



In re Estate of Benson Mbatiah Muya (Deceased) (Succession Cause E051 of 2006) [2024] KEHC 10961 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 10961 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E051 OF 2006
RN NYAKUNDI, J
SEPTEMBER 20, 2024
IN THE MATTER OF THE ESTATE OF THE
LATE BENSON MBATIAH MUYA - (DECEASED)**

BETWEEN

JOHNSON KAHIRA MBATIAH 1ST APPLICANT

ELLY KURIA MBATIAH 2ND APPLICANT

AND

CHARLES WANYOIKE MBATIAH RESPONDENT

RULING

1. What is pending before me for determination is an application for review expressed to be brought under the provisions of Section 47, 93(1) & (2) of the Succession Act, Rules 49, 63 and 73 of the Probate and Administration Rules, Section 80 of the Civil Procedure Act, Rule 44 of the Civil Procedure Rules, Section 120 of the Evidence Act and Articles 35, 47, 48, 50(1) & 159(2) (c) of the Constitution of Kenya. The applicant seeks reliefs to wit: -
 - a. Spent
 - b. That the court be pleased to review its orders made vide its ruling delivered on 7th November, 2019 requiring the Applicants to deposit into an interest earning account the sum of Kshs. 8,000,000/= being proceeds of sale of title No. Uasin Gishu/Kimumu/2373 to one Elizabeth Jepchumba Tunoi.
 - c. That the court do inquire and find that there is an error apparent on the face of the record since it ordered that all dealings over the following assets of the late Benson Mbatiah Muya be preserved i.e. L.R. Uasin Gishu/Kimumu/2375, 2376, 2380, 2384, 2385 and 2386 and revert to the names of the deceased, which order was made at the instance of the Respondent Charles



Wanyoike Mbatiah but was never: - (i) extracted nor, (ii) lodged or registered with the Land Registrar Uasin Gishu where their respective registers are domiciled.

- d. That the orders made on 7.11.2019 were made in error since there was no administrator or personal representative appointed by the court upon the demise of the grant holder on 21.3.2023. The Respondent had not sought to be appointed an administrator and the court never appointed either the applicants to be such an administrator.
 - e. That the 2nd Applicant as aggrieved party had a duty to court and the law to ensure that all orders, decrees and edicts of the court over the estate he sought to protect were extracted and registered in the respective land registry, he failed to do so and is busy selectively seeking enforcement in a manner prejudicial to the applicant and other beneficiaries.
 - f. That the Respondent by deed and representation has varied the certificate of confirmation of grant of letters of administration made on 16.3.2009 by agreeing to settlement made on 5.4.2013 before counsel and drawn benefits from the arrangement by appropriating parcels of land known as L.R. Uasin Gishu/Kimumu/2374 to his own use and continues to reside in L.R. Uasin Gishu/Kimumu/2375 while at the same time requiring the applicants to deposit the proceeds of sale of L.R. No. Uasin Gishu/Kimumu/2375 while at the same time requiring the Applicants to deposit the proceeds of sale of L.R. No. Uasin Gishu/Kimumu/2373, against the court orders that directed that the other title save 2373 be restored in the name of the deceased.
 - g. That in view of the apparent error on the face of the record, the court be pleased to appoint an administrator or administrators in terms of Section 66 of the Law of Succession Act who shall exercise the powers of a personal representative donated by Section 82 & 83 of the Succession Act.
 - h. That pending the appointment of a personal Representative to the estate of the deceased, the court be pleased to suspend the execution of its orders requiring the applicants to deposit Kshs. 8,000,000/= into an interest earning account in the names of counsels for the parties.
 - i. That by dint of the previous ruling of 20.8.2015 the Deputy Registrar of the court ordered stay of all conveyance including of parcel No. Uasin Gishu/Kimumu/2373, which order was extracted but not registered by the Respondent with the Lands Registry, which allowed the interested party to search, lodge and register her transfer over the same. The title was subsequently upheld by the court in its ruling of 7.11.2019 as bonafide and legitimate.
 - j. In the alternative and without prejudice to the foregoing the court do find that the entire estate of the deceased has devolved to the heirs in terms of their agreement made on 5th April, 2013 before counsel and mark the cause as closed.
2. The application was supported by an affidavit sworn by Johnson Kahira Mbatiah and the grounds fronted were that the letters of administration intestate were taken out by the deceased's widow Sarah Wanjiku Mbatia on 16th August, 2006 and the same were confirmed on 16th March, 2009. Vide a ruling made on 11.5.2009 the court ordered status quo to remain in respect of the entire estate.
 3. That the Respondent/Beneficiary of the said orders failed to extract, lodge and register the said orders with the Land Registry – Eldoret over the plots that constituted the estate, which would have had the effect of prohibiting and inhibiting the lands office from conducting any dealings over the estate.
 4. Further, it was a ground that the applicants who were beneficiaries of L.R. NO. Uasin Gishu/Kimumu/2373 went ahead and obtained title by transmission and later sold it to the interested party Elizabeth Jepchumba Tonui.



5. The court revoked the grant on 7th November, 2009 on application by the respondent while upholding the title obtained by the interested party. The court then ordered that the proceeds of sale of the above be deposited into an interest earning account in the names of the counsels on record pending hearing and determination of the suit.
6. The applicants averred that there has been activities and actions outside the courts view evidence in writing that presupposes that the heirs have shared out the estate assets and appropriated them.
7. That proceeding so far taken have elevated the Respondent into an administrator or personal representative of the estate against the Applicants who are treated like intermeddlers fit for punishment.

Response

8. The Respondent in opposition to the application filed a replying affidavit dated 16th July, 2024. The Respondent contended inter alia, that the law firm of Ngigi Mbugua & Co. Advocates is on record for the 1st applicant only based on the notice of appointment filed in court and thus the application by the joint applicants is a nullity; that the court has no jurisdiction to entertain the application for review of the decision dated the 7th November, 2019 as the applicants vide their application dated the 6th February, 2020 sought leave to appeal out of time as against the ruling and they were unsuccessful as can be discerned from the ruling delivered by the Hon. Justice Stephen Githinji on the 30th November, 2020; that the application for review fails to meet the requirement of moving the court without unreasonable delay as embodied in Order 45 Rule 1 of the Civil Procedure Rules, 2010 as it is brought over 4 years and 8 months later from the date the decision was made.
9. The Respondent further averred that the applicants also made an attempt to vary the orders of the court to deposit the money and sought to have it substituted with one that would accord them the opportunity to deposit a title to land of which the Hon. Grace Sitati – Deputy Registrar did in a ruling delivered on the 24th September, 2021 reiterating that the applicants were bound to comply with the order of the Learned judge within 60 days; that the applicants did not appeal against the order and cannot move 3 years later to review it; that the fact that they applied to substitute the cash deposit with a title clearly indicates that they were not aggrieved by the order but only sought an alternative mode of compliance hence they fail the test under Section 80 of the Civil Procedure Act, Cap 21 being the persons aggrieved by an order for purposes of review.
10. It was the Respondent' case that the applicants again on 17th November, 2021 moved the court to review the order to deposit the funds and sought to deposit the title deed for the land parcel known as Waitaluk/mobonde Block 12 (sirende)/474; that the motion was considered by the Hon. Justice Wananda J. R. Anuro on the 17th November, 2023 who found the same to be devoid of merit and dismissed the same with costs. The learned judge further directed that the applicants do appear before the Deputy Registrar of the High court to show cause why they ought not to be committed to Civil jail for failure to comply with the order of the court to deposit the funds.
11. The respondent subsequently appeared before the Registrar and while well affirming the validity of the order they sought indulgence to comply with its strict terms as entered. That the applicant's application as can be discerned is res-judicata. He maintained that the matter raised in the application cannot by any stretch of imagination amount to errors apparent on the face of the record as one needs a long drawn process to consider whether there is an error and they can be as many varied opinions on the matter; that the non-registration of a court order does not affect its validity and also no legal obligation



exists to register an order and that the failure to appoint an administrator does not affect the validity of the decision of the judge.

Determination.

12. I have considered the submissions filed in support of the parties' respective positions. The only issue that culls itself for determination is; Whether there is a mistake or error on the face of the record or any sufficient reason to justify review of the judgment herein.
13. The starting point in this conversation would be Section 80 of the [Civil Procedure Act](#) Cap 21 which provides as follows: -
 - “ 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(b) of the [Civil Procedure Rules](#), provides as follows:
 - (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.”
15. To put the matter to context, some issues need highlighting. In the impugned decision by Hon. Githinji J, the court identified the following issues for determination:
 - a. Whether the Respondents (the instant applicants) should be restrained from carrying out any dealings in the suit properties
 - b. Whether the register should be restored the titles in the name of the deceased.
 - c. Whether the respondents should deposit the proceeds of the sale and rent for Uasin Gishu/ Kimumu 2373 in a joint interest earning account.
 - d. Whether the interested party should be restrained from utilizing Uasin Gishu/Kimumu/2373



- e. Whether the grant of letters of administration issued to Serah Wanjiku Mbatiah should be revoked.
16. The court considered the identified and made various declarations. On the first issue, the court restrained the Respondents from dealing in the suit lands and reasoned that since the administratrix of the estate of the deceased died on 21st March, 2013, any dealing in the suit properties would amount to intermeddling.
17. On the second issue, the court pointed out that it was not shown that any of the titles save for 2373 have been transferred or any conveyance conducted on the same. The court proceeded to restore all other titles save for 2373 to the name of the deceased given that the grant was revoked by operation of law.
18. As to whether the Respondents should deposit the proceeds of the sale and rent for Uasin Gishu/ Kimumu 2373 into the court or into a joint interest earning account, this court directed that the purchase price be deposited into a joint interest earning account and the rent be computed and remitted to the interested party as she has a valid title and is entitled to the same.
19. On the next issue, the court found that the interested party had established the threshold to be considered a bonafide purchaser and therefore there should be no injunctive orders issued against her. That such orders against her are unmerited and were as a result denied.
20. Finally, the court did find that the grant issued to Serah Wanjiku Mbatiah had become inoperative by dint of Section 76(e) of the Succession Act and was therefore revoked.
21. The said decision was subsequently challenged on two occasions. First, was an application by Elizabeth J. Tunoi who filed an application seeking stay of execution of the said ruling and leave to appeal the orders. The application was considered by Hon. Githinji J and dismissed the same for reasons that the applicant had not given a plausible and satisfactory explanation for the delay and thus the leave to file a notice of appeal had no merit.
22. Second, an application for review came in by the 2nd applicant who sought order that the orders directing the applicants to deposit the purchase price into a joint interest earning account be reviewed or set aside and that this court be pleased to allow the applicant to deposit title number Waitaluk/ Mobonde Block 12/Sirende/474 with court as security. The application was considered by Hon. Wananda J. and vide this court's ruling dated 17th November, 2023 the application was dismissed the said application and reasoned that the applicant had not met the requirements of Order 45.
23. It is also important to note that the question on substitution of this court's orders to deposit title number Waitaluk/Mobonde Block 12/Sirende/474 instead of the sum of Kshs. 8,000,000/= was litigated before the Deputy Registrar and the same was dismissed and the applicant was granted a period of 60 days to deposit the funds as per this court's orders by Hon. Githinji J.
24. This is a fourth attempt to challenge the ruling dated 7th November, 2019. I am at a loss as to why the parties are persistent on the same prayers, couched differently which in my view is to obtain a favorable ruling.
25. Again, as this court reasoned in its ruling dated 17th November, 2023 review orders in a succession cause is governed by Rule 63(1) of the *probate and administration Rules*, as also captured under Order 45(1) of the *Civil Procedure Rules*. The court in the said decision made a finding that the applicant had not disclosed the ground under which he has approached the court but evidently it was not on account pf "discovery of new evidence" nor "mistake or error". The same could presumably be categorized under "for any other sufficient reason".



26. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -
- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
27. The general thread running through the various attempts to challenge the ruling dated 7th November, 2019 is that of review of the said decision and the same has failed all along. The same has already been adjudicated by this court and in any event if there would be a contrary decision, it would part from this court's position on the various issues raised and it would set a very unsustainable precedence.
28. I have anxiously felt it necessary however to briefly highlight some of the key principles which hinge very closely to the litigation of this succession cause. What is clear from the record is that the parties whatever the differences that may exist between them, this litigation by installment for all purpose and intent is just a multiplicity of proceedings on the same subject matter. From the perspective of comparative jurisprudence, the canons of Res judicata in our Section 7 of the *Civil Procedure Act* could



not have found its proper contextualization on this subject but for the reasoning of the privy council in the case of *Hoystead v Commissioner of Taxation* (1925) AC 155, in particular, the dicta of Lord Shaw that:

“in the opinion of their lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension by the court of the legal result either of construction of the document or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted on this abundant authority reiterating that principle. Thirdly, the same principle namely; that of setting to rest rights of litigants applies to the case where a point fundamental to the decision, taken or assumed by the Plaintiff and traversable by the defendant as not be traversed. In that case, also a defendant is bound by the judgment; although they may be true enough that subsequent light or ingenuity might suggest some traverse which has not been taken. The principle of setting parties’ rights to rest applies and estoppel occurs.”

29. In appreciating the principles in the above case, as now settled even in our jurisdiction, the doctrine of res judicata in a wider sense acts as a bar against proceedings which are re-litigated over and over again to attain the threshold of an abuse of process. It has often startling on my part to encounter Succession proceedings in the various courts in which litigation on the same issues disguised as new cause of action. In looking at the instant application, largely I must admit that there is no new cause of action open to the applicants to defend and they should be estopped, for all purposes and intent to file multiplicity of applications on the grounds that there is a remedy capable of being granted by this court.
30. This was the position articulated by the court in The *Kenya Commercial Bank Limited v Muiru Coffee Estate Limited & another* (2016) eKLR that:

“Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.”

31. I need say no more. The remaining duty is to dismiss the application dated 8th July, 2024 with costs.
32. It is so ordered

DATED SIGNED AND DELIVERED AT ELDORET, THIS 20TH DAY OF SEPTEMBER 2024

R. NYAKUNDI

JUDGE

In the Presence of

Simiyu for the Applicant

Odwar for the 1st Applicant

