreage as given by the court does not tally on the ground. The challenge is what the beneficiaries will face on the ground. Crucial evidence was left out, and the issue would have been settled had the evidence been tendered. After the matter was filed in court, the parties went back to the clan and sorted their issues, and affidavits on the same were filed in court. The Ruling has disinherited the beneficiaries in parcel no. 541. There are more than 60 families who should remain where they are. On the grounds of opposition, it was submitted that the application is not brought under section 76 of the *Law of Succession Act*. The court has powers under Article 159 to entertain the application and settle the parties. The people who have settled in the land are willing to come to court to explain themselves for harmony of the families.

6. Mr Waswa, for the objector, submitted as follows: the application is opposed. The applicant cannot approach the court with an application on grant ad litem, which was issued for the estate of Stephen Murunga his uncle yet his father was Rabson Wekesa Murunga. When a man dies, the wife is the priority, then the children. The applicant should have applied for a grant, "debonis non" which grant is taking over from a beneficiary or a deceased administrator. The applicant lacks capacity. On the notice of appointment, it is submitted that learned Counsel represented the applicant in the initial petition and now he is changing the position by representing the applicant. The applicant should have approached the court through the 5th schedule, paragraph 16 of the Probate & Administration Rules. The certificate of grant was not annexed to the application, and the applicant has not sought an annulment/ revocation or rectification of the certificate. Order 45 does not apply under the circumstances, and under 22 Rule 7 of the Civil Procedure Rules if the acreage of the land parcel comes into dispute at execution level, the law provides that a certified copy of the register be presented before the court. The surveyor's report is outside the provisions of the law, nor has the surveyor come to court. Since it is the applicant who asked him to do the report, the surveyor will 99% favour him. Mr. Kapten in response, submitted that the limited grant should have been challenged in the Chief Magistrates' court. At this level, they do not need a notice of appointment; the respondent's counsel also acted for other parties, including the applicant. The applicant has come for a review, and the court has powers under Cap 160 and Order 21 of the *CPR* and Article 159 of *the Constitution* of Kenya. The court should look at the substantive law rather than the technicalities. The applicant is asking the court to rectify and relook the Ruling.

Analysis And Determination

7. I have considered the rival affidavits and the oral submissions by the parties. The applicant seeks to have the Ruling dated 29.3.2023 recalled, reviewed, and set aside and to reinstate the substantive cause for hearing of the protestor's evidence. The main issue is whether the applicant has made a case for review of the court's ruling and or setting aside of the said ruling. The application is brought under sections 1A, 1B, 3 & 3A, 80 of the *Civil Procedure Act* and Order 45 & 51 of the Civil Procedure Rule. The respondent submits that the order the applicant seeks to be reviewed has not been attached. Is this fatal? The applicant cited the provisions of Article 159 of *the Constitution*.

8. In *John M. Njoroge & Others Vs. Cecilia M. Njoroge & Others* (2016) eKLR, the court held:-

> "As stated above, the only provisions of the Civil Procedure Rules imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by Rule 63 of the Probate & Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in order 45 of the Civil Procedure Rules."

9. It is, therefore my view that Order 45 of the *Civil Procedure Rules* would apply herein by dint of Rule 63 (1) of the *Probate & Administration Rules*. The provisions of Order 45, state as follows:

> "(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."

10. The next issue is whether failure to attach the order is fatal to the applicant's application. This issue was dealt with by the court of Appeal for Eastern Africa in the case of *G.M. Jivanji vs M. Jivanji & Another* [1929 – 30] 12 K.L.R. 44 in which it held interalia:

> "A person applying for a review under that order must be 'aggrieved by a decree or order". The words 'decree' and 'order' are here used in the sense set out in the definitions in section 2 of the Civil Procedure Ordinance. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application should be for a review of the judgment upon which it is based. But, in my opinion, however aggrieved a person may be at the various expressions contained in a judgment or even at various rulings embodied therein, unless that person is aggrieved at the formal decree or the formal order based upon the judgment as a whole, that person cannot under Order XLII (now Order XLIV) appear before the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The ratio decidendi expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a party to a suit. In these proceedings no resultant decree on the 29th August 1930, had yet come into existence. It is the duty of a party who wishes to appeal against, or apply for a review of decree or order to move the court to draw up and issue the formal order."

11. In addition, in the case of Belgo Holdings Ltd –vs- Robert Kotich Otach & Another (2009) Eklr Lady Justice Lesiit considered an objection that the order sought to be reviewed had not been annexed to the application as in the present case. The Applicant had argued the order was within the court record and needed not to be attached to the application. Lady Judge Lesiit in her ruling cited with approval the decision of Nyarangi, J (as he then was in the case of *Bernard Githii on behalf of Mutathini Farmers Co. –vs- Kihoto Farmers* Co. Ltd HCCC Nairobi 32 of 1974 where Nyarangi, J stated thus: "There is no decree drawn up and attached to the application. It is not as clear as it ought to be what aggrieves the applicant. There has to be a decree or order in discovery of new and important matter or evidence----- before an application may be made for a review of a judgment".

12. It is clear from the above decisions that the decree or order sought to be reviewed must be annexed or attached to the application in order for the Applicant to clearly show what has aggrieved it. I agree with the views of Nyarangi J and Lady Justice Lesiit. This omission cannot be cured by the provisions of Article 159 of *the Constitution*. Failure to annex that decree or order is fatal to the application. I will, therefore, not consider the merits of the application.

13. The respondents have also raised the issue that the applicant's lawyer is not on record for the applicant. The applicant's lawyer relied on Order 9 of the *Civil Procedure Act*. The said order provides as follows;

    1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the by time being in force, be madeor done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

14. It is evident from the court record that the applicant's lawyer did act for the petitioner, Charles Murunga, who is now deceased. The respondents' lawyer too at one time acted for the protestors from I gather from the court record. The Counsels appear to have been on record for the different parties at different times. The applicant's lawyer should have filed a Notice of appointment on behalf of the applicant, noting that he was not a party in the matter before the death of the deceased administrator. The applicant's motion is therefore struck out, with no order as to costs, as this is a family matter.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 13TH DAY OF MARCH 2025.

R.E. OUGO

JUDGE

In the presence of:

Mr. Kapten -For the Applicant

Respondents – Absent

Wilkister -C/A