



**Maingi & another v Maingi (Succession Cause E024 of 2021)  
[2024] KEHC 8188 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8188 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE E024 OF 2021**

**HM NYAGA, J**

**JULY 5, 2024**

**BETWEEN**

**FRANCIS MACHARIA MAINGI ..... 1<sup>ST</sup> OBJECTOR**

**ALFRED WAMBARE MAINGI ..... 2<sup>ND</sup> OBJECTOR**

**AND**

**CONSOLATA NJERI MAINGI ..... ADMINISTRATOR**

**RULING**

1. The Applicants filed Notice of Motion dated 9<sup>th</sup> November, 2023 brought under Sections 3, 3A and 80 of the Civil Procedure Act, Order 45 Rule 1(1) (a) and Order 45 Rule 3(2) of the Civil Procedure Rules seeking the following orders:-
  1. Spent
  2. That this Honourable Court be pleased to grant leave to the firm of Mburu Machua & Co. Advocates to come on record for the Applicant after Judgment has been entered.
  3. That this Honourable Court be pleased to grant stay of execution of the Judgment delivered on 25<sup>th</sup> September,2023 and all consequential orders arising therefrom.
  4. That this Honourable Court be pleased to review and set aside the orders of 25<sup>th</sup> September,2023.
  5. That this Honourable Court be pleased to issue such other directions as it deems just, fit and/ or necessary in the circumstances and interests of justice.
  6. That costs of this Application be in the cause.
2. The Application is premised on grounds on its face and supported by an Affidavit of Francis Macharia Maingi sworn on even date.



3. He depones that a judgment was entered in this suit on 25<sup>th</sup> September, 2023 and there is an error apparent on the face of the record in that this court; Failed to take into account the objectors' evidence adduced during hearing that Mary Nyambura moved into the family home and lived with the family almost immediately when the 1<sup>st</sup> Administrator got married to the deceased in the year 1983 and continued to live there up to around the year 1992 when she moved to the separate house built by the deceased. Failed to take into account that Mary Nyambura was the 1<sup>st</sup> Administrator's sister and had not purchased the land but only settled on Dundori/Lanet Block/2456 in the house built by the deceased during his lifetime. Failed to consider the Objector's evidence that parcel known as Dundori/Lanet Block 2451 & 2452 (Kiamunyeki 'A') was given to Francis Macharia Maingi by the deceased during his lifetime as a wedding gift. Failed to consider that ¼ of the share in Dundori/Lanet 5/261 is to be sold and the proceeds to take care of the debts in the estate, a decision that will greatly affect the share of Francis Macharia in the deceased's estate. Failed to consider that Alfred Wambare Maingi had buried his wife in parcel known as Dundori/Lanet 5/267 and therefore the said parcel of land should devolve to him and himself. Failed to consider the Objector's evidence that Kevin Macharia Maingi has never settled on parcel Dundori/Lanet 5/267 as stated by the 1<sup>st</sup> Administrator but lives on parcel Dundori/Lanet Block 5/263 (Kiamunyeki 'A') and the Administrator was only working to ensure his son gets a share of the said parcel. Failed to consider the Protestor's evidence that parcel Dundori/Lanet Block 2304 was registered in the 1<sup>st</sup> Administrator's name after the demise of the deceased and the same should revert to the estate and be distributed to Alfred Wambare Maingi.
4. He further depones that the deceased's assets that were transferred by the 1<sup>st</sup> Administrator ought to revert to the estate and be subjected to distribution and that the aforesaid judgment will have the effect of distributing the deceased's estate unfairly.
5. The Respondent Consolata Njeri Maingi opposed the Application through her Replying Affidavit sworn on 20<sup>th</sup> February, 2023 wherein she depones that this application is defective since the Applicant failed to annex the aforesaid judgment.
6. She avers that there is no error on the face of the record and that the Applicant should have appealed the judgment if he was dissatisfied with it.
7. She deposes that this court is now *functus officio*, and that the application lacks merit and should be dismissed with costs to her.
8. The Application was canvassed through written submissions. Parties were given timelines to file their respective submissions.
9. Only the Respondent's Submissions were on record at the time of writing this ruling which was initially scheduled for delivery on 19<sup>th</sup> June 2024. The same was rescheduled. Thereafter the applicant did file their submissions on 28<sup>th</sup> June 2024. Though filed out of time I will consider them.

### **Applicants' submissions**

10. The Applicants submit that they have made out a good case for review.
11. The Applicants then proceeded to contend that there was an error apparent as it was held that Mary Nyambura was said to have purchased the property known as Dundori/Lanet/2456.
12. It was also submitted that the deceased gave Francis Macharia Maingi the property known as Dundori/Lanet/2451 and Dundori/Lanet 2452 and being gifts inter vivos, they did not form part of the net estate. Counsel cited the provisions of Section 42 of the *Law of Succession Act* and the case of *Micheni Aphaxard Nyaga & Others v Robert Njue & 2 Others* [2021] eKLR.



13. It was also submitted that there was an apparent error on the face of the record as the court failed to consider that Kevin Macharia has never resided on the parcel known as Dundori/Lanet/5/267 and it is only Alfred Wambare who had settled there and had even buried his wife there. That the said Kevin Macharia lived on land parcel No. Dundori/Lanet 5/263 (kiamunyeki "A").
14. It was also submitted that there was an error apparent on the face of the record as the court failed to consider that Dundori/Lanet Block 2304 was registered in the name of Consolata Njeri Maingi after the demise of the deceased and this amount to intermeddling with the estate as provided under Section 45 of the *Act*.
15. It is thus submitted that this court made its decision based on mistaken facts and thus it can review the orders issued.
16. On costs, the applicants submitted that she should be awarded the same. She cited *Nancy Cheroni Koros & 2 Others v Presbyterian Foundation and 2 others* [2014] eKLR.

### **Respondent's submissions**

17. The Respondent submitted that the application does not meet the threshold set out in Order 45 of the *Civil Procedure Rules*. She submitted that there is no sufficient reason advanced to warrant this court to allow the Application and the court cannot sit on appeal on its decision.
18. She argued that allowing the Application would amount to re-opening of the case afresh.
19. To buttress her submissions, she relied on the following cases;
  - i. *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR
  - ii. *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR
  - iii. *Sardar Mohamed v Charan Singh Nand Singh* [1959] EA
  - iv. *Ajit Kumar Rath v State of Orisa and Others* Supreme Court cases 596 and 608
  - v. *Tokesi Mambili & Others v Simion Litsanga Sabwa*, Civil Appeal 90 of 2001
  - vi. *Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya* [2019] eKLR
  - vii. *Evan Bwire v. Andrew Aginda* Civil Appeal No. 147 of 2006 cited in *Stephen Githua Kimani v. Nancy Wanjira Waruingi T/A Providence Auctioneers* (2016) eKLR
  - viii. *Suleiman Murunga v Nilestar Holdings Limited & another* [2015] eKLR

### **Analysis & Determination**

20. I have considered the Application, affidavit in support and in opposition to the Application plus the submissions on record. The issues that stand out for determination in my view are as follows;
  - i. Whether the firm of Mburu Machua & Co. Advocates should be granted leave to come on record for the Applicant post judgment.
  - ii. Whether the Application is defective.
  - iii. Whether the applicants have met the threshold for review of the judgment dated 25<sup>th</sup> September, 2023.



21. The rules and procedure for engagement of an advocate post judgment are set out under Order 9 rule 9 of the [Civil Procedure Rules](#) which provides as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

22. It is therefore clear that the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) make it mandatory that a change of Advocates after judgment has been entered must be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. I note that the Applicants were being represented by the firm of Nancy Njoroge, Kairu & Co Advocates before delivery of the judgment.

23. From the Application filed in Court there is no indication that the firm of Mburu Machua & Co. Advocates served the firm of Nancy Njoroge, Kairu & Co Advocates with the instant Application. Further, no mention has been made of any attempts to obtain consent of the said firm which was declined. There is no affidavit of service of the application upon the said advocates.

24. The current advocate filed a notice of change of advocate on 16<sup>th</sup> November, 2023 but there is no evidence of service of the said notice upon the Applicants’ previous advocates firm.

25. The provisions of Order 9 rule 9 of the [Civil Procedure Rules](#) are couched in mandatory terms hence compliance is a vital requirement.

26. It is thus clear that the Applicants have not met the threshold as set out in Order 9 Rule 9 of the [Civil Procedure Rules](#), 2010. This is sufficient reason to dismiss the application. However, I will also consider the substantive prayers in the application.

27. The Respondent argued that the application is defective since the Applicants did not attach a copy of the judgment they seek to review. I note that there is no requirement under Order 45 of the [Civil Procedure Rules](#) for an applicant to annex the order or ruling sought to be reviewed. Even if there was, that in my view would be a procedural technicality that is curable by Article 159 (2) (d) of the [Constitution](#). Thus, the Application is not fatal.

28. On this issue I am guided by the Court of Appeal in [Peter Kirika Gitthaiga & another v Betty Rasbid](#) ((2016) eKLR, where it went on to state that: -

“Of course an order or decree is the formal expression of the decision of the court. An order emanates from a ruling whereas a judgment gives rise to a decree and should ordinarily be extracted. As already stated Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court’s attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective.”



29. I am in agreement with the above decision and in this case, the failure to annex the judgment is not fatal because the same can easily be accessed on the court file.

30. Section 80 of the [Civil Procedure Act](#) which is the substantive law relating to review provides as follows:

“ 80 Any person who considers himself aggrieved 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 order therein as it thinks fit”.

31. To operationalize Section 80 above, the procedural provisions of Order 45 (1) of the [Civil Procedure Rules](#) provide that:

“ 45

(1) Any person considering himself aggrieved 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 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 to the review”.

32. An application for review of a judgment, ruling order or decree is guided by the principle of discovery of a new and important matter, an error apparent in the face of record or any other reason analogous to the first two. In *Muyodi v. Industrial & Commercial Development Corporation & Anor.*, (2006) 1 EA 243), the Court of Appeal stated:

“For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face



of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”.

33. In the Indian case of *Aribam Tuleshwar Sharma v. Ariban Pishak Sharma* (1979) 45CC 389, 1979(11) UJ 300 SC, it was held that:

“The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits that would be province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court.”

34. The applicants have asked this court to review the Orders issued on 25<sup>th</sup> September, 2023 on account of error apparent on the record. I have duly considered their depositions and the Respondent’s response and submissions in that regard.
35. It is clear from the Applicants’ depositions that they are aggrieved by the decision of this court in regards to the distribution of the deceased’s estate. In fact, they have categorically deposed that the effect of the said judgment is to completely disinherit them and distribute the deceased’s estate unfairly. In essence they are aggrieved by the judgment of this court.
36. Applying the said provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* to this application, I find that this application falls short of meeting the threshold of review. There is no new evidence and demonstration of a mistake or error apparent on the face of the record.
37. In my opinion the correct recourse is for the applicants to file an appeal against the said judgment.
38. Accordingly, I find that the Application lacks merit and it is hereby dismissed.
39. This being a family matter, I order that each party should bear their own costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 5<sup>TH</sup> DAY OF JULY, 2024.**

**H. M. NYAGA**

**JUDGE.**

In the presence of:-

C/A Jamleck

Ms Nyabuto for Gatheca – Respondent

Ms Ndichu for Machua for Applicant

