In re Estate of Monicah Mirae (Deceased) (Family Appeal 24 of 2023) [2025] KEHC 6583 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6583 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

FAMILY APPEAL 24 OF 2023

FN MUCHEMI, J

MAY 15, 2025

IN THE MATTER OF THE ESTATE OF MONICAH MIRAE (DECEASED)

BETWEEN

STEPHEN KIMANI KAMAU ..... APPELLANT

AND

GABRIEL MBURU KAMAU ..... 1ST RESPONDENT

AUGUSTINE NJOROGE KAMAU ..... 2ND RESPONDENT

RULING

1. The application for determination dated 16th January 2025 seeks for orders of review and setting aside of the judgement delivered on 11th July 2024.

2. The respondent filed a replying affidavit dated 10th February 2025 in opposition to the application.

The 1st Respondent/Applicant's Case

3. The applicant states that the current appeal was filed out of time as the appeal was filed in Kiambu High Court and later transferred to the current court. There was on record a pending application for leave to file the appeal out of time at the time of transfer. The applicant argues that when the file was presented before this court, the appellant failed to inform the court about his pending application to file the appeal out of time. The court gave directions on how to proceed with the main appeal and judgment was subsequently delivered on 11th July 2024.

4. The applicant argues that being a lay person he did not understand legal procedures which required that an appeal from a subordinate court ought to be filed within 30 days after the judgment of the trial court. The applicant further argues that he perused the court record and noted that no leave was granted to have the appeal filed out of time thus the said orders of the court ought to be reviewed on

the ground that the same falls within an error on the face of the record. The applicant further states that there has been no delay in bringing the present application as the same has been informed by the discovery of new information.

The Appellant/Respondent's Case

5. The respondent states that judgment in the matter was delivered on 11th July 2024 in the presence of the applicant. The respondent further states that the estate in dispute was distributed *vide* Certificate of Confirmation of Grant issued on 5th October 2005 in *Thika CM Succession Cause No. 270 of 2004* which distributed the assets of the estate equally amongst the parties herein. Since the confirmation of the grant, the applicant has made it his mission to stop and hinder the distribution of the estate by filing numerous applications.

6. The respondent states that the certificate of confirmation of grant has never been revoked and is still in force and the current court in its judgment of 11th July 2024 appreciated that as the estate was divided amongst the three parties herein as the only beneficiaries, the same is unlikely to change.

7. The respondent avers that the court considered the application for leave to appeal out of time and granted the orders sought. The appeal was then admitted and directions for herring given. The respondent further avers that the said issue was also considered while analysing the matter and rendering the judgment. Thus, an error does not exist on the face of the record as alleged by the applicant and neither is there discovery of new and important material that the applicant was not aware of at the time of the hearing.

8. The respondent argues that the current court is *functus officio* having rendered its judgment on 11th July 2024 and cannot re-open the matter for hearing as the applicant is attempting to do so.

9. The respondent further argues that litigation must come to an end as the beneficiaries of the estate have not enjoyed their bequests 19 years after the confirmation of the grant as a result of the applicant's frivolous and vexatious litigation over the distribution of the estate.

10. The application was disposed of by way of written submissions.

The Applicant's Submissions

11. The applicant reiterates the contents of his affidavit and submits that an appeal filed out of time without leave of court is a nullity. The applicant refers to Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the *Civil Procedure Rules* and the cases of *Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited* (2014) eKLR; *Nyamogo & Nyamogo v Kogo* (2001) EA 701 and The *Official Receiver and Liquidator v Freight Forwarders* (no citation given) and submits that he has demonstrated that there was an error on the face of the record and discovery of new matter which is that no leave was obtained before filing the instant appeal.

The Respondent's Submissions

12. The respondent reiterates what he deposed in his affidavit and submits that prior to filing the current appeal, he filed an application to file the appeal out of time on 7th March 2023 then at *Kiambu High Court vide Appeal No. E065 of 2023*. The application was considered by the current court after the transfer of the file from Kiambu on 17th January 2024, 15th February 2024 and 30th April 2024 when the court allowed the application, admitted the appeal and issued directions as to the hearing of the appeal. thus, the respondent argues that there was no error on the face of the record and neither is

there discovery of new and important material to invoke the provisions of Order 45 Rule 1 of the *Civil Procedure Rules*.

13. The respondent submits that the current court is functus officio having rendered the judgement and the applicant ought to have lodged an appeal with the Court of Appeal if he was dissatisfied with the judgment of the court. The respondent further relies on the case of *Beatrice Gichuki v Julius Muturi Gitahi* [2022] eKLR and submits that the application is an afterthought as the applicant only filed it after he began the subdivision process in January 2025.

14. The main issue for determination is whether the orders sought for review and setting aside are warranted.

The Law

Whether the orders sought for review and setting aside are warranted.

15. Order 45 of the *Civil Procedure Code* sets out the parameters for an application for review as follows:-

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 order made 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 which he applies for the review.

16. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been 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. Secondly, the applicant must demonstrate to the court that there is a mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

17. The applicant grounded his application on error apparent on the face of the record and discovery of new material which was not in his knowledge or produced by him at the time when the decree was passed or order was made. On the issue of any error apparent on the face of the record, the Court of Appeal in the case of *Muyodi v Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:-

> In *Nyamogo & Nyamogo v Kogo* (2001) EA 174 this Court said that an error on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the

face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may be conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal.

18. Similarly in *National Bank of Kenya Ltd v Ndungu Njau* Civil Appeal No. 211 of 1996 (UR) the Court of Appeal held:-

> " 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. Additionally in *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR the court stated:-

> 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 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review.

20. The court went on to say:-

The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the *Civil Procedure Rules* and Section 80 of the *Act*. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.

21. Evidently, from the above, it is clear that the error ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. The applicant states the error apparent on the face of the record is that there was no leave obtained before the appeal was filed. It is my considered view that what the applicant is raising requires examination and argument. The applicant argues that leave was not obtained to lodge the present appeal and therefore the appeal is a nullity. The respondent on the other hand argues that leave was obtained by the court, the appeal was admitted and directions given on disposal of the appeal. Review is impermissible without a glaring omission, evident mistake or similar ominous error. 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 for review. The grounds are

raised by the applicant require re-appraisal of the evidence on record which would amount to this court sitting on its own appeal. Thus, it is my view that the applicant has not demonstrated any error apparent on the face of the record.

22. The applicant has further raised the ground for discovery of new evidence. The phrase "discovery of new and important matter" was illuminated in the case of *Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya* [2019] KEHC 6379 (KLR) where the court held:-

> For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court.

23. In the instant case, the court record was available to all the parties herein for perusal. The record shows that the applicant was served with the application in question and he participated fully in the proceedings. Thus he was always aware of the contents of the court file and had a duty to raise any important issue before the appeal was disposed of. The material alleged as new by the applicant does not qualify to be so as it was available to the applicant at the time of preparing the appeal for hearing and at the final stages.

24. The applicant has brought the present application 6 months after the impugned decision was made. It is trite law that an application for review ought to be made without unreasonable delay. The applicant has not advanced any reasons for the six-month delay before filing the current application

25. It is my considered view that the applicant has not met the threshold to warrant the orders sought for review. Accordingly, the application dated 16th January 2025 lacks merit and is hereby dismissed with no orders as to costs, this being a family matter.

26. It is hereby so ordered.

RULING DELIVERED VIRUALLY, DATED AND SIGNED AT THIKA THIS 15TH DAY OF MAY 2025.

F. MUCHEMI

JUDGE