In re Estate of Hellen Jemeli Bargutwo (Deceased) (Probate & Administration 42 of 2021) [2025] KEHC 6691 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6691 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

PROBATE & ADMINISTRATION 42 OF 2021

JR KARANJA, J

MAY 22, 2025

BETWEEN

NATHAN KIBET KOECH ..... PETITIONER

AND

ISAACK KIPKALUM KOECH ..... OBJECTOR

RULING

1. A fresh grant of letters of administration intestate was issued herein on the 17th July 2024, pursuant to the ruling of this court made on the same day on the application for revocation of the grant previously issued to Nathan Kibet Koech [Petitioner] on the 29th November 2016 in respect of the estate of the Late Hellen Jemeli Bargutwo [deceased].

2. The sole estate property was a parcel of land described as LR No. Nandi/Eisero/3X5 measuring 136.155 acres which was to be shared among the beneficiaries consisting of the deceased's eleven [11] children i.e. three [3] sons and eight [8] daughters. The Petitioner was the fifth eldest child and the youngest son of the deceased.

3. Isack Kipkalum Koech [Applicant] raised an objection to the issuance of the grant on the basis that he was a step-son of the deceased and that the estate property which was initially registered in the name of his father and that of step-mother [deceased] was divided into two equal portions in the year 1990 such that two separate titles were created i.e. Parcel No. Nandi/Eisero/4X5 and No. Nandi/Eisero/4X6.

4. The Applicant alleged that following the sub-division he became the registered owner of the Parcel No. 4X5, while the deceased became the registered owner of Parcel No. 4X6. The Applicant therefore implied that the estate property No. Nandi/Eisero/3X5 ceased to exist and was not available for distribution similar to Parcel No. 4X5 as the property of the deceased.

5. The hearing of the Applicant's objection was apparently stayed by the court on 19th October 2020 pending hearing of a matter filed before the Environment and Land Court relating to the estate

property or part thereof. However, the matter was revived on 20th April 2023, when this court directed that the objection and cross-petition by the Applicant be heard on 9th May 2023, by "viva-voce" evidence as previously directed on the 19th September 2019.

6. It is notable that although the objection was made on the 21st March 2019, the impugned grant was made and issued on 29th November 2016.

   In the cross petition, the Applicant indicated that the only free property available for distribution was the Land Parcel No. Nandi/Eisero/4X6 which together with Land Parcel No. Nandi/Eisero/4X5 were previously part of Land Parcel No. Nandi/Eisero/3X5.

7. All the foregoing notwithstanding, the objection was overtaken by events following the filing by the Applicant of the application for revocation of grant dated 11th April 2024, which was heard by this court and culminated in the impugned ruling made on 17th July 2024, resulting in the issuance of the fresh grant to both the Applicant [Isack] and the Petitioner [Nathan].

8. The present application by the Applicant vide the summons for review dated 7th August 2024, is made under Section 47 of the *Law of Succession Act* and Rule 63 read with Rule 73 of the Probate and Administration Rules.

   At this juncture prayers [2] and [3] of the application are most relevant. Thus, the Applicant seeks orders to the effect that there be an order of stay or suspension of the grant of the letters of administration dated 17th July 2024 pending the hearing of this application inter-parties.

9. This application was heard inter-parties by way of written submissions which were filed by both sides though their respective advocates i.e Messrs C.F. Otieno & Company Advocates, and Messrs Miyienda & Company Advocates. This being the position, prayer [2] is since spent leaving prayer [3] as the only prayer for which the Applicant seeks exercise of the court's discretion in his favour.

10. In the prayer [3], the Applicant seeks an order that the grant of letters of administration to Nathan Kibet Koech and Isack Kipkalum Koech made on the 17th July 2024 in this cause be reviewed and set aside and substituted with orders removing the applicant as an administrator of the estate of Hellen Jemeli Bargutwo and removing Nandi/Eisero/3X5 from the list of assets and replacing it with Nandi/Eisero/4X6 in P&A 5.

11. The grounds in support of the application are set out in the material summons and fortified by the Applicant's supporting affidavit dated 7th August 2024 and supplementary affidavit dated 26th February 2025.

    The Petitioner opposed the application on grounds set out in his replying affidavit dated 20th January 2025.

12. A consideration of the application by this court on the basis of the supporting grounds and those in opposition thereto as well as the rival submissions by the parties reveals that the issue for determination is whether the application is competent and proper before the court and if so, whether the Applicant is deserving of the basic order sought herein for exercise of this courts discretion in his favour.

13. Although the application is essentially for review of the ruling made by this court on 17th July 20924, the relevant provision of the Law i.e. Order 45 of the Civil Procedure Rules is not invoked even though the applicant relies on it in his submissions and by the fact that Rule 63 of Probate and Administration Rules is readily invoked along with Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules.

14. Section 47[1] of the Succession Act grants this court the jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders as may be expedient while Rule 73 of the Probate and Administration Rules grants inherent powers to the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

    Rule 63 of the Probate and Administration Rules allows the application of Order 45 of the Civil Procedure Rules "inter-alia" in succession proceedings. However, the Applicant did not invoke Order 45 of the Criminal Procedure Rule as the enabling provision of the law bringing this application. To that extent, the application is improper and incompetent before this court for grant of the order sought by the Applicant.

15. However, regard being given to Article 159[2][d] of *the Constitution* which provides for administration of justice without undue regard to procedural technicalities, the glaring defect in the application may as well be disregarded. This therefore raises the question whether the Applicant has established or satisfied the necessary ingredients of Order 45 Rule 1 of the Civil Procedure Rules for this court to exercise discretion in his favour.

16. Rule 1[1] of Order 45 Civil Procedure Rule 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, or 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".

17. The Applicant is asking this court to review its ruling of the 17th July 2024 to the extent that the Applicant be removed as an administrator to the estate of the deceased Hellen Jemeli Bargutwo and also that the estate property described as Nandi/Eisero/3X5 be removed from the list of assets and replacing it with Nandi/Eisero/4X6 in P&A 5. The main ground for the application as may be deciphered from the averments in the supporting affidavits and the supporting submissions is that there is some mistake or error apparent on the face of the record.

18. The mistake or error being alluded to is that in the impugned ruling the court treated Land Parcel No. Nandi/Eisero/3X5 as being the estate property available for distribution and issued a fresh grant for its administration in the names of the Applicant and the Petitioner, yet there was evidence showing that the parcel ceased to exist upon its sub-division into two portions in the year 1990, thereby creating Parcel No. Nandi/Eisero/4X5 registered in the name of the Applicant and Parcel No. Nandi/Eisero/4X6 belonging or registered in the name of the deceased.

19. It is the Applicant's contention that the Parcel No. Nandi/Eisero/3X5 being non-existent and the Environment and Land Court having confirmed as much in its judgment made on 25th January 2023 in which the Applicant was declared the owner of Parcel No. Nandi/Eisero/4X5 for which he has a valid title and Parcel No. Nandi/Eisero/4X6 was declared the property of the deceased, then it would follow

that the impugned ruling of this court in as much as it found Land Parcel No. Nandi/ Eisero/3X5 to be the property of the deceased available for distribution and appointing the Applicant and the Petitioner as joint administrators of the estate, was erroneous and a mistake warranting review in the manner suggested in this application.

20. In essence, what the Applicant is saying is that Parcel No. Nandi/Eisero/4X6 being the property of the deceased was the correct Parcel of Land available for distribution amongst the beneficiaries in this succession cause, rather than Parcel No. Nandi/Eisero/3X5 which no longer exists after being partitioned into two creating new Parcel No. 4X5 and 4X6.

    The Applicant is also saying that Parcel No. 4X5 registered in his own name was never and could never be available for distribution as the property of the deceased.

21. The Applicant submitted that this succession court cannot contradict the land court in matters of ownership of land as it did in its impugned ruling and if the court were to proceed on the assumption that Parcel No. Nandi/Eisero/3X5 in fact existed, then there would be a problem in the implementation of the court order as the land registry would not interfere with its records.

22. Drawing from the decision of the court in the case of Mbogo and Another Vs. Shah [1968]EA, the Supreme Court of Kenya in Parliamentary Service Commission Vs. Martin Nyaga Wambora & Others APP. NO. 8 of 2017, provided the guiding principles for applications for review of a decision of the court made in exercise of discretion as follows; -

    (i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this court;

    (ii) Review of exercise of discretion is not a right, but an equitable remedy which calls for a basis to be taken by the Applicant to the satisfaction of the court.

    (iii) An application for review of exercise of discretion is not an appeal or a chance for the Applicant to re-argue his/her application;

    (iv) in an application for review of exercise of discretion the Applicant has to demonstrate, to the satisfaction of the court, how the court erred in the exercise of its discretion or exercised it whimsically;

    (v) during such review application in focus is the decision of the court and not the merit of the substantive motion subject of the decision under review.

    (vi) the Applicant has to satisfactorily demonstrate that the judge[s] misdirected themselves in exercise of discretion and: -

        (a) As a result, a wrong decision was arrived at or

        (b) It is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice."

23. In the National Bank of Kenya Vs. Ndungu Njau the Court of Appeal in respect of applications for review stated as follows:-

    "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 sufficient ground for review that another judge could have taken a different view of the

matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law."

24. In Republic Vs. Advocates Disciplinary Tribunal Ex-parte Appollo Mboya [2019] eKLR, the High Court while dealing with the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules summarized the applicable principles in reviewing its own decision as follows: -

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 review under Section 80 on the basis of subsequent decision/ judgement of a co-ordinate 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 fact of 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 conclusions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 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 Civil Procedure Code. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

25. In this case, the onus to prove or demonstrate the existence of a mistake or error apparent on the impugned ruling of this court lay with the Applicant.

However, the grounds preferred herein by the Applicant do not demonstrate the alleged mistake or error apparent on the face of the record. Instead, there is clear demonstration of the Applicant's dissatisfaction with the impugned ruling on the basis that the estate property identified therein was not the actual estate property belonging to the deceased and available for distribution as it ceased to

exist after its partition into two equal parts to create two distinct parcels of land one of which was the actual estate property available for distribution.

26. The Applicant implied that the finding of this court that Parcel No. Nandi/3X5 was the actual estate property available for distribution was an error of fact and law. Therefore, this court was divested of the jurisdiction to order the issuance of a fresh grant respecting the said Parcel No. 3X5 which was found by the Environment and Land Court to be non-existent having been divided into two portions one of which belonged to the Applicant and the other to the deceased.

27. The Applicant further implied that this court improperly appointed the Applicant as one of the two administrators while not possessed of the necessary jurisdiction after the finding of the Environment and Land Court to the effect that the Applicant was the lawful Proprietor/Owner of Parcel No. Nandi/Eisero/4X5 which arose from Parcel No. Nandi/Eisero/3X5 following its sub-division into two.

    It was for all the foregoing reasons that the Applicant seeks a review of the impugned ruling so that the name of the Applicant as the Administrator of the estate of the deceased is removed and that land Parcel No. Nandi/Eisero/3X5 is removed from the list of assets in Form P&A 5 and replaced with Parcel No. Nandi/Eisero/4X6.

28. It is clear from the grounds and submissions in support of this application for review that the Applicant is seeking under the guise of review to have the entire succession cause re-opened for re-consideration a fresh in as much as the impugned ruling according to him was factual and legally flawed.

    This is the more reason why he seeks an amendment to the initial petition for grant of letters of administration intestate listing Parcel No. Nandi/Eisero/3X5 as property of the deceased instead of Parcel No. Nandi/Eisero/4X6.

29. It is also clear that the Applicant seeks review more on points of law rather than on the ground that there exists a mistake or error on the face of the record or impugned ruling. In any event, the Applicant has failed to demonstrate a prima-facie error or mistake on the face of the record or the impugned ruling which made it clear that what was before the court was a succession dispute for which Land Parcel No. Nandi/Eisero/3X5 was the subject matter it its original rather than frequented or dismembered form thereby rendering the land dispute in the Environment and Land Court irrelevant for the purpose of the succession cause.

30. Indeed, just like this court has no jurisdiction to deal with matters before the Environment and Land Court, the said court has no jurisdiction to deal with matters before this succession court. In relying on the ruling or judgment of the Environment and Land Court in the dispute before it to ask for review of this court's ruling, the Applicant is actually inviting this court to sit on appeal against its own ruling and/or for that matter the judgment of the Environment and Land Court which enjoys the status of a High Court with jurisdiction to deal with land disputes.

31. This court, applying the principles enunciated in the aforementioned decisions of the Supreme Court, the Court of Appeal and the High Court would find and does hereby find that the present application is unmerited for want of satisfactory grounds for exercise of discretion in favour of the Applicant.

    The application is therefore dismissed with costs to the Respondents.

32. The Applicant has an option to file a substantive appeal against the impugned ruling or even this ruling or file a protest to the summons for confirmation of grant dated 20th January 2025 filed herein by the Petitioner/ Respondent. Short of all that, the Applicant may opt to move the court under the provisions of Section 76 of the *Law of Succession Act*

DATED AND DELIVERED THIS 22ND DAY OF MAY 2025

HON. J. R. KARANJAH

JUDGE