



In re Estate of Simon Njogu Wahinya (Deceased) (Succession Cause 578 of 2008) [2024] KEHC 12597 (KLR) (15 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 578 OF 2008
DKN MAGARE, J
OCTOBER 15, 2024**

IN THE MATTER OF THE ESTATE OF SIMON NJOGU WAHINYA (DECEASED)

BETWEEN

**SALOME NJERI NJOGU 1ST OBJECTOR
HANNAH WANJIRU NJOGU 2ND OBJECTOR
JOSEPH MUHIA NJOGU 3RD OBJECTOR
AGNESS GATHONI NJOGU 4TH OBJECTOR**

AND

**GEORGE WAWERU NJOGU 1ST RESPONDENT
JOSPHAT KIIRU NJOGU 2ND RESPONDENT**

AND

**SAMUEL KABUTHIA NDANA APPLICANT
PAUL MURIITHI GICHUKI APPLICANT
AGNES WAMBUI MURIITHI APPLICANT
DANIEL KAMAU NJUGUNA APPLICANT
MUCHIRI G. PETER APPLICANT
BENARD MIANO WAIGANJO APPLICANT**

RULING

1. By a Summons General dated 8/12/2023, the 1st Respondent sought the following reliefs:
 - a. Spent



- b. Spent
 - c. Spent
 - d. That this Honourable Court do review and set aside the Judgment dated 22/11/2023 to the extent that it affects the ownership and registration of L.Rs Mwea/Tebere/B/5061 and Mwea/Tebere/B/5059.
 - e. Costs
2. The application is premised on the grounds on its face and the supporting affidavit of the Applicants sworn on 8/12/2023 thus:
 - a. The 1st Applicant is the registered proprietor of L.R No. Mwea/Tebere/B/5061.
 - b. The 2nd Applicant is the registered proprietor of L.R No. Mwea/Tebere/B/5059.
 - c. The Judgment dated 22/11/2023 called for cancellation of the said two titles.
 - d. The Applicants were not parties to the proceedings leading to the judgment and as such were condemned unheard.
 3. There is another application dated 22/1/2024 and filed by one Benard Miano Waiganjo. He also pleads that the cancellation of Mwea/Tebere/5062 a subdivision of Mwea/Tebere/4777 affected his title and possession of the said Mwea/Tebere/4777. Further, that on 31/1/2018, he entered into an agreement of sale of Mwea/Tebere/5062 with Josphat Kiiru Njogu, the registered owner of the said parcel who sold and furnished all transfer documents to Benard Miano Waiganjo. It is his case that he was not served and had no knowledge and hence could not participate in the proceedings leading to the revocation of grant.
 4. A similar application was filed by Daniel Waiganjo Njuguna dated 22/1/2024 seeking to review the Judgment dated 22/11/2023 as it affected his title No. Mwea/Tebere/5060, a subdivision of Mwea/Tebere/4777 in that the said title was cancelled without his knowledge of the proceedings leading to the revocation of the grant and cancellation of the subdivided titles.
 5. Further, one Agnes Wambui Muriithi and Muchiri G. Peter also filed applications on 23/1/2024. They allege that the judgment dated 22/11/2023 cancelled Mwea/Tebere/4967 property of Agnes Wambui Muriithi and Mwea/Tebere/4965 & 4964 property of Muchiri G. Peter which were cancelled without their knowledge of the proceedings leading to the revocation of the grant and cancellation of the subdivided titles.
 6. George Waweru Njogu, the 1st Respondent filed application dated 22/1/2024 seeking that the application for revocation of grant dated 1/4/2019 be heard de novo. He alleges that his brother Josphat Kiiru Njogu gave evidence on his behalf without his authority. That he had not signed the affidavit which his brother produced in court.
 7. The Objectors filed replying affidavit sworn on 22/1/2024 by Salome Njeri Njogu opposing the application dated 8/12/2023 and replying affidavit dated 5/7/2024 opposing the application dated 22/1/2024 as follows:
 - a. The Applicants are not children of the deceased and have no locus.
 - b. The application is incompetent as there is no prayer to enjoin the Applicants as parties.



- c. The application is premature as the Applicants will have an opportunity to object to the summons for confirmation of grant following the revocation vide judgment dated 22/11/2023.
 - d. The summons dated 22/1/2024 was filed by an advocate who is not properly on record as there is no notice of appointment of advocates.
 - e. The Applicants should claim against the people who sold land to them.
8. The 2nd Respondent filed a replying affidavit dated 2/7/2024 in which he deposed that he had no objection to the applications seeking to set aside the cancellation of titles as indeed the various properties had been sold to the Applicants.

Submissions

9. The Applicants filed submissions dated 28/6/2024 and 22/7/2024. They submitted that they had satisfied the conditions for grant of stay of execution. Reliance was placed on [*Kenya Shell Limited v Benjamin Karuga Kibiru Civil Appeal No. Nai 97 of 1986*](#) to submit that they had demonstrated substantive loss.
10. The Applicants also submitted that they had satisfied the conditions for review or setting aside the judgment. They submitted in this regard they had no knowledge of the proceedings and were condemned unheard. They cited *Kingata Kithoi & Another vrs Mbevi Kioko & Another* 1982 KLR.
11. The 1st Respondent filed submissions dated 18/7/2024 in support of the application that the application for revocation of grant dated 1/4/2020 be heard de novo. He relied on *Republic vs Nongovernmental Organizations Coordination Board ex parte Evans Kidero Foundation* (2017) eKLR to submit that the application was heard without his participation against the principles of natural justice.
12. The 2nd Respondent also filed submissions dated 26/7/2024. It was submitted that indeed the Applicants were not heard.
13. Reliance was also placed on the case of *SM vs HE* (2019) eKLR to submit that Article 50 of [*the Constitution*](#) required a fair hearing, which the Applicants were in this case not granted as they were not served and had no knowledge of the proceedings leading to the revocation of the grant.
14. The Petitioners filed submissions dated 5/7/2024. They submitted therein that the Applicants had no locus standi as they first did not seek to be enjoined in the proceedings as parties.
15. It was further submitted that the Applicants did not prove the conditions for review of judgment of court as required under the law.
16. The Petitioners also submitted that Section 93 of the [*Law of Succession Act*](#) did not protect the Applicants as the grant herein was revoked because the proceedings leading thereto were declared fraudulent and there was no validly appointed administrator of the estate as to be called to account.

Analysis

17. The issue before me for determination is whether there is any lawful ground on which the Judgment of Court dated 22/1/2023 should be reviewed and set aside.



18. The court has perused the said judgment and notes that this court decreed that the grant issued on 15/9/2009 and confirmed on 2/7/2010 was so issued and confirmed through fraud and nondisclosure of material facts hence disinheriting 3 children of the deceased.
19. This court also revoked the said grant and appointed Salome Njeri and Joseph Muhia Njogu as administrators of the estate of the deceased. The titles issued as subdivided under the impugned grant were also revoked and the land directed to revert to the name of the deceased, Simon Njogu Wahinya.
20. The affected titles were as below stated:
 - Land Parcel No. Mwea/Tebere/B/277 subdivided into 4 parcels as named below:
 - Land parcel No. Mwea/Tebere/B/4773
 - Land parcel No. Mwea/Tebere/B/4774
 - Land parcel No. Mwea/Tebere/B/4775
 - Land parcel No. Mwea/Tebere/B/4776
 - Land Parcel No. Mwea/TebereB/4777 subdivided into 5 parcels as follows:
 - Land parcel No. Mwea/Tebere/B/5058
 - Land parcel No. Mwea/Tebere/B/5059
 - Land parcel No. Mwea/Tebere/B/5060
 - Land parcel No. Mwea/Tebere/B/5061
 - Land parcel No. Mwea/Tebere/B/5062
 - Land Parcel No. Mwea/Tebere/B/4778 subdivided into 4 parcels as follows:
 - Land parcel No. Mwea/Tebere/B/4964
 - Land parcel No. Mwea/Tebere/B/4965
 - Land parcel No. Mwea/Tebere/B/4966
 - Land parcel No. Mwea/Tebere/B/4967
 - Land Parcel No. Kirinyaga/Gathigiri/288 subdivided into 6 parcels as follows:
 - Land parcel No. Kirinyaga/Gathigiri/2478
 - Land parcel No. Kirinyaga/Gathigiri/2479
 - Land parcel No. Kirinyaga/Gathigiri/2280
 - Land parcel No. Kirinyaga/Gathigiri/481, 82 and 83
 - Land parcel No. Kirinyaga/Gathigiri/2482
 - Land parcel No. Kirinyaga/Gathigiri/2483
21. The subdivisions now sought to be set aside are the ones affecting Parcel No. Mwea/Teberere/B/4777 and Mwea/Teberere/B/4778.
22. The ground upon which the applications dated 8/12/2023 and 22/1/2024 seek to set aside the judgment of this court are materially on account of failure to accord the Applicants an opportunity to air out their objections to matters under the judgment since the Applicants had registered and



beneficial interest in the estates as divided and cancellation thereof put their interest at loss or risk of loss and which was an injustice.

23. The Applicants are said to have been condemned unheard and the adverse orders deprived them of their property in the subdivided titles.
24. On the other hand, the Objectors seek to exclude the Applicants from the affairs of the estate of the deceased. Largely, they maintain that the Applicants are not beneficiaries of the estate of the deceased and the applications are premature as the estate is yet to be divided following the revocation of the initial grant. They also submit that the Applicants have no locus standi.
25. This court observes that family rivalry and distrust is a normal trend among families in quest to establish their boundaries to their inheritance following the demise of deceased property holders. Factions grow among families with antagonistic forces among members of the same family and which are manifest in the thirst for keeping certain members of the family out of inheritance or within dismal ranges of mounts on the bounds of the estate. What such parties forget is that inheritance is a matter of right and one cannot exclude the other. Even a parent cannot exclude their most detested child from inheritance as a matter of law unless all indications justify such exclusion. See *Re Sigsworth*.
26. In this case, since the two Respondents are not in agreements with the Objectors, they have sided with the Applicants and appear to suggest that indeed the Applicants have a right and the application should be allowed. In the 1st Respondent's application dated 8/12/2023, he strongly seeks to set aside the Judgment and have the proceedings leading to revocation of grant heard de novo. The joint reason of the Respondents as appears from their filed papers is that the 1st Respondent did not give the 2nd Respondent authority to sue and attest to the matters on his behalf that were subject to the proceedings leading to the impugned judgment of this court. The 2nd Respondent readily admits that he was misinformed that he had the 1st Respondent's authority. What is however curious to this court is the fact that it is the said Respondents that were established to have fraudulently and through nondisclosure obtained the grant that was revoked. During the revocation proceedings, they never informed the court of the need to enjoin the Applicants to the proceedings. I have perused the Third Party Notices said to have been filed and noted the same were a nonstarter. They never actioned.
27. Back to the application, I have to establish whether they satisfy the conditions precedent to reviewing and setting aside a judgment of Court. The Applicants seek to set aside the cancellation of the title deeds emanating from the fraudulently subdivided property. The court in its impugned judgment did not allocate the said property to anyone. The court only directed that the property reverts to the name of the deceased.
28. However, the court observes that the 6 Applicants brought their applications singularly while the matters sought to be remedied before the court were largely similar. This was in error. Counsel ought to have guided the Applicants properly. It was not in the interest of expeditious disposal of the applications by filing numerous independent applications to address similar issues. The parties ought to have filed one application addressing all the Applicants. This was more so convenient since the advocate representing them was the same.
29. Be that as it may, I tend to think that the applications herein are premature. The matters herein pertain the estate of the deceased to whom the property reverted. The title deeds as issued could not take effect because they were issued through material nondisclosure and fraudulently in order to disinherit certain beneficiaries. Therefore, following the revocation of the grant, this court finds that there is no grant that passed any property to any party. The Applicants' submissions that they were not heard is equally not merited since the only issue in the Judgment was whether the grant was obtained fraudulently, and



which was determined in the affirmative. That is an issue that the Applicants have not demonstrated how decision without involving them would adversely affect their interest in the property. I say so because a fraudulent grant was meant to be revoked. It is not the Applicants evidence that their participation would have retained or legalized the grant.

30. Therefore, the proceedings leading to the judgment involved an issue between the administrators and beneficiaries of the estate. The Applicants reserve a chance to participate in the proceedings when the administrators appointed under the judgment pursue the process of confirmation of grant. That is not the issue before this court.
31. Therefore, although the Applicants in both applications base their grounds on failure of natural justice, the application clearly seeks to set aside the Judgment on grounds of review. The Applicants have not demonstrated any error apparent on the face of the judgment or emergence of a new matter of evidence that was not in their knowledge at the time of passing the judgment.
32. The grounds for review are applicable to succession matters and ought to have been proved. In *John Mundia Njoroge v Cecilia Muthoni Njoroge & Another* [2016] eKLR the court cited Rule 63 of the Probate and Administration Rules, and stated as follows:

“As stated above, the only provisions of the Civil Procedure Rules imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.”

33. Consequently, Section 80 of the *Civil Procedure Act* states that:

“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”.

Section 63 (e) of the *Civil Procedure Act* states that:

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.”

34. Order 45 of the Civil Procedure Rules provides for Review and it states 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”

35. I also associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies vs. Dr. Badia and Anor* Kisumu HCCC No. 191 of 1994 where he opined that:

“The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by him at the time when the ruling was made.”

36. From the face of the Judgment, there is nothing to review. The Court of Appeal in *Mahinda vs. Kenya Power & Lighting Co. Ltd* [2005] 2 KLR 418 expressed itself as follows:

“The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made.”



37. In the case of *Dock Workers Union & 2 others v Attorney General & another Kenya Ports Authority & 4 others (Interested Party)* [2019] eKLR it was therefore held that: -

“In this regard, for a Court to review its own orders, it must be demonstrated that there is discovery of new and important matter or evidence. It must also be shown that the new evidence was not within the knowledge of the party seeking review or could not be produced at the time the orders were made. Such party must also satisfy the Court that this was the case even after exercise of due diligence. A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay.”

38. The Code of Civil Procedure, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

“The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure... The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper.”

39. Therefore, this court’s exercise of unfettered discretion in review as craved by the Applicants has to be premised within the bounds of the law. Otherwise it will be capricious and whimsical and defeat the very purpose of serving justice which the law is set to achieve. I find no legal basis on which to exercise my discretion in favour of the Applicants in the applications before me. In the case of *Ramakant Rai vs. Madan Rai*, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

“Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life.’ Wide enough in all conscience is the field of discretion that remains”.

40. I am therefore satisfied that with the judgment dated 22/11/2023 in place, the administrators are not capable of passing any title from the estate of the deceased to themselves, to the beneficiaries, dependents of the deceased or any other interested party. The rights claimed by the Applicants in the property are rights that have not accrued and must be presented during the application for and confirmation of the fresh grant as was ordered by the court. The property thus remains in the name of the deceased until such processes are done. The applications are thus premature and unmerited.



Determination

41. In the upshot, I make the following orders:-

- a. The Application dated 8/12/2023 is dismissed in limine.
- b. The Application dated 22/1/2024 is dismissed in limine.
- c. Each party shall bear own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF OCTOBER, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Wairimu for 1st and 2nd Applicants

Ms. Wanjera for Magee for the Applicants

Mr. Makworo for 1st Respondent

Ms. Kiragu for the 2nd Respondent

Court Assistant – Jedidah

