



REPUBLIC OF KENYA



In re Estate of Jane Wachuka Nduhiu (Deceased) (Succession Cause 616 of 2001) [2024] KEHC 10108 (KLR) (8 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 616 OF 2001
MA ODERO, J
AUGUST 8, 2024**

IN THE MATTER OF THE ESTATE OF JANE WACHUKA NDUHIU - (DECEASED)

RULING

1. Before this court for determination is the Summons dated 2nd August 2023 by which the Applicants Peter Ndungu Nduhiu And Elizabeth Nyambura Ndiritu seek the following orders:-
 - “ 1. That the Honourable Court be pleased to review its judgment dated 6/4/2018 by adding “The beneficiaries seek a surveyor to sub-divide the suit Property LR THEGENGE/GATHUTHI/354 without interfering with the developments made by each beneficiary and taking into account the grave yard of the beneficiaries parents.....”
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2. The application which was premised upon section 47 of the *Law of Succession Act*, Rules 49, 63 & 73 of the *Probate and Administration Rules*, CAP 160 Laws of Kenya was supported by the Affidavit of even date sworn by the 1st Applicant.
3. The Respondent William Gikandi Nduhiu opposed the application through the Replying Affidavit dated 28th September, 2023.
4. The Application was canvassed by way of written submissions. The Applicant did not file any written submissions but the Respondent filed the written submissions dated 17th April 2024.

Background

5. This succession cause relates to the estate of the late Jane Wachuka Nduhiu (hereinafter ‘the Deceased’) who died intestate on 22nd March 1996. The Deceased was survived by the following persons:-
 - (a) William Gikandi Nduhiu - Son



- (b) Charles Wanjohi Nduhiu - Son
 - (c) Ann Wamwere Wambugu - Son
 - (d) Elizabeth Nyambura Ndiritu - Daughter
6. The estate of the Deceased comprised of only one asset the parcel of land known as L.R. No. Thegenge/gathuthi/354 (hereinafter referred to as the 'suit land')
 7. Following the demise of the Deceased Grant of Letters of Administration Intestate was made to William Gikandi Nduhiu and Peter Ndungu Nduhiu. The grant was duly confirmed on 8th April 2018. According to the terms of the confirmed Grant the suit land was to be divided equally amongst all the beneficiaries with each receiving 2.46 acres.
 8. The 1st Applicant Peter Ndungu Nduhiu protested against the proposed mode of distribution of the estate. The protest was heard by way of oral evidence and on 6th April 2018 Hon. Justice Jairus Ngaah delivered a judgment in which he directed that the suit land be divided equally between all five children (beneficiaries) of the Deceased. It is that judgment which the Applicants now seek to have reviewed.
 9. The Applicants claim that the Respondent had engaged a surveyor without the Applicants input which surveyor moved to place beacons on the suit land without taking into account the developments made by the Applicants as well as the locations of the graveyards of the beneficiaries parents.
 10. That the respondents actions threaten the proprietary rights of the Applicants and may mitigate against peaceful co-existence. The Applicants accuse the Respondent of intermeddling with the estate of the Deceased.
 11. In opposing the application for review the Respondent avers that the judgment of 6th April, 2018 has been fully executed and individual titles have been issued to all five beneficiaries. The Respondent denies having failed to involve the Applicants in the Sub-division process and instead avers that it was the Applicants who refused to co-operate leading to the court dispensing with their participation.
 12. The respondents state that the Applicants did not raise any issues during the process of suit division and that it is too late for them to raise issues now. He urges the court to dismiss this application.

Analysis and Determination

13. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by the respondent.
14. Section 80 of the *Civil Procedure Act*, Cap 21, Laws of Kenya provides as follows:-
 - “ 80 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.
15. Order 45 Rule (1) of the *Civil Procedure Rules* provide that:-
 - (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 an 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.”
16. Order 45 Rule 1 is very explicit that a court may only review its orders on the following grounds:-
- a. There must be discovery of new and important evidence which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made;
 - b. There was a mistake or error apparent on the face of the record;
 - or
 - (c) There were other sufficient reasons; and
 - (d) The application must have been made without undue delay.”
17. In this case the Judgment in question was delivered on 6th April, 2018. The application seeking review of that judgment was made on 2nd August 2023 which is more than five (5) years after the judgment was delivered.
18. In my view this amounts to inordinate delay. The Applicants have given no explanation why, if they had genuine reasons it took them over five
- (5) years to file this application for review. I find that has been excessive delay in filing this application for review.
19. That being said the Applicants are required to show that there exists an error apparent on the face of the record so as to warrant a review of the judgment.
20. An error apparent on the face of the record refers to that error which is clearly discernible and does not require much elucidation. In *National Bank Of Kenya Limited -vs- Ndungu Njau* [1997] eKLR the court of Appeal held as follows:-
- “A review may be granted whenever the court considered 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 elaborate argument to be established.”
21. In this case the Applicants claim that the court failed to take into account the developments they had done on the suit land as well as the position of the graveyards of their parents. This is not an error



apparent on the face of the record. What the Applicants are in effect saying is that the court erred in failing to taken into account the issues they have raised. This is a matter for appeal not for review.

22. The next question the court has to consider is whether there has been discovery of new and important evidence which after due diligence was not within the knowledge of the Applicant so as to warrant a review of the judgment of 6th April 2018.
23. In discussing this aspect of discovery of new and important evidence the Supreme Court of India observed as follows in the case of *Ajit Kumar Rath -vs- State Of Orisa & others:-*

“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 for 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.” [own emphasis]

24. There has been no demonstration of any new and/or important evidence which was not known at the time of trial. The developments the Applicants claim to have done on the land and the location of their parents graves were matters which were well within the knowledge of the Applicants at the time the trial was proceeding. I find no evidence of discovery of new and important evidence.
25. The Applicants claim that they were not included and/or informed when a surveyor was appointed to sub-divide the Suit land.
26. However the Respondent counter that it was the Applicants who declined to co-operate necessitating the obtaining of a court order dispensing with their participation. A copy of the said court order issued on 12th March 2019 appears as Annexure WGN ‘2’ to the Replying Affidavit dated 28th September, 2023.
27. Additionally the Respondent has annexed notices dated 21st January 2021, 19th February, 2021 and 30th March 2021 by the District Surveyor – Nyeri issued through the local chief to ALL the beneficiaries asking them to avail themselves for the sub-division exercise. See Annexure WGN 3(a), 3(b) & WGN ‘4’ to the Replying Affidavit.
Therefore the Applicants allegation that they were not informed of the exercise is a blatant lie.
28. I find that the Applicants were properly informed of the sub-division Exercise but chose to stay away in the misguided belief that their non- participation would scuttle the exercise. Their plan did not succeed. Had they participated they would have raised all pertinent issues before the surveyor.
29. It is too late for the Applicants to cry foul now.
30. In any event it is quite evident that the partition has now been concluded. A copy of the valuation Form appears as Annexure WGN 1 to the Replying Affidavit. It is pertinent to note that Peter Nduhiu who is the 1st Applicant has signed the mutation form. Why then file this application to challenge the work done by the Surveyor. Based on the foregoing I find no merit whatsoever in this application for review. The same is an abuse of court process as well as amounting to a waste of udicial time.



31. Finally I dismiss in its entirety the Summons dated 2nd August 2023.

Costs will be met by the Applicants.

DATED IN NYERI THIS 8TH DAY OF AUGUST, 2024

MAUREEN A. ODERO

JUDGE

