In re Estate of Enock Imbuye (Deceased) (Succession Cause 13 of 2017) [2025] KEHC 5645 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5645 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

SUCCESSION CAUSE 13 OF 2017

RK LIMO, J

MAY 8, 2025

IN THE MATTER OF THE ESTATE OF ENOCK IMBUYE-(DECEASED)

BETWEEN

RUTH IMBUYE ..... 1ST APPLICANT

ERICK NAMWOYI IMBUYE ..... 2ND APPLICANT

AND

RICK MASINDE IMBUYE ..... 1ST OBJECTOR

DENNIS MUCHUMA IMBUYE ..... 2ND OBJECTOR

ROSALINE KHAVETSA IMBUYE ..... 3RD OBJECTOR

VIOLET INJETE IMBUYE ..... 4TH OBJECTOR

RULING

1. The applicants herein Ruth Imbuye & Erick Namwoyi Imbuye, have moved this court vide an application dated 1st July 2024 seeking the following reliefs;

   i. Spent

   ii. That the order made in the judgment dated 1/2/24 by Hon. Justice L. Kimaru that a DNA test be conducted be reviewed and set aside.

   iii. Costs.

2. The application is premised on the following listed grounds;

   a. That the court vide a ruling dated 8/4/2020 had ruled that Rick Masinde Imbuye, Dennis Muchama Imbuye, Rosaline Khavetsa and Violet Injete Imbuye all being children of Betty Mukite Sichangi were not objectors in the Succession Cause.

b. That the court vide the ruling of 8/4/2020 using its inherent jurisdiction had given the said children leave to file further affidavits in support of their mother's objection but there was noncompliance.

c. That there was no pending application by either Betty Mukite Sichangi or her adult children for recognition as biological children of the deceased.

d. That the issue of whether the four children were biological children of the deceased and therefore entitled to the estate as beneficiaries was not addressed by counsels and it was in their view an error on the face of the record for the court to order for a DNA test to be undertaken.

e. That the applicants had filed a Notice of Appeal but the Notice was withdrawn vide a notice dated 5/4/2024.

f. That the determination of this ruling will have a direct bearing on the application dated 1/2/2024.

3. The application is further supported by an affidavit in support sworn on 1/7/2024 by Ruth Imbuye the 1st applicant herein. The deponent has majorly reiterated the above listed grounds in her affidavit in support.

4. The deponent has taken issue with the judgment of Hon. Justice L. Kimaru dated 1/2/23 stating that it was contrary to the ruling of 8/4/2020 delivered by Justice Chemitei. According to her since there was no pending application by the respondents asking to be recognized as the biological children of the deceased, the order for a DNA test to determine if they are indeed biological children must be an error.

5. They have further through learned counsel Mr Kiarie urged this court to review and set aside the impugned judgment.

6. Mr Kiarie submits that the purpose of the DNA test ordered is to establish paternity of the respondents yet their mother had filed objection seeking for recognition as a widow of the deceased.

7. They contend that in the objection filed by the mother, the children were also claiming to be dependants. They further submits that Justice Chemitei gave them a chance to file further affidavits in proof of dependency which they failed to do and that vide the ruling dated 8/4/2020 the objection filed by the mother was dismissed.

8. It is further submitted that no appeal was preferred by the respondents against that ruling by Justice Chemitei who found that the mother to the respondent was not married to the deceased and therefore not a beneficiary.

9. The applicant contends that in the impugned judgment the court made no reference to the ruling of 8/4/2020. Mr Kiarie submits that Justice Kimaru ruled out birth certificates as evidence of paternity but went ahead to order for a DNA test which in his view was an obvious error.

10. The applicants submit that the respondents herein were not parties to the objection filed and that DNA sampling had not even been sought. For that reason the applicants feel that the order for DNA was an error which this court should review and set aside. They rely on the case of *Pancras T. Swai –vs- Kenya Breweries Ltd* (2014)eKLR where the Court of Appeal dealt with the question of when the High Court can review its order and that the review can be done where the court deems it necessary to correct an apparent error or omission on the part of the court.

11. The respondents are opposed to this application and have relied on a replying affidavit sworn on 12/11/24 by Rick Masinde Imbuye. The 1st Respondent maintains that he is the 1st biological child of the deceased and Betty Mukite Sichangi.

12. The respondents insist that they are entitled to the estate of the deceased and that terming them as 'objectors' is a mere technicality. According to them that technicality can only be cured by DNA test.

13. They contend that they are parties in this cause and there was no order that removed them from the proceedings.

14. The respondents opine that the applicants should have pursued the appeal against the decision to have DNA test done if they though the same had merits. It is their contention that the appeal had no merit and that is the reason the applicant withdrew it.

15. They support the court's decision for a DNA contending that the court had wide discretion/ jurisdiction to make orders that ensure that justice prevails. They take the position that the exercise of that discretion can be on an application by a party or suo moto basis.

16. The respondents fault the applicants for failure to annex the order sought to be reviewed and that it took their counsel to download this application from court portal to enable them respond stating they were never served.

17. They have through their learned counsel Mr.Oduor faulted the applicants for undue delay in seeking review contrary to the provision of Order 45 Rule 1(b) of the *Civil Procedure Rules*. They rely on the decision of *Myodi –vs- Industrial Development Corporation and Anor* (2006)E.A. The respondents submit that the court in that decision made a distinction between an error on the face of record and a mere erroneous decision. They contend that the court found that where an error on substantial point of law stares one on the face and there could possibly no or reasonably no two opinions on it, then an error on the face of the record can be made out. They submit that the other hand, an error which must be established by long process of reasoning or on points of law where there could conceivably be two opinions on it, the same can hardly be error on the face of the record. They submit that the grievance expressed by the applicants is appealable and to them that is what should be pursued.

18. They submit that the order for DNA made was to determine the question of dependency.

19. They further fault this application for focusing on the impugned decision rather than the main cause in the proceedings.

20. It is their contention that a review is not a matter of right but an equitable remedy and being an equitable remedy the applicants in their view have not met the threshold for that remedy.

21. They argue that this court cannot be asked to exercise its discretion with a view to limiting discretion of another judge adding that there was nothing injudicious in directing that a DNA test be undertaken. They submit that on the contrary a DNA test will likely lead to a just and expedient disposal of this cause.

22. This court has set out both the applicant's case and the respondents' response. Both counsels have raised pertinent issues to persuade this court to take their respective positions.

23. The application before me has invoked the inherent power/jurisdiction of this court under Section 47 of the *Law of Succession Act*. In the cited section this court is granted jurisdiction to make such orders or decrees for purposes of expediency. The applicants have also invoked the provisions of Rule 63 and 73 of *P&A Rules*. Rule 63 specifies the rules of the *Civil Procedure Rules* that apply in probate matters

and one such rule is Order 45 of the *Civil Procedure Rules* which deals with revision. Rule 73 gives the court inherent powers to "make such orders as may be necessary for the ends of justice or prevent abuse of court process". Rule 73 therefore expands the scope or discretion to court to go beyond the rules provided to make any such orders that meets the ends of justice.

24. The application before me substantially invokes the provisions of Order 45(1) of the *Civil Procedure Rules* which state 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 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".

25. Going by the above provisions a party aggrieved by an order/decree can move a court for review. A review as rightly put by the respondent is not a right but a discretionary matter. The following guidelines are provided under Order 45.

    i. A discovery of new and important matter or evidence not within the knowledge of the applicant after exercise of due diligence and was not tendered at the time the court made the order/decree.

    ii. On account of a mistake or error on the face of record.

    iii. Any other sufficient cause.

    iv. Make the applicant without unreasonable delay.

26. The applicants are not seeking for orders of review on the grounds of discovery of new matter or evidence but on account of an error they claim is on the face of record. So what is the error? That is the elephant in the room and the only issue for determination in this application.

27. The applicants were aggrieved by the order issued in the judgment dated 1/2/2023 delivered on 17/2/23. In the said judgment the Hon. Justice Kimaru made the following pronouncement;

    i. That the objector, Betty Mukite Sichangi was not a wife to the deceased as she was not married to the deceased under customary law. She is not therefore a dependent or a beneficiary of the deceased.

    ii. The objectors failed to prove or establish that the deceased established her a home or maintained or supported her and her children as expected of a husband during his lifetime.

    iii. For the court to conclusively and finally make a determination as regards to whether or not the children of the objector were sired by the deceased, a patrilineal DNA test shall be conducted. The cost of the test shall be shared equally between the applicants and the objector. The applicants and the objector's children shall supply their biological samples to enable the DNA to be undertaken....."

28. There is no dispute that the applicants were aggrieved by part of the judgment because they filed a Notice of Appeal on 3/3/23 14 days after the judgment was delivered. The Notice of Appeal however was withdrawn a year later vide a withdrawal notice dated 5/4/24.

29. The applicants later on 2/7/24 filed the present application seeking for review and setting aside of the judgment and in particular the order for DNA test to be conducted.

30. An issue has been raised with respect to delay by the applicants in bringing the application given the guidelines listed above which requires that such applications, should be filed without unreasonable delay. As I have observed above the impugned judgment was delivered on 17/2/23 while this applicant was filed on 2/7/2024. A period of one year 5 months had lapsed. Can that period be termed unreasonable delay? In my view the answer is both yes and no depending on the circumstances obtaining and the explanation offered.

31. In this matter the applicants are duly represented by counsel who is quite senior at bar. The proceedings were typed and supplied to counsel on 15/12/2023 as per certificate of delay issued on 15/12/2023 issued by the Deputy Registrar.

32. The applicants have given reasons for delay stating that they were pursuing an appeal. That reason however was given from the bar though counsel. The applicants did not offer any explanation either in the body of the application or in the supporting affidavit. This court therefore finds no sufficient reason to explain the reasons for the delay and that in the absence of good explanation or at all this court finds that the delay is unreasonable.

33. But more importantly I have considered the substance of the application and in particular what the applicant describes as "an error on the face of the record".

34. I have gone through the judgment of Hon. Kimaru J (as he then was) and the good judge was making a determination on the objection proceedings filed by Betty Mukite Sichangi and her children the respondents herein. The succession proceedings herein was filed by Judith Mukangu (now deceased) who described herself as the widow of the deceased. Before the grant was issued she died and her children applied to substitute her. Betty Mukite Sichangi and her children filed an objection and the court entertained the objection and reached the verdict I have highlighted above.

35. From the conclusion of the judgment it is not contested that the fate of Betty Mukite Sichangi was sealed. The judge found her not to have established that she was a wife or a dependent to deceased.

36. The same cannot be said about her children who are the respondents herein. The judge found that in order to "conclusively" and with "finality" determine whether the respondents herein are biological children and therefore dependents, a "patrilineal DNA test" was to be conducted. The judge in my view exercised inherent jurisdiction and discretion in making that finding conscious of the fact that the DNA test will bring the matter of dependency to rest and meet the ends of justice.

37. The question posed is whether this court can be moved to exercise its discretion to set aside the discretion of another judge. The answer to that question obviously is in the negative and the cited case of *Pancras T. Swai –vs- Kenya Breweries Ltd* (2014)eKLR put it succinctly when referencing *National Bank of Kenya Ltd –vs- Ndungu Njau*;

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of 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. More

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 stature or other provision of law cannot be ground for review. The learned judge made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he reached a wrong conclusion of law, it could be a good ground for appeal but not for review.....".

38. The applicants have placed weight on the ruling dated 8/4/2020 by Judge Chemitei. I have looked at the ruling and from the ruling the good judge found application filed by the respondents incompetent for not complying with Sections 68 & 69 of the *Law of Succession act* by filing objections. The judge however gave them a window of opportunity pursuant to Article 159 of the *Constitution* to file responses and adduce evidence. The ruling of 8/4/2020 therefore did not shut the door to the respondents but as to whether they took the chance is an issue beyond the scope of the application before me.

39. This court finds that the applicants ought to have pursued their appeal to the end because what they have pointed out as an error on the face of record is a conscious and positive decision/conclusion reached by the court upon determination of the evidence presented to him. Whether the good judge reached the correct conclusion or erroneous one is outside the purview of revisionary powers of this court. What the applicants in essence are asking this court is to overturn an equitable remedy granted in exercise of a discretion by another judge. This court cannot do that because its hands are tied by concurrence of jurisdiction of the court that made the decision and this court. The only court that can intervene is a court exercising appellant jurisdiction.

In the premises this court finds that the application dated 1/7/24 is simply unsustainable and is dismissed with costs.

DELIVERED, DATED AND SIGNED AT KITALE THIS 8TH DAY OF MAY , 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Ruling delivered in open court

In the presence of;

Kiarie for applicant

Oduor for respondent

Munialo for respondent

Duke/Chemosop – court assistants