



**In re Estate of Kibore Arap Kurgat (Deceased) (Miscellaneous Succession Cause 85 of 1999) [2024] KEHC 8845 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8845 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS SUCCESSION CAUSE 85 OF 1999**

**JRA WANANDA, J**

**JULY 19, 2024**

**N THE MATTER OF THE ESTATE OF KIBORE ARAP KURGAT (DECEASED)**

**BETWEEN**

**JOHN ADORI WASORE ..... APPLICANT**

**AND**

**MARTHA CHEPCHUMBA KURGAT ..... RESPONDENT**

**AND**

**KAPSAGAWAT PRIMARY SCHOOL ..... INTERESTED PARTY**

**HERMAN AGAROMBA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JORAM OPATI MULIMI) ..... INTERESTED PARTY**

**RULING**

1. The Application herein seeks Review of a Ruling delivered in this matter.
2. This action begun as Kapsabet Principal Magistrates Court Succession Cause No. 67 of 1997 in which the Applicant had applied and obtained a Grant of Letters of Administration over the estate of the deceased. The Grant was subsequently confirmed on 13/01/1999 and pursuant thereto, the Applicant became the sole beneficiary of the deceased's parcel of land known as Nandi/Chebilat/517 measuring 2.6 Ha (6.5 Acres). Upon learning of this development, the Respondent, in her capacity as the widow of the deceased, moved to this High Court and filed this Cause seeking revocation of the Grant. The ground advanced was that the Applicant, not being related to the deceased in any way, misled that Court that he was the heir to the deceased and thus fraudulently obtained the Grant.
3. However, before the Application could be heard, the parties entered into a consent whereof the Grant was revoked and the title to the parcel of land acquired by the Applicant also nullified. Since the Applicant, the 1<sup>st</sup> Interested Party and the 2<sup>nd</sup> Interested Party were all claiming to have purchased



portions of the parcel of land but with the Applicant and the 1<sup>st</sup> Interested Party alleging differing or overlapping acreages and conflicting portion identities, the matter proceeded to full viva voce trial in respect to those issues. Upon closure of the trial, Hon. Ogola J delivered his Ruling on 26/09/2022 by which he distributed the parcel of land as follows:

2 <sup>nd</sup> Interested Party	Herman Agaromba	2 Acres
1 <sup>st</sup> Interested Party	Kapsagwat Primary School	3.5 Acres
Applicant	John Adori Wasore	0.93 Acres

4. Dissatisfied with the decision, the Applicant, through his Advocates, Messrs C.D. Nyamweya & Co. filed a Notice of Appeal and followed it up with an Application for Stay of execution pending Appeal. The Application was however dismissed by Hon. Nyakundi J on 23/12/2022.
5. The Applicant has now returned to this Court with the instant Application brought by way of the Chamber Summons dated 16/02/2023. The prayers sought are as follows:
  - i. [.....] Spent.
  - ii. [.....] Spent.
  - iii. [.....] Spent.
  - iv. That the Honourable Court be pleased to review and/or vary orders in Ruling dated 26<sup>th</sup> September 2022.
  - v. That costs be provided for.
6. The Application is stated to be brought under Rules 49 and 73 of the Probate and Administration Rules 1980 and “all other enabling provisions of the law”. It is then premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by the Applicant.
7. In the Affidavit, the Applicant deponed that the said Ruling has serious errors of omission, that the deceased died on 5/03/1985 and on 30/04/1985 his parcel of land Nandi/Chebilat/517 was sold by his wife and son to the 1<sup>st</sup> Interested Party, that further, on 8/05/1985 and 30/01/1986, the said wife and son made an Agreement and/or acknowledgment for Receipt of the balance consideration, that the said son, Kibor Arap Serem and the wife, Martha Jepchumba had not obtained a Grant from the Court to transact the properties of the deceased, that in the Ruling, the Court did not and/or omitted to address this issue which is quite glaring and apparent on the record, and is also extremely pertinent as the sale constitutes an offence under Section 45 of the Law of Succession Act, but the Ruling does not address it and that this constitutes a major error on the face of the record.
8. He deponed further that the Application has been brought timeously given that there was an Application dated 13/10/2022 which was heard on 17/11/2022 and reserved for Ruling on 21/11/2022 when the same was not ready and was set to be delivered on notice, that his Advocates had been checking for the file at the Court Registry where it was always indicated that the same was in the Judge’s chambers for drafting of a Ruling, but was however finally found to have been inadvertently taken to the Archives, the Ruling having been delivered in December 2022, that there appears to have been an inadvertence in sending out the Ruling notice, that the file was traced on the 15/02/2023 and this Application was made on 16/02/2023. In conclusion, Counsel deponed that the Notice of Appeal has been withdrawn.



### **1st Interested Party's Replying Affidavit**

9. The Application is opposed by the 1<sup>st</sup> Interested Party, Kapsagawat Primary School vide the Replying Affidavit sworn by one Jonathan Meli and filed on 6/03/2023 through Messrs Z.K. Yego & Co. Law Offices Advocates. In a rather lengthy Affidavit, he deponed that he is the Chairman of the 1<sup>st</sup> Interested Party, that it has been settled by the Court vide the Ruling delivered on 26/09/2022 that the 1<sup>st</sup> Interested Party has been in occupation of the parcel of land since the year 1982 when it bought the same from the deceased for valuable consideration, that the Court also found that the Applicant, by his own admission, fraudulently instituted Succession proceedings in Kapsabet P&A No. 67 of 1997 with respect to the deceased's estate in which he obtained the Grant of Letters of Administration by disguising himself as a son of the deceased. He contended further that the Appellant used the fraudulently acquired Grant to obtain title to the whole of the parcel of land, that the Court revoked the Grant, that it was the Court's finding that the 1<sup>st</sup> Interested Party had lawfully purchased portions of the parcel of land from the deceased in the year 1982, that aggrieved by the Ruling, the Respondent filed a Notice of Appeal without the leave of the Court as required under Order 42 of the Civil Procedure Rules and thus the Notice was invalid. He added that upon filing the Notice of Appeal, the Appellant had a period of 60 days to file the Appeal, i.e., by 28/12/2022, which lapsed without the Appeal being filed.
10. He contended further that the Applicant filed an Application for stay pending Appeal which was dismissed on 23/12/2022, that the Applicant then filed an Application to withdraw the Notice of Appeal yet the same had lapsed by effluxion of time on 28/11/2022 when no Appeal was filed, that the withdrawal was because the Applicant deemed that the intended Appeal was bereft of grounds to sustain it. He deponed further that the Applicant's actions of applying for stay of execution, then filing a Notice of Appeal, then withdrawing the same and now filing an Application for Review is a malicious ploy aimed at curtailing the ends of justice and depriving the Interested Party from enjoying the fruits of its Judgment, that the Judge in the Ruling of 26/09/2022 noted that the Applicant and the Respondent struck him as untruthful people, and that the instant Application is an afterthought after the Applicant realized that his Notice of Appeal was invalid.
11. He further deponed that the Applicant has not satisfied the conditions for Review as set out under Order 45 of the Civil Procedure Rules, namely, "discovery of new and important evidence", "error apparent on the face of the record" or "for any other sufficient reason" and that the Application has been brought after unreasonable delay. He contended that the 1<sup>st</sup> Interested Party bought 4 acres of the parcel of land and has been in occupation since then. According to him, the Ruling addressed all pertinent issues and the Application is therefore Res Judicata, that the Applicant is inviting this Court to sit on appeal on its own Ruling, and that the proper forum to ventilate the issues ought to be the Court of Appeal. In conclusion, he deponed that the Interested Party stands to suffer great prejudice should the Application be allowed since it has already completed the process of survey, subdivision, beaconing, fencing and physical planning and thus epic resources have been expended.

### **2nd Interested Party's Replying Affidavit**

12. The Application is also opposed by the 2<sup>nd</sup> Respondent, Herman Agaromba vide his Replying Affidavit filed on 6/03/2023 through Messrs R.M. Wafula & Co. Advocates. In the Affidavit, he deponed that the Respondent, the Applicant and the 1<sup>st</sup> Interested Party have never had any claim over the 2 acres that was distributed to the 2<sup>nd</sup> Interested Party vide the Ruling of 26/09/2022, that pursuant to the Ruling, they embarked on its implementation and survey work was carried out and that it is inconsiderate for the Applicant to seek to cancel what has already been done and which involved



money and great effort. He deponed further that the Applicant is guilty of not disclosing that such survey work had been done and beacons already placed, that it is inconsiderate for the Applicant to seek a blanket order yet he has no issue with the 2<sup>nd</sup> Interested Party's portion of the parcel of land

### Hearing of the Application

13. The Application was canvassed by way of written Submissions. The Applicant filed his Submissions on 14/07/2023 while the 1<sup>st</sup> Interested Party filed on 15/08/2023. On his part, Counsel for the 2<sup>nd</sup> Interested Party informed the Court that he would not be filing any Submissions since he was in support of the 1<sup>st</sup> Interested Party's Submissions.

### Applicant's Submissions

14. Regarding the law applicable in determination of Applications for Review in Succession matters, Counsel for the Applicant cited the case of S. Moto Omweje Isaka (Deceased) Succession Cause No. 88 of 2011 (Kakamega) where the Judge also cited the case of *John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another* [2016] eKLR. He submitted that the correct applicable provision is Section 63 of the *Probate & Administration Rules* and also Order 45 of the *Civil Procedure Rules*, and that the Applicant has also invoked Rules 49 and 73 of the *Probate and Administration Rules* 1980 which are general provisions. He also cited the case of *Estate of Saverio Ruri Njuiri (Deceased)* Miscv Suuccession Cause No. 187 of 2016 Embu, *Kenya Power & Lighting Co. Ltd v Ben Paints* [2016] eKLR and also the case of Meshallum Waweru Wanguku and submitted that in view of the above, the failure to invoke Section 63 aforesaid is not fatal as the Court can still turn to Section 47 and Rule 73 aforesaid.
15. Regarding "the real issue before Court", Counsel submitted that the error referred to relates to the capacity to sell the land of a deceased person as governed under Section 45 of the *Law of Succession Act* and cited the case of *Estate of Paul Mwarua (Deceased)* [2017] eKLR. In respect thereto, Counsel reiterated the allegation that by two respective Agreements, the wife and son of the deceased sold the deceased's land after the death of the deceased, to the 1<sup>st</sup> Interested Party, that the Agreements were made 1 month and 2 months, respectively, after the death of the deceased yet the wife and son did not have any Grant of representation. He reiterated that there is a glaring error on the face of the record as nowhere in the Ruling did the Court address itself to the issue. He contended further that another error on the face of the record is the Court's failure to address the fact that that from the Agreement dated 22/12/2022, the payment period was to be 90 days but the 1<sup>st</sup> Interested failed to complete within such 90 days and instead, paid in 3 years thus rendering the sale invalid.
16. Counsel insisted that the Application was filed without delay and to demonstrate this, he repeated the account already set out in his Affidavit by giving a chronology of alleged events that happened within the Court Registry, including the pendency of various Applications, "missing file" and filing of a Notice of Appeal, among others, and which, according to him, is what led to the Applicant's inability to file the Application immediately after delivery of the Ruling. In conclusion and in response to the allegation that the Applicant filed Kapsabet P&A No. 67 of 1997 fraudulently pretending to be the son of the deceased, Counsel submitted that the Grant was nullified by consent and that the 1<sup>st</sup> Interested party is merely clutching on straws instead of addressing the issue of the error on record.

### 1st Interested Party's Submissions

17. Counsel for the 1<sup>st</sup> Interested Party, too, reiterated matters already set out in the 1<sup>st</sup> Interested Party's Replying Affidavit including that the Application is an Appeal disguised as an Application for Review and also Res Judicata and that the Court is now functus officio. He contended further that the Applicant appears to fault the reasoning of the Court which is outside the realm of Review jurisdiction.



He cited the case of *Nyamongo and Nyamongo v Kogo* [2001] 1 EA 173, and the case of *National Bank of Kenya Limited v Ndungu Njau*, Civil Appeal No. 211 of 1996 [1997] eKLR and submitted that a Judgment cannot be reviewed on the basis of “errors of law” but only on the basis of “errors apparent on the face of the record” and which errors can only be clerical or arithmetic, and that if the Court reached an erroneous conclusion of law, that cannot be a ground for review.

18. Regarding the prayer for stay of execution, Counsel submitted that the same contravenes Order 42 Rule 6(2) of the *Civil Procedure Rules*, and that since the Applicant already withdrew the intended Appeal, there is no loss that the Applicant will suffer if stay is not granted. He contended further that in any event, the prayer is overtaken by events the orders having been already implemented. Counsel also contended that the Application has been brought 5 months after the Ruling, which is an unexplained delay and that the Applicant is indolent and guilty of laches. In conclusion, he cited the case of *Machira t/a Machira & Co. Advocates v East African Standard* [2002] eKLR.

### Determination

19. The issue that arises for determination in this Application is “whether the Ruling delivered herein on 26/09/2022 by Hon. Ogola J should be reviewed”.
20. Review of orders in a Succession Cause is governed by Rule 63(1) of the *Probate and Administration Rules*, which provides as follows:

“63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

- (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

21. It is therefore clear from the foregoing that the only provisions of the *Civil Procedure Rules* imported to the *Law of Succession Act* are those listed above and which includes Order 45 of the *Civil Procedure Rules* which relates to Review (see *John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another* [2016] eKLR).
22. In the circumstances, any party seeking review of orders in a probate or Succession matter must meet the requirements set under Order 45(1). The same 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.”

23. Order 45 therefore provides for three circumstances under which an order for review can be made. The first one is where there has been “discovery of new and important matter or evidence”. The second is where there has been “a mistake or error apparent on the face of the record”. The third ground is “for any other sufficient reason”. The Applicant has come under the ground “mistake or error apparent on the face of the record”. Has the Applicant successfully brought himself within that ground?
24. The Applicant claims that the Ruling has serious errors of omission in that the portions of the parcel of land No. Nandi/Chebilat/517 claimed by the 1<sup>st</sup> Interested Party were sold to the 1<sup>st</sup> Interested Party by the wife and son of the deceased after the deceased had already died on 5/03/1985 and before the wife and the son had obtained a Grant from the Court authorizing them to transact the properties of the deceased. The Applicant claims that in the Ruling, the Court did not or omitted to address this issue which is quite glaring and apparent on the record. According to him, the issue is extremely pertinent as the sale constituted an offence under Section 45 of the Law of Succession Act, and that the Court’s omission to consider it was a major error on the face of the record.
25. The Applicant also contends that another error on the face of the record is that the Court did not consider the fact that from the Agreement dated 22/12/2022, the payment period was to be 90 days but the 1<sup>st</sup> Interested failed to complete within such 90 days and instead, paid in 3 years thus rendering the sale invalid.
26. Regarding “an 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, described the same in the following terms:

“...in *Nyamogo & Nyamogo v Kogo* [2001] EA 174 this Court said that an error apparent 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 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...”



27. Similarly, “an error apparent on the face of the record”, was described in the Tanzanian case of *Chandrakant Joshibhai Patel v R* [2004] TLR, 218 as one that:

“...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions.’

28. There is also the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, where the Court of Appeal had the following to say:

“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 provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise, we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”

29. It is therefore clear that “an error apparent on the face of record” must be one that is obvious to the eye, and self-evident. It must be one which when considered, would not yield two results and does not require elaborate arguments to be established.

30. Looking at the matters complained by the Applicant as not considered by Ogola J, I have looked at the Submissions filed by Applicant after close of the trial and I note that he did raise the matters. The same were therefore before the Judge when he rendered his decision. In regard thereto, the Judge found and held as follows:

“28. The Respondent (Applicant herein) has challenged the Interested Party’s second and third agreements on record. It is indeed true that the same were entered into after the demise of the deceased. However, with regard to the sale agreement entered into the year 1982, it is without doubt that the school purchased the portion in dispute before the Respondent (Applicant herein) who alleges to have bought his land in 1984. .... The 2<sup>nd</sup> Interested Party also corroborated the evidence that the school has been on the said land since 1980. From the surveyor’s report on record, it is evident that of the 3.5 acres being claimed by the school, there are developments; there are latrines and a nursery school ....”

31. The foregoing demonstrates that it is not true, as alleged by the Applicant, that the Judge did not address the issue of whether or not the portion sold to the 1st Interested party was sold before or after the death of the deceased. The above quoted statements prove that indeed, the Judge conclusively dealt with the issue and in his findings, overruled the Applicant’s contention that the sale was invalid because



it was made after the death of the deceased. In the circumstances, acceding to the complaints raised herein by the Applicant will mean that this Court will have to engage in a re-appraisal of the evidence and the testimonies given by the witnesses during the trial and to re-analyze the decision of Ogola J to establish substantive and factual matters. This the Court cannot do under the Revision jurisdiction.

32. It is evident that the grounds alleged by the Applicant amount to faulting the Judge for proceeding on an incorrect exposition of the law and for misconstruing a statute or the relevant provisions of law. As clearly stated in the authorities cited above, those cannot be accepted as valid grounds for review. They may be grounds for appeal, but cannot by any stretch of imagination, amount to grounds for review. In the circumstances, my finding is that the purported “mistake or error” is not such as envisaged under the “Review” jurisdiction contemplated Order 45 of the Civil Procedure Rules.

### **Final Orders**

33. In the premises, the Notice of Motion dated 16/02/2023 filed by the Applicant, the said John Adori Wasore is hereby dismissed with costs.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JULY 2024**

.....

**WANANDA J. R. ANURO**

**JUDGE**

**Delivered in the presence of:**

**Ms Chepkwony h/b for Nyamweya for Applicant**

**N/A for all other parties**

**Court Assistant: Brian Kimathi**

