



**In re Estate of Sichangi Chesoli (Deceased) (Succession Cause
103 of 2007) [2024] KEHC 9910 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9910 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 103 OF 2007**

REA OUGO, J

JULY 10, 2024

IN THE MATTER OF THE ESTATE OF SICHANGI CHESOLI (DECEASED)

BETWEEN

PIUS MASINDE SICHANGI PETITIONER

AND

MOSES SIMIYU OBJECTOR

RULING

1. Moses Simiyu the objector hereinafter referred to as the applicant filed a Motion dated 11.1.2.2023 seeking the following orders that;
 - i. Spent
 - ii. This court issues a temporary stay of execution of the Ruling dated November 28, 2023.
 - iii. Pending the hearing and determination of the application the court do review the Ruling dated November 28, 2023 on grounds that there is an error on the face of the record of the Ruling
 - iv. The costs of the application be borne by the petitioner/ respondent.
2. The application is brought under Sections 3A, 80 of the Civil Procedure Act Cap 21 Laws of Kenya, Order 45 Rule 1 (1) (2), Order 40, Rules 1,2,3,4 and 10, Order 50 of the Civil Procedure Rules, Rules 63 and 73 of the Probate & Administration Rules.
3. The application is supported by 9 grounds on the face of the application from (a) to (h) and a supporting affidavit sworn by the applicant dated December 11, 2023, the grounds echo what is the supporting affidavit. He depones as follows; he is an administrator of the estate of the late Ben Simiyu Sichangi who left the following beneficiaries; Hudson Wekesa Sichangi, Johnstone Barasa Sichangi, Beatrice Nasambi, Fred Wafula , Peter Sichangi, James Sichangi, Pius Nyongesa, Alfred Wanjala,



Moses Simiyu Maurice Mulongo, and Christine Nafula. That the petitioner and his father Zablou Masinde Sichangi were awarded all land known as Kimilili/ Kibengei/698 and Kimilili/ Kibengei 704 respectively to the exclusion of the legitimate beneficiaries. The Ruling relied on the decision held in P & A No. 3 of 1983 which was not disclose the property which the objector's father attempted to sell or the acreage in question. The court did not consider the fact that Zablou Masinde Sichangi is deceased. There was no evidence or agreement produced in court to demonstrate that the Objector's father sold his portion to third parties. The Ruling delivered on November 29, 2023 awards the Petitioner's father all the parcel number 704 which is ancestral land. The Law of Succession Act provides that all beneficiaries are entitled equally. The Ruling does not disclose the land which the objector and other beneficiaries should relocate to thus likelihood to be homeless and landless. That unless the Court intervenes and issues appropriate orders the beneficiaries will remain landless. During the trial, he stated that their family had no problems with the petitioner's family occupying parcel number 698 but the ancestral land parcel number 704 be divided amongst other beneficiaries. All beneficiaries are entitled to equal shares under the Law of Succession Act Kenya. No appeal has been preferred on the said Ruling.

4. The application was opposed.
5. Parties canvassed the application by way of oral submissions. Mr. Oira for the applicant reiterated what was deponed by the applicant in his supporting affidavit.
6. Mr Wamalwa for the respondent submitted that they rely on the replying affidavit dated It was submitted April 3, 2024 from the grounds raised by the applicant they are faulting the court on the Ruling and the applicant has not shown any error on the face of the record. The court has been faulted for relying on a ruling made by the tribunal. The court reasoned in the ruling and there is no error on the face of the record. The grounds raised are subject to an appeal, not a review. The applicant did not seek leave to appeal against the said Ruling. The application should be struck off.
7. In response Mr. Oira the Objector stated filed the motion and he filed a Notice of Appointment. That without looking at the procedural technicalities the party should be granted the orders sought. They are back to invoke the provisions of Rules 62 & 73 of the Probate and Administration Rules and that the court has the power to review its own decision.

Analysis And Determination.

8. I have considered the rival affidavits and the provisions of the law on stay of execution and review of orders. The applicant seeks a review of the Court's ruling dated the 29th of November 2023. The applicable provision of the law is Order 45 of the Civil Procedure Rules cited below as follows ;

[Order 45, rule 1.] Application for review of decree or order. 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.

- (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 on which he applies for the review. [

Order 45, rule 2.] To whom applications for review may be made.

2.

- (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.
- (2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.
- (3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

[Order 45, rule 3.] When court may grant or reject application.

3.

- (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.
- (2) Where the court is of opinion that the application for review should be granted, it shall grant the same: Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

[Order 45, rule 4.] Application where more than one judge hears.

4.

- (1) Where the application for a review is heard by more than one judge and the court is equally divided the application shall be dismissed.”

9. The applicant is seeking an order of review of the orders in the ruling dated November 29, 2023. In his supporting affidavit, he has indicated how he is aggrieved with the court ruling (see paragraphs



3,4,5,6,7,9, and 12 of the supporting affidavit.) The applicant is dissatisfied with the court ruling. As corrected submitted by the respondent the applicant has failed to point out the error on the face of the record as alleged in his grounds on the face of the application.

10. A court may review an order if the applicant demonstrates that there is an error on the face of the record. It has to be an apparent error or omission on the part of the court. To allege that the court did not consider that a party was deceased or that the court relied on a decision P&A No. 3 of 1983 which did not disclose the property which the objector's father attempted to sell or the acreage in question, is not an apparent error. The applicant is faulting the court for failing to consider issues it should have in reaching its decision. The error or omission has to be self-evident. Justice Mativo (as he then was) observed as follows in the case of *R vs Medical Practitioners & Dentists Board & another & Others* [2021] eKLR , that “

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 either of the facts or the legal position. If an error is not self-evident and detection thereof require long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1. To put it differently, an order or 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. As was held in *Nyamogo & Nyamogo v Kogo*:-2

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a 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 along-drawn 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

11. I have not been persuaded that there is an error on the face of the record. The applicant's application lacks merit. The application dated 11.12.2023 is dismissed. Each party is to bear its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT BUNGOMA THIS 10TH DAY OF JULY 2024.

R.E.OUGO

JUDGE

In the presence of;

Mr. Oira For the Applicant - Absent

Moses Simiyu/ Applicant - Present in person



Respondent - Absent

Wilkister/ Diana - C/A

