



**In re Estate of the Late Simeon Kamau Kuria (Succession Cause
218 of 1997) [2024] KEHC 4534 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 218 OF 1997
RN NYAKUNDI, J
APRIL 11, 2024**

BETWEEN

BEATRICE WANGUI KAGUNDA APPLICANT

AND

ANN WANJIRU KAMAU PETITIONER

AND

TABITHA MBUKII MBURU 1ST RESPONDENT

ELIZABETH WAMBUI NDUNGU 2ND RESPONDENT

EVANSON KIMANI NDUNGU 3RD RESPONDENT

VALLEY MAPS & SURVEYORS 4TH RESPONDENT

RULING

1. By a Notice of Motion dated 22/1/2024, the Applicant, Beatrice Wangui Kagunda seeks orders that;
 1. **Spent.**
2. This Honourable Court be pleased to review/vary the orders made on 9/10/2023 and instead confirm the orders made and issued on 20/1/2015 by this Honourable Court for interest of justice.
3. The Honourable Court be pleased to compel the Administrator to compensate (me) the Applicant for demolition of my house without any authority (Kshs.300,000/=).
2. The application is premised on the grounds therein and is further supported by the affidavit sworn by the Applicant on 22/1/2024.



The Applicant's Case

3. The Applicant deposed that she is one of the surviving beneficiaries of the estate herein, that the orders made on 9/10/2023 are defective as they capture the Applicants therein as the beneficiaries of the deceased. The Applicant further contends that the same directed the beneficiaries to pay up surveyor's fees when no survey had been done.
4. The Applicant further deposed that the said order also directed the beneficiaries to demolish structures on the boundary of the estate of the deceased which order contradicts with another order issued on 20/1/2015 by Judge C. W Githua. The Applicant maintains that the order issued on 20/1/2015, stated that no activity was to be done on the deceased property until it is well distributed to the respective beneficiaries, which up to now is yet to be actualized.
5. The Applicant contends that the Administrator together with one Nahashon Muniu Kamau demolished her house and thereby evicted her from the estate of the deceased without proper justification and thus preventing her from enjoying the benefits of being a beneficiary like they are.
6. The Applicant wants the Court to vacate the orders issued on 9/10/2023 and instead direct that there be no other activity in the deceased's estate until the same has been conclusively distributed amongst all of the 8 beneficiaries as per the schedule of distribution on the Certificate of Confirmation of Grant.
7. The Applicant further wants the Court to compel the administrator herein to build a house for her or compensate her with Kshs.300,000/= for demolishing all her structures and house included without her permission or any directive from a Court of law.
8. The application is unopposed. There is an Affidavit of Service filed in Court on 16/2/2024 showing that the Respondents herein were served through their Counsel but did not file any response.

Determination

9. From onset I must mention that the Court herein on 9/10/2023 directed that no application on this subject matter shall be filed without leave of the Court. Be as it may the Applicant herein without leave of Court decided to file this instant application. I need to remind parties that Court orders are never issued in vain, they ought to be complied with.
10. It must be noted that the power of review is available only when there is an error apparent on the face of the record. For purposes of clarity review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.
11. Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -
 - “ Any person who considers himself aggrieved—
 - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”



12. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

“ 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.”

13. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

14. *Sarder Mohamed v. Charan Singh Nand Sing and Another* (1959) EA 793 where the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

15. Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608, had this to say:-

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

16. In *Tokesi Mambili and others Vs Simion Litsanga* the Court held as follows: -



- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
 - ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.
17. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -
- 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 reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate 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 face of the 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 conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 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 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.



18. In the present case, the Applicant wants the Court to review its order dated 9/10/2023 in which the Court herein directed as follows;
1. That the temporary structures along the boundary of the estate be demolished to give way for vacant possession within 21 days from today's date (9th October, 2023).
 2. That the issue of showing Beatrice her share and entitlement is a logistic issue to be delivered by the Administrator, Surveyor and the Area Chief.
 3. That fortunately for this case against the submissions by Beatrice, a letter dated 4th October, 2023 clarified clearly that there is no issue about her not being shown the portion of land and its boundary.'
 4. That again that is not an issue to be entertained by this Court. It is more of an administrative issue and the same has been completed as per the Chief's Letter.
 5. That the issue therefore is frozen and not justifiable before this Court.
 6. That the Court has no jurisdiction to entertain a non-justifiable issue.
 7. That the beneficiaries to comply in meeting their part of the bargain in paying up the surveyor's fees.
 8. That this file is marked as closed save for compliance by the Administrator to file a probate account on or before .
 9. That no application on this subject matter shall be filed without leave of the Court.
 10. That the laws of Section 83 of the Act, final orders on probate account be availed on or before 18th March, 2024.
19. The Applicant maintains that the said order contradicts another order that was issued on 20/1/2015 before Honourable Lady Justice, C. W Githua. The Applicant also wants the Court to direct that there be no activity on the estate of the deceased herein until the same has been conclusively distributed amongst all the 8 beneficiaries as per the schedule of distribution in the Certificate of Confirmation Grant. The Applicant herein has however failed to categorically state whether there has been discovery of new and important matter or evidence which was not within her knowledge or could not be produced at the time when the order to be reviewed was made. Further, the Applicant has not shown that there was a mistake or error apparent on the face of the record or for any other sufficient reason to warrant the review being sought. From a cursory perusal of the order of 9/10/2023 it is evident that the Applicant herein was in fact present when the said order was issued by this Court.
20. It is evident from the pleadings on record that the Applicant is unhappy with the decision reached by this Court and, as such, she ought to have preferred an appeal rather than asking for a review.
21. The Applicant save for mentioning in passing that her structures and house were demolished, she however did not tender any cogent evidence to support her allegations. I need not remind the Applicant that he who alleges must prove is a cardinal rule in evidence and as such her assertions are just mere assertions without any proof.



- 22. In the end, the Applicant have failed to demonstrate that there was mistake or error apparent on the face of the record and/ or any sufficient reason to enable this Court review/ or set aside its orders issued on 9/10/2023.
- 23. Before I put down my pen, it is worthwhile to note that litigation must always come to an end. I take judicial notice that this is an old matter that has been in Court unfortunately over 27 years, in essence denying the beneficiaries in the estate herein from enjoying their respective inheritance.
- 24. Accordingly, the Applicant’s application dated 22/1/2024 is without merit and is hereby dismissed with no orders as to costs.
- 25. It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF APRIL 2024

In the presence of
Mr. Rotich for the Plaintiff
M/s Beatrice Kagunda for the

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R. NYAKUNDI
JUDGE
innjugunaadvocate@gmail.com

SUCCESSION CAUSE NO 218 OF 1997	0
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