



REPUBLIC OF KENYA



In re Estate of Francis Muiri Ngacha alias Hudson Muiri Ngacha (Deceased) (Succession Cause 72 of 2016) [2024] KEHC 11546 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11546 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 72 OF 2016
MA ODERO, J
SEPTEMBER 20, 2024
IN THE ESTATE OF FRANCIS MUIRI NGACHA
ALIAS HUDSON MUIRI NGACHA (DECEASED)**

RULING

1. Before this court for determination is the Summons dated 17th April 2023 by which Sarah Wambui Muiri And Stephen Irungu Muiri (the joint Administrators of the estate) seek the following orders:-
 - “ 1. That the judgment of the honourable court delivered on 24th November 2022 together with the consequential certificate of confirmation be reviewed and set aside.
 2. That the honourable court be pleased to re-examine the distribution of the deceased with whatever modifications the honourable court may deem appropriate and thus uphold the principles of Article 27 of the Kenya constitution and Section 35 of the Law of Succession Act namely fairness equality and equity amongst the children of the deceased in the distribution of the estate.
 3. Any other order that the honourable court may deem fit and just to grant to meet the ends of justice.
 4. That the costs of the application be costs in the cause.”
2. The application which was premised upon Rules 43, 49, 59 and 63 of the *Probate and Administration Rules* and order 45 of the Civil Procedure Rules 2010 was supported by the joint Affidavit of even date sworn by the Applicants.
3. The 3rd Administrator/Respondent David Kariuki Muiri opposed the application for review through his Replying Affidavit dated 3rd July 2023.



4. The other Citee's all put in consents agreeing to have the judgment dated 24th November 2022 reviewed and to have the certificate of Confirmed Grant rectified accordingly.
5. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 30th September, 2023 whilst the Respondent relied upon his written submissions dated 24th June 2024.

Background

6. This Succession Cause relates to the estate of the late Francis Muiri Ngachaalias Hudson Muiri Ngachahereinafter ('the Deceased') who died intestate on 17th June 2023. A copy of the Certificate of Death Serial No. 282085 appears as Annexure 'DKM1' to the Supporting Affidavit dated 18th August 2016.
7. Following the demise of the Deceased Grant of letters of Administration Intestate was on 22nd November 2022 made to Sarah Wambui Muiri, David Kariuki Muiri and Stephen Irungu Muiri.
8. Vide a judgment delivered on 24th November 2022, Hon. Lady Justice Florence Muchemi set out the mode of distribution of the estate. The Grant was duly confirmed on 24th November 2022.
9. The Applicants have now come to court seeking to have the judgment delivered on 24th November 2022 as well as the certificate of Confirmed Grant issued as a consequence thereof reviewed. They also seek to have the distribution of the estate reviewed in order to adopt the Applicants proposed mode of distribution of the estate.
10. The 3rd Administrator David Kariuki Muiri vehemently opposed the application as he argued that it sought to introduce a new mode of distribution of the estate.

Analysis And Determination

11. I have considered the application filed in this court, the replies filed thereto as well as the written submissions filed by the parties.
12. The Applicants in seeking to review the judgment of 24th November 2022 are in effect seeking to amend the mode of distribution of the estate as set out in that judgement. In the premises the Applicants ought to have filed a Summons seeking rectification of the confirmed Grant.
13. 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.”
14. 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 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.”
15. 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.”
16. *In Re: Estate of Oliokampai Sarapae Sanguti(Deceased)* [2019] eKLR, Hon Justice R, Nyakundi in setting out the parameters for review stated as follows:-
- “ 11. The Position for setting aside or modifying a court’s judgements would appear to be no difference in both Zimbabwe and South Africa even though both those countries apply Roman-Dutch Law. Some helpful comments to that effect by the Court of Appeal of Tanzania in the Transport Equipment Case (supra) which quotes the leading textbook by Herbstein & Van Wanes: The Civil Practice of the Superior Courts in South Africa, 3rd Edition:
- A final judgement being res judicata is not easily set aside, but the Court will do so on various grounds such as fraud, discovery of new documents, error and irregularities in procedure.”
12. The same seems to be the case in India. The above position for judicial review has also been upheld in numerous court cases. I shall take just a random sampling of a decision rendered by the Supreme Court of India: *Airbam Teleshwar Sharma v Ariban Pishak Sharma* [1979] 45CC 389, 1979(11) UJ 300 SC, which held that:
- “The power of review may be exercised on the discovery of new and important matter of 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 exercise



on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the 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.”

13. As regards error on the face of the record in Kenya, I associate myself with the case of in *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] I EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

“.....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 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. This laid down principle of law is indeed applicable in the matter before us.”

14. In view of the above provision of law, there can therefore be no room for argument concerning the authority or power of this court to review its own judgements within the scope and ambit of section 80 of the *Civil Procedure Act* and Order 45 (1) of the *Civil Procedure Rules*.” [Own emphasis]

17. In this case the judgment in question was delivered on 24th November 2022. This application for review was made in April 2023 roughly five (5) months after the said judgment was delivered. No explanation is given as to why the Applicants took so long to notice these alleged ‘errors’. However the delay is not in my view so inordinate as to render the application untenable.

18. The Applicants filed an application seeking review of the judgment delivered on 24th November 2022. In that judgment the Court set out the mode of distribution of the estate. As stated earlier it is quite obvious that what the Applicants are attempting to achieve is a ‘rectification’ of the Certificate of Confirmed Grant.

19. Rectification of Grants is provided for in Section 74 of the *Law of Succession Act*, Cap 160, Laws of Kenya and Rule 43 (1) of the *Probate and Administration Rules*. Section 74 which provide as follows:-

“74. Errors may be rectified by court:

Errors in names and descriptions or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”



20. Rule 43 (1) provides as follows:

“Where the holder of a grant seeks pursuant to the provisions of Section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in form 110 for such rectification through the registry and in the cause in which the grant was made.”

21. From the language of Section 74 of the *Law of Succession Act* and Rule 43 (1) of the Probate and Administration Rules, the scope of rectification of grants of representation is limited to “errors in names and descriptions, or in setting forth the time and place of the deceased’s death or the purpose in a limited grant. I may add that such other minor errors in that genre could also be rectified.”

22. *In Re estate of Geoffrey Kinuthia Nyamwinda (deceased)* [2013] eKLR the court stated:

“The law on rectification or alteration of grants in Section 74 of the *Law of Succession Act* and Rule 43 of the *Probate and Administration Rules*.....what these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out of the time or place of the deceased’s death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general....”

23. The Applicants have in their Supporting Affidavit listed a whole host of amendments that they seek to have made to the Confirmed Grant. These include the alteration of acreages of several parcels of land. No surveyors reports have been annexed to confirm the true acreage of the land parcels in question. The court is unable to determine with certainty what the true acreage of these parcels of land is.

24. There are claims that some of the properties to be distributed are not registered in the name of the Deceased. Changes of this nature cannot be dealt with casually under an application for review. These are substantive changes which require tangible proof. The question that arises is why it has taken so long for the applicants to notice these anomalies.

25. There are also claims that properties allocated to a particular beneficiary have been registered in the name of a different person. Again this is a major anomaly and cannot be dealt with in a casual manner.

26. The changes being proposed by the Applicants cannot be said to be minor errors in names and descriptions. They cannot be said to fall under the ambit of an error on the face of the record. It is quite obvious to this court that the Applicants are seeking to overhaul the entire Confirmed Grant and to alter/vary the mode of distribution as set out in the judgment of 24th November 2022. Such far reaching changes cannot be effected under a Summons for review and/or rectification of the Grant.

27. The only option available to the Applicants is to seek to have the entire Grant revoked and to apply for issuance of a fresh Grant to include the new changes to distribution that they wish to effect.

28. Alternatively if the Applicants are dissatisfied with the mode of distribution set out in the judgment of 24th November 2022, they are at liberty to file an appeal against said judgment.

29. Based on the foregoing I find that this application for review has no merit. The Summons dated April 17, 2023 is hereby dismissed in its entirety. This being a family matter I make no orders on costs.

DATED IN NYERI THIS 20TH DAY OF SEPTEMBER, 2024.

MAUREEN A. ODERO



JUDGE

