



Athi Stores Limited v Varma for (Madan Mohan Singh Varma - Deceased) & 2 others (Miscellaneous Application 234 of 2013) [2024] KEHC 11251 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 234 OF 2013
MW MUIGAI, J
SEPTEMBER 24, 2024**

BETWEEN

ATHI STORES LIMITED APPLICANT

AND

REENA VARMA FOR (MADAN MOHAN SINGH VARMA - DECEASED) 1ST RESPONDENT

SUNIT SHER SINGH VARMA 2ND RESPONDENT

SHAMIT SINGH VARMA 3RD RESPONDENT

RULING

1. Vide an Application dated 20th January 2023 brought under section 80 the *Civil Procedure Act* and Order 45 Rule 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules, 2010, the Applicant seeks the following orders;
 - i. Spent
 - ii. Spent
 - iii. The decision of 2nd March 2022 be reviewed and/or set aside that Madan Mohan Singh Varma-Deceased can be legally and properly substituted
 - iv. The decision be reviewed and/set aside taking into account that Reena Varma is neither the executrix, grantee under any Grant nor the personal representative of the deceased's estate.
 - v. Costs be provided for.



2. The Application is supported by the affidavit of Shammit Noranjandass Ghai, a director of Athi Stores Limited deposited on 20.01.2023 in which she stated that an application dated 7.11.2018 was dismissed vide an order of 7.03.2019 by Justice G.V Odunga (as he then was) on the grounds that the executors cannot fully delegate their power to administer the estate of a deceased person to a third party, however close that third party is to the deceased. Further that a Notice of Motion Application dated 13.04.2021 was opposed and a certificate of confirmation of grant of probate with will was adduced indicating that the same had been granted to one Rubinder Singh Choudrie and Kamalijeet Sinnggh Bhari on 14.02.2018. That on 2.03.2021, the court granted orders that Ms Reena Varma be substituted in place of the 1st Applicant Madam Mohan Singh Varma.
3. The Applicant contends that Ms Reena Varma was substituted in place of Madam Mohan Singh Varma- deceased without taking into account that she is neither the executrix, grantee under any grant nor the personal representative of the deceased. It was indicated that the executors had since renounced their executorship. The Applicant contends that there is an error apparent on the face of the record.

Grounds Of Opposition

4. In response, the Respondents contended that;
 - a. The application is fatally defective as the Applicant had not attached a copy of the order it is seeking to have reviewed contrary to the provisions of order 45 Rule 1
 - b. The alleged error identified by the Applicant does not qualify as a basis for review under section 80 of the *Civil Procedure Act* and order 45 Rule 1 as it is trite law that an erroneous view of evidence or of law is not a ground for review but a ground for appeal.
 - c. It is apparent from the grounds relied on by the Applicant that it is dissatisfied with the court's conclusions, on evidence and law and is asking this honourable court to re analyse the evidence on record so as to arrive at a different conclusion on evidence that was on record when the application was argued and the court in its ruling recognized, analysed and arrived at a conclusion.
 - d. The application is frivolous, vexatious and an abuse of the process as it is aimed at delaying the hearing of the primary application seeking for accounts which application has been pending or 11 years and which the Respondent has not responded to.

Further Affidavit Dated 11.06.2024

5. The Applicant stated that on 22.02.2024, H.K. Chemitei J delivered a ruling restraining the executors from renouncing their rights under the written will and the notice of renunciation dated 24.06.2022 was set aside as there are unresolved issues relating to the Will herein. LR 11895/V-1RNo 25641/1 under Survey Plan No 89702 which is the main bone of contention in the Application dated 8/9/2021. Therefore Ms. Reena Varma cannot be made an executrix of the deceased's estate.
6. The Application was disposed of by way of written submissions.

Applicant's SubmissionS

7. While relying on the case of Civil Appeal no 235 of 1997, The official receiver and Liquidator vs Freight Forwarders Kenya Limited, Wangechi Kimita and another vs Mutahi WWakibiru (1982)1 KAR 977, It was submitted that the court has unfettered power of review and the same can be done under the



ground “any sufficient reason” however the Applicant’s position was that there was an error on the face of the record.

8. Secondly, it was submitted that failure to attach the order to be reviewed was not fatal and this point was buttressed by the cases of *The Methodist Church of Kenya Registered trustee Bishop Muku & 2 others vs David Mwebia Muthamia & 2 others*, *Abdulahi Mohamud vs Mohammad Kahiye* [2015] e KLR and *Kenya Union of Clinical Officers & 76 others vs County Government of Vihiga* and another [2024] KEELRC 455 (KLR).
9. Lastly, it was submitted that there is a difference between an erroneous decision and an error apparent on the face of the record, that the first can be corrected by a higher court while the latter only by exercise of the review jurisdiction.

Respondent’s Submissions

10. The applicant contends that the error identified by the Applicant does not qualify as a basis for review under order 45 Rule 1 as the Applicant seeks to have the conclusion of the court reviewed upon considering the evidence on records contrary to the principle that a good ground for appeal may not be a good ground for review. Secondly, that an erroneous view of the evidence or law is not a ground for review though it may be a good ground for appeal. Reliance was placed on the case of *Nyamogo & Nyamogo Advocates vs Kogo* (2001) 1EA 173.
11. While reiterating its grounds of opposition and the principles of review espoused in the case of *Republic vs Public Administrative Review Board and 2 others* [2018] e KLR, *Republic vs Advocates Disciplinary Tribunal Ex Parte Apollo Mboya* [2019] e KLR and *Timber Manufactures and Dealers vs Nairobi Golf Hotels (k) LTD HCCC 5250 of 1992* it was submitted that the grounds for review had not been satisfied and the application should be dismissed with costs.

Determination.

12. I have considered the Notice of Motion Application, the responses thereto and the submissions of the parties. There are 3 Rulings of the Courts relevant to this matter as follows;
 - a. Ruling of Hon G. V. Odunga J (as he then was) of 7/3/2019
 - b. Ruling of Hon G. V. Odunga J (as he then was) of 2/3/2022
 - c. Ruling of Hon H. K Chemitei of 22/2/2024.
13. The issue(s) distilled for determination are;
 - a. Whether the order of 2nd of March 2022 should be reviewed and or set aside
 - b. Whether failure to attach the ruling to be reviewed is fatal
 - c. Who should bear the costs of the Application
14. Section 80 of the *Civil Procedure Act* 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
15. Review of order is provided for under Order 45 Rule 1 of the Civil Procedure Rules which provides 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 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.[Emphasis added]
 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. The principles for review were summarized by Respondents in the case of Republic vs Public Administrative Review Board and 2 others [2018] eKLR. The court also distinguished between grounds of appeal and grounds for review and stated as follows;

“It is also important to distinguish grounds of appeal and grounds for review. Guidance can be obtained from the case of National Bank of Kenya Ltd vs Ndungu Njau[9] where the court held:-

“In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.”(Emphasis added).

14. In Abasi Belinda vs Fredrick Kangwamu and another[10] the Court held that:-

“a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal”



15. Also of useful guidance is the following excerpt from the judgement in the above cited case of National Bank of Kenya Ltd vs Ndungu Njau[11] where the court stated:-

“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.”

16. The power to review a judgment or an order 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. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”

17. On 7th March 2019 the Trial Court in its Ruling stated as follows;

“In this case the applicant states that she is the widow of the deceased. That may be so. However, without letters of administration or probate, she has no capacity to litigate on behalf of the deceased or his estate simply because she is his wife. She however, contends that she has been authorised by the executors of the deceased’s estate to do so. With due respect, only the Court has the power, through issuance of grant of letters of administration or probate to authorise a person to step into the shoes of a deceased person. That power cannot be delegated to the executors. Accordingly, the executors themselves cannot lawfully delegate their power to administer the estate of a deceased person to a third party however close that third party is to the deceased. It follows that this application is devoid of merit. It is hereby dismissed but with no order as to costs.”

18. The Applicant contends that the decision should be reviewed and/set aside as there is an error apparent on the record on the basis that Reena Varma is neither the executrix, grantee under any Grant nor the personal representative of the deceased’s estate.

19. The Trial Court in its Ruling of 2.03.2021 stated as follows;

“In this application, the applicant has averred that following the death of the 1st Applicant herein Succession Cause No. 1254 of 2017 was initiated which resulted into the Grant of Probate on the 14th February, 2018 and that on the 1st July, 2018 a Certificate of



Confirmation of Written Will was issued. If that position is correct, then it would then seem that by the time the earlier application was being dismissed, there was a Certificate of Confirmation of the Will in respect of the Estate of the 1st Applicant. What is however clear is that in the earlier application, the applicant approached this Court in her capacity as the 1st Applicant's widow as opposed to being the legal representative of his estate.

.....

As I have said hereinabove, the applicant herein brought the matter in her capacity as the widow of the deceased and not as the legal representative. In my view since the two capacities are different, the doctrine does not apply.

20. The Trial Court went on to state as follows;

“In this case parties agree that there have been squabbles between the former directors and the new directors as regards the management of the Respondent company. Whereas the new directors are of the view that the same have been resolved or are capable of being resolved within the ambit of the Company's constituting documents and the law, the Applicant believes otherwise. However, it is not in doubt that the Applicant herein, if she is the legal representative of the estate of the 1st Applicant, is properly entitled to substitute the 1st Applicant in these proceedings and protect the interest of the estate of the 1st Applicant. That is the gist of the application before me though the parties have addressed me on many other issues which are not relevant at this stage

.....

.In the premises the order that commends itself to me at this stage and which I hereby grant is that Ms. Reena Varma is hereby substituted in place of the 1st Applicant, Madan Mohan Singh Varma-Deceased.

21. The term error apparent on the record was discussed by the Supreme Court in the case of Florence Wairimu Mbugua and 2 others vs Timber Manufacturers and another [2023] eKLR where the Court stated as follows;

“This Section as quoted, embodies what is ordinarily referred to as the “Slip Rule”. By its nature, the Slip Rule permits a Court of law to correct errors that are apparent on the face of the Judgment, Ruling, or Order of the Court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the Judgment or decision of the Court. By the same token, such errors must be of such nature that their correction would not change the substance of the Judgment or alter the clear intention of the Court. In other words, the Slip Rule does not confer upon a Court, any jurisdiction or powers to sit on appeal over its own Judgment, or, to extensively review such Judgment as to substantially alter it. ...”

Correction of an apparent error on the face of the record, which is unavailable to the applicants, is distinct from a review.

22. This Court is tasked with conduct of review of the Court Ruling of delivered on 2/3 2022 in that unlike the Ruling of 7/3/2019 by the same Court found the Applicant's application devoid of merit and dismissed her request to represent her late husband in the instant proceedings as the Executors could not delegate their legal mandate. In the subsequent Ruling of 2/3/2022, the Court granted orders that the Applicant Ms Reena Varma is hereby substituted in place of the 1st applicant Madan Mohan Varma.



23. This Court perused the Court record and appraised itself of the 3 pertinent Rulings on this issue and found the following undisputed uncontested facts/findings;

The Applicant Ms Reena Varma is the sole spouse widow of shareholder/Director of Athi Stores holding 12/5 % shares.

The Applicant Ms Reena Varma vide the Will of the deceased Madan Mohan Singh Varma of 2017 bequeathed 12.5% shares of Athi Stores Ms Reena Varma absolutely and to be held in trust for their 4 children among other properties.

The Grant of Probate was issued on 14th February, 2018 and Certificate of Confirmation of Written Will issued/granted on 17/9/2018.

The executors of the estate of the deceased herein renounced their rights but the renunciation was contested by the Applicant Athi Stores. By Ruling of 24th June 2024.

Hon HK Chemitei J restrained the Executors from renunciation pending resolution ownership of property contested in Environment & Land Court Machakos Misc Civil Application Number 234 of 2013.

24. From the above outline this Court; after careful consideration of the record, I note that there is no error on the face of the record, the court was well aware of the grant of probate and the capacity under which the substitution was done at the time of making the ruling.

25. Further, there is no contest on transfer/transmission of deceased's shares to the Applicant in Athi Stores Ltd. On completion of Transmission of 12.5 % shares from the deceased; Madan Mohan Singh Varma to the Applicant Reena Sharma; according to the impugned Ruling of 2/3/2022, the Trial Court outlined in detail at Paragraph that the Executors were unable to effect transmission of shares because the Respondent, Athi Stores Ltd had 'inactive' status at the Registrar of Companies as the Company through its Directors failed to file Annual Company Returns since 2010 and the Company is yet to be linked to e-citizen details and will be regularized upon payment of requisite penalties and filing returns of missing years.

26. Section 80 of *Law of Succession Act* provides;

80. When grant takes effect

1. A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.

27. Section 80 LSA fortifies the transmission of deceased's shares to the widow of the deceased and she is validly legal shareholder and Director of Athi Stores Ltd.

28. The fact of non- completion rectification of CR12 by the Companies Registry to amend include the Applicant as shareholder/Director holding 12/5% shares as per Confirmation of Grant of Probate is for explained reasons that have no bearing on the Applicant but falls squarely on the Company Athi Stores Ltd that operates through its Directors.

29. As of now pending regularization of the Company Records at the Companies Registry, the Applicant may participate and pursue the derivative suit filed in 2013 as shareholder/Director of Athi Stores Ltd.



30. This Court from the above consideration of the facts and Rulings that culminated with appointment of Ms Reena Varma to substitute Madan Mohan Singh Varma, finds no error apparent on the face of the record for review.
31. Secondly, as to whether the failure of the Applicant to attach the Ruling to be reviewed was fatal. I note that the Ruling was attached in the submissions which is not a pleading. However, I invoke Article 259 (2) (d) of *the Constitution* and find that the same is not fatal.
32. I am guided by the finding in the case of Peter Kirika Githaiga & another v Betty Rashid [2016] eKLR where the Court stated as follows;
- “But from the various decisions rendered by the High Court, the resolution on their part seems unanimous, that an application for review is fatally defective if the order sought to be reviewed is not attached. While no provision of the law makes this a requirement, some of the reasons advanced by the High Court are that inclusion of the order is mandatory so as: to enable the court to determine the impugned point (per Visram, J. as he then was) in *Wilson Saina v Joshua Cherutich t/a Chirutich Company Ltd* [2003] eKLR; and for there to be clarity as to what “aggrieves the applicant”, (Lesiit, J. in *Belgo Holdings Limited v Robert Kotich Otach & Another* [2009] eKLR). Similar sentiments are expressed in various other cases such as by Mutungi, J. in *Suleiman Murunga v Nilestar Holdings Limited & Another* [2015] eKLR. However, in the case of *Rose Njeri Muiruri v. James Kiiru Chege & Another* [2009] eKLR; Kasango, J. veered off the High Court path and held that failure to attach the order is not fatal at all.”
33. . In our view, the position espoused by this Court and by Kasango J., represents the correct position, as they allow for recognition of the fact that while the law does not expressly demand that the order/decree be attached, it is at times necessary that the same be extracted for purposes of enabling the court have clarity as to the orders complained about.

Disposition

1. In the end, the Certificate of Urgency filed on 23/1/2023 raising issues for review in Ruling of 2/3/2022 on error apparent on the face of the Record, these issues if at all can only be addressed on appeal and not vide a review because the Trial Court addressed them extensively.
2. On perusal of the Court Record, pleadings Submissions and Rulings relevant to the instant suit finds no error apparent on the face of the record.
3. Consequently, the application is dismissed with costs.

RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 24/9/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

In The Presence

Mr. Zakayo H/b J. Singh - For The Appellant

Mr. Njoroge - For The Respondent



Geoffrey/patrick - Court Assistant(s)

