



In re Estate of Ali Karisa wa Nguma aka Ali Mohamed (Deceased) (Succession Cause 424 of 2013) [2024] KEHC 14182 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 14182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 424 OF 2013
G MUTAI, J
OCTOBER 11, 2024
IN THE MATTER OF THE ESTATE OF ALI KARISA
WA NGUMA AKA ALI MOHAMED (DECEASED)**

BETWEEN

**KADZO KARISA CHENGO 1ST APPLICANT
DAMA KARISA CHENGO 2ND APPLICANT
KHAMIS KARISA CHENGO 3RD APPLICANT
ALI KARISA CHENGO 4TH APPLICANT
FATUMA KARISA CHENGO 5TH APPLICANT
SUING ON BEHALF OF THE ESTATE OF KARISA CHENGO NGUMA
(DECEASED)**

AND

**KACHE RUWA KALAMA 1ST RESPONDENT
SHIDA ALI NGUMA 2ND RESPONDENT**

AND

KHALID HADI AHMED APPLICANT

RULING

Introduction

1. The deceased in whose estate this cause was filed died on 31st March 1994. This court issued a grant of representation to his estate on 2nd May 2014. The grant was subsequently confirmed on 14th December 2015.



2. Prior to the issuance of the grant aforesaid, the Kadhi's Court had in Kadhi's Court Succession Cause No 214 of 2011 in respect of the same estate issued a grant and or succession order on 22nd May 2012. Armed with the grant issued by the Kadhi, the respondents sold the estate's sole asset, Title Number Mombasa/Bububu "A" Settlement Scheme/27, to the applicant for valuable consideration.
3. Vide an application dated 3rd July 2019, Karisa Chengo sought, inter alia, the following orders:-
 - (d) That the grant and or succession order issued in the Mombasa Kadhi's Court Succession Cause No 214 of 2011 on 22nd May 2012, pursuant to Article 170(5) of *the Constitution* of Kenya 2010, section 5 of the Kadhi's Court Act (Cap 11 of the Laws of Kenya) and Section 48(2) of the *Law of Succession Act* (Cap 260 of the Laws of Kenya) be revoked and all subsequent orders including the resultant Title No Mombasa/Bububu "A" Settlement Scheme/27 issued in favour of the Respondent be revoked;
 - (e) That the grant of letter of administration intestate made on 8th April 2014 and the subsequent confirmation of grant on 23rd November 2015 and issued on 14th December 2015 be considered as the only valid succession orders or grant of the Court; and
 - (f) That the orders issued herein be served upon the Land Registrar Mombasa for compliance.
(emphasis added)
4. After hearing the parties and upon considering the submissions made by their respective advocates, this Court (per Onyiego, J) on 22nd May 2022 dismissed the summons for Revocation of Grant dated 15th August 2018, vide which the respondents had sought to have the grant issued to Karisa Chengo revoked. In respect of Mr Chengo's application for revocation of the grant issued by the Kadhi's Court, the Court held as follows:-
 1. At paragraph 54:-

“In the instant case, the respondent, being a Christian, could not be subjected to the jurisdiction of the Kadhi's Court. On that ground, I am satisfied that the right Court with jurisdiction was the High Court, not the Kadhi's Court. To that extent the application for revocation of the grant and orders of the Kadhi's Court in Succession Cause No 214 of 2011 is allowed and consequential orders thereto set aside.”
 2. At paragraph 64:-

“Having held as above, I do not find any evidence committed by the respondent nor concealment of material information, nor were the proceedings defective in substance. If anything it is the applicants who in my view are abusing the Court process by being dishonest. For those reasons, the revocation application herein dated 13th August 2018 is dismissed. This being a family issue, each party shall bear own costs. In conclusion therefore the following orders apply:-

 - a. Revocation application dated 3rd July 2019 is allowed as prayed;
 - b. Application for revocation dated 13th August 2018 to be dismissed in its entirety; and
 - c. Each party shall bear own costs.”



5. No appeal was filed against Onyiego J's decision, nor has it been set aside or reviewed. I understand the words "allowed as prayed" to indicate that all the prayers of the Applicants/Respondents that were then pending determination were allowed.
6. When the Applicants/Respondents attempted to have the orders made by Onyiego J executed by compelling the Land Registrar to register the title in their favour, Khalid Hadi Ahmed, who I shall hereafter refer to as "the Applicant", filed the Notice of Motion dated 13th October 2023 vide which he sought four orders:-
 1. To have the application certified urgent;
 2. To have the Court stay the execution of the judgment of Onyiego, J;
 3. "That this honourable Court be pleased to join Khalid Hadi Ahmed in these proceedings as a 3rd Respondent and be granted leave to defend his interest in these proceedings; and
 4. That costs of this application be provided for.
7. The proposed Applicant averred that he was the registered owner of Title No Mombasa/Bububu "A" Settlement Scheme/27 and the subsequent subdivisions and that he was in possession thereof.
8. The Summons dated 13th October 2023 were opposed by the Applicants/Respondents.
9. After hearing the parties and upon considering submission, I, on 9th April 2024, ruled that the Notice of Motion dated 13th October 2023 had no merit. In paragraphs 30, 31, and 37 I held as follows: -

At paragraph 30:-

"Having considered the said application carefully it is my view that the proposed 3rd Respondent's application has no merit as it seeks joinder of the Proposed 3rd Respondent, and not a review of the judgment of the Court. The judgment delivered on 27th May, 2022 has not been appealed against, reviewed, or set aside."

At paragraph 31:-

"Without review or setting aside of the said judgment, I am afraid that joinder of the proposed 3rd Respondent will be an exercise in futility."

At paragraph 37:-

"The upshot of the foregoing is that I find no merit in the application dated 13th October 2023. The same is hereby dismissed..."
10. The Applicant was aggrieved by my decision and filed a Notice of Appeal, which was subsequently withdrawn so that the review application, the subject of this ruling, could be canvassed.

Notice of Motion dated 23rd April 2024

11. Vide a Notice of Motion dated 23rd April 2023, the Applicant sought the following orders:-
 1. Spent;
 2. Spent;



3. This honourable Court be pleased to review and set aside the order made on 9th April 2024 directing the Land Registrar to attend Court on 29th April 2024 to show cause why he should not be committed to civil joint for allegedly failing to comply with Court orders allegedly direction him to revoke the title issued on 29th September 2016 for Mombasa/Bububu “A” Settlement Scheme/27 and alter the register by purportedly upholding the grant and confirmation made and issued on 25th March 2015 and confirmed on 14th December 2015;
4. Costs of the application be provided for.
12. The applicant avers that there is an error apparent on the face of the record in respect of the ruling that this Court delivered on 9th April 2024 in so far as the order issued on 27th May 2022 did not direct the Land Registrar to revoke the title for Mombasa/Bububu “A” Settlement Scheme/27 or Mombasa/Bububu “A” Settlement/Scheme/1345 and 1346 but merely revoked the grant issued by the Kadhi in Kadhi Succession Cause No 214 of 2011. It was urged that the Applicant was not a party to the proceedings that led to the impugned decision and that he was not, therefore, heard, which action was violative of his right to a fair hearing under Article 50(1) and the right to property under Article 40 of *the Constitution* of Kenya, 2010. Further, this Court had no jurisdiction to issue directions to the Land Registrar to revoke or otherwise interfere with the registered ownership by the Applicant of the suit property as he bought the same from the administrators who then had a valid grant. He urged that under section 93 of the *Law of Succession Act*, a transfer of land made by administrators holding a grant of letters of administration is valid even if the grant is subsequently revoked or varied. Lastly, it was urged that this Court lacks jurisdiction to determine questions of ownership of land because under Article 162(2), as read with Article 165(5) (b) of *the Constitution*, since jurisdiction is reserved, under the said provision to the Environment & Land Court.
13. The Applicants/Respondents filed Grounds of Opposition, through their lawyer Kenga & Co., dated 8th May 2024, in which it was stated that having chosen to appeal, the Applicant could not file an application for review and secondly that he lacked standing to file the application.

Submissions of the Parties

14. The application was canvassed by way of both oral and written submissions.

Submissions of the Applicant

15. The submissions of the Applicant are dated 20th June 2024.
16. Counsel for the Applicant submitted that the Court made an error apparent on the face of the record to the extent that it made an order directing the Land Registrar Mombasa to attend Court to show cause why he should not be punished for failing to comply with an order dated 27th May 2022. It was urged that the order dated 27th May 2022 sought to be enforced through contempt application does not contain words directing the Land Registrar to revoke the resultant title for Title No Mombasa/Bububu “A” Settlement Scheme/27.
17. It was urged that the Court made the order without establishing the property’s registered owner, ascertaining whether he was a party to this cause and hearing him. The applicant submitted that the matter should be referred to the Environment & Land Court, which is the Court with complete jurisdiction.
18. The applicant identified 6 issues as coming up for determination to wit:-



- a. Whether the lodging of the Notice of Appeal dated 18th April 2024 precluded the Applicant from applying for a review of the order made on 9th April 2024;
 - b. Did the applicant have a locus standi to apply for a review of the said order?
 - c. Whether the text of the order of 27th May 2022 contained the words directing the Land Registrar Mombasa to revoke the resultant title for Title No Mombasa/Bububu “A” Settlement Scheme/27;
 - d. Whether in the absence of the words directing the Land Registrar, Mombasa to revoke the resultant title for Title No Mombasa/Bububu “A” Settlement Scheme/27, the order of 9th April 2024 directing the Land Registrar to attend Court to show cause why she should not be punished for failing to revoke the resultant title for Plot No Mombasa/Bububu A Settlement Scheme/27 constitutes an error on the face of the record?;
 - e. Whether section 93(1) of the *Law of Succession Act* denies the High Court jurisdiction to invalidate the transfer of the suit property to the Applicant in the application for review?
 - f. Whether there are any other sufficient reasons that warrant application for review.
19. Issue No. 1 was spent as the applicant withdrew the Notice of Appeal.
20. Regarding the second issue, it was urged that anyone considering himself aggrieved by a decision can apply for review. Counsel submitted that the applicant is the present registered owner of the suit property. The order compelling the Land Registrar to appeal before it would make the applicant lose his property without having been heard. Counsel placed reliance on the decision of the Court of Appeal in *Daniel Gichuru Kingori & 2 others vs Wambugu* [2022]KECA 1168KLR, where it was held that:-
- “...the wording of the provision of order 45 Rule 1 is meant to take into account that the said provisions are not restricted to the parties to a suit since it talks of “any person considering himself aggrieved”. An aggrieved party may not find the avenue of appeal sensible and may apply for review...”
- It was thus urged that the applicant has locus standi to apply for review.
21. Counsel for the applicant urged that the order issued on 27th May 2022 did not contain words directing the Land Registrar to revoke the suit land. The Court was urged to look at the text of the order issued by the Court and compare it with the prayers in the application dated 18th September 2023. It was urged that the orders issued on 27th May 2022, 2nd May 2014 and 23rd November 2015 did not contain the words that would said to have compelled the Land Registrar, Mombasa to revoke the titles in favour of the Applicant.
22. It was submitted that what was sought to be enforced was a non-existent order directing the Land Registrar to revoke the titles. Reference was made to the decision of the Court in *Daniel Odhiambo Okaka vs Samuel Udali Mtange & another* [2018]eKLR where it was held that an applicant seeking to have an alleged contemnor punished for contempt of court must prove the existence of the order of which he seeks enforcement. It was thus urged that the Court should review the order of 9th April 2024 on account of clear error on the face of the record.
23. It was submitted that at the time the suit was properly sold to the applicant, the sellers had a full grant. When the full grant was revoked, an ownership dispute over title was created. It was averred that Article 165 (5) (b) of *the Constitution* denies the High Court jurisdiction over matters relating to title of land.



I was referred to the decision of the Court in re Estate of Mbai Wainanina (deceased) [2015]eKLR, where the Court held that:-

“The mandate of Probate Court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property... a party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment Land Court.”

24. Lastly, it was submitted that the applicant wasn't heard, prior to the issuance of the orders of 9th April, 2024. This, it was urged, constituted a sufficient reason to warrant a review of the orders of the Court.
25. In light of the foregoing, counsel urged that I review my earlier orders. Counsel relied on the decision of the Court of Appeal in Alton Homes Ltd & another vs Davis Nathan Chelogo & 5 others [2020]eKLR.

Written Submissions of the Applicants/Respondents

26. The Applicants/Respondents' written submissions is dated 5th July 2024. It was submitted that the application was filed by a non-party. Mrs. Chengo, learned counsel for the respondents, submitted that the Land Registrar did not appeal the decision of the Court.
27. It was submitted that the applicant was seeking to have its application dated 13th October 2023 reheard notwithstanding the fact that it had been dismissed. Counsel urged that the matter was now res judicata.
28. Counsel admitted that this Court has jurisdiction to hear the application.
29. It was urged that there was no error apparent on the face of the record and that if the court misconstrued the law, then the Applicant should appeal against the decision.

Analysis of the Law

30. Section 80 of the Civil Procedure Act states 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.”

31. Order 45 Rule 1 of the Civil Procedure Rules 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.

32. What is evident from the provisions of statutes is that a party who desires to have a decision with which he is aggrieved reviewed must show that:-

1. He had discovered new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or couldn't be produced by him at the time when the decree was passed or order made;
2. There was a mistake or error apparent on the face of the record; and
3. There is otherwise sufficient reason to review the judgment or ruling.

33. Mativo, J (as he then was) considered the import of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules in Republic vs Advocates Disciplinary Tribunal Exparte Apollo Mboya [2019]eKLR. The learned judge distilled the principles used by courts when considering the applications for review as being:-

- 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. 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 grounds on which review can be sought are enumerated in Order 45 Rule 1.”

34. I have already indicated that the Applicant withdrew the Notice of Appeal. The Applicants/ Respondents admitted that the Applicant has the standing. I will discuss the remaining 4 issues identified by the Applicant in the succeeding paragraphs.

35. It is evident from the submissions that the Respondent/Applicant’s sole ground is that there is an error apparent on the face of the record.

36. What amounts to an error apparent on the face of the record was described in *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243 as:-

“...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.”

37. Did I make an error that is clear and obvious and requires no elucidation or elaborate argumentation?

38. The Respondent herein, Karisa Chengo Nguma, filed Summons for Revocation of Grant on 22nd May 2012 in the Kadhi. The Summons was dated 3rd July 2019.

39. Among the prayers sought in the said summons was prayer No. 4, which sought was:-

5. That the grant and or succession order issued in the Mombasa Kadhi’s Court Succession Cause No 214 of 2011 on 22nd May 2012, pursuant to Article 170(5) of *the Constitution* of Kenya 2010, section 5 of the Kadhi’s Court Act (Cap 11 of the Laws of Kenya) and Section 48(2) of the *Law of Succession Act* (Cap 260 of the Laws of Kenya) be revoked and all subsequent orders including the resultant Title No Mombasa/Bububu “A” Settlement Scheme/27 issued in favour of the Respondent be revoked.



40. After hearing the parties and upon applying the reasoning of the Court of Appeal in Christine Kimwana Chuba and Charles Chuba vs Asia Mfusi Chuba, Mombasa Court of Appeal Civil Appeal No. 121 of 2018, the Court held that:

“In the instant case, the Respondent, being a Christian, could not be subjected to the jurisdiction of the Kadhi’s Court. On that ground, I am satisfied that the right Court with jurisdiction was the High Court, not the Kadhi’s Court. To that extent, the application for revocation of the grant and order of the Kadhi’s Court in Succession Cause No. 214 of 20121 is allowed, and the consequential orders thereof set aside.”

41. In paragraph 64, the Court stated: -

“....Revocation application dated 3rd July 2019 is allowed as prayed.”

42. My understanding of the decision of the learned Judge’s decision is that “allowed as prayed” meant that prayer No. 4 in the Summons for Revocation of Grant dated 3rd July 2019, which specifically sought the revocation of Title No Mombasa/Bububu “A” Settlement Scheme/27 was allowed.

43. Having allowed the prayer for revocation, did the judge compel the Land Registrar to act on his orders revoking the title? The answer to that is in the affirmative. The Applicants/Respondents sought, in prayer (f) of the Notice of Motion dated 3rd July 2019, an order to the effect “that the orders issued herein be served upon the Land Registrar Mombasa for compliance” (emphasis added). Compliance, it would stand to reason, called for the said Land Registrar to revoke the title. By not complying, even after being served, the Land Registrar went against the judgment of the Court.

44. The judgment of Onyiego, J, is the primary document from which the impugned orders were drawn. Orders must be stated, have to be read in a way that gives effect to the judgment.

45. In light of the foregoing, I am unable to see how this Court erred when it observed in paragraph 27 that:-

“This honourable Court, in its judgment delivered on 27th May 2022, revoked the grant, and subsequent orders issued on Mombasa Kadhi’s Court succession cause No. 2014 of 2011 on 22nd May 2012, including the resultant Title No. Mombasa Bububu “A” Settlement Scheme/27 issued in favour of the Respondents.”

46. In paragraph 30, I held: -

“Having considered the said application carefully, it is my view that the proposed 3rd Respondent’s application has no merit, as it seeks a joinder of the proposed 3rd Respondent and not a review of the judgment of the Court. The judgment delivered on 27th May 2022 has not been appealed against, reviewed, or set aside.”

47. For a Court to review its decision based on an “error apparent on the face of the record”, the “error” must be self-evident. The Court of Appeal in National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR held that:-

“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.”(emphasis added).



48. The supreme court of Uganda in Edison Kanyabwera v Pastori Tumwebaze (2005) UGSC 1, defined error apparent on the face of the record in the following terms:-

“It is stated that in order that an error may be a ground for review, it must be one apparent on the face of the record, ie an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error may be one of fact, but it is not limited to matters of fact, and includes also error of law.”

49. In their attempt to persuade this Court that review is merited, counsel for the Applicant made long, elaborate submissions that focused on what the order stated and ignored the text of the judgment of the learned Judge. The fact that it was necessary to submit at length to fit the application within the ambit of review is sufficient evidence that this is not a fit and proper matter for review.

50. The application dated 23rd April 2024 seeks to review my ruling of 9th April 2024. Based on what the application dated 3rd July 2019 sought and what was granted by Onyiego, J on 27th May 2022, it is evident that the learned judge revoked it. It is also clear from the judgment that he intended to compel the Land Registrar to implement the said orders; thus, my ruling cannot be said to have been in error.

51. In my view, the third ground of review, to wit, that there should be sufficient reason, is not a blank cheque to be used by any aggrieved party. Sufficient reason must be interpreted “ejusdem generis.”

52. Whether this Court can revoke titles or what effect section 93 of the *Law of Succession Act* has, in this case, are matters of law that should have been appealed against when Onyiego, J delivered his judgment. I cannot sit on appeal against the decision of my brother Judge, whose jurisdiction is similar to mine. I agree with the submissions of the counsel for the Applicants/Respondents that misconstruing a statute or other provision of law cannot be a ground for review and that an erroneous order/decision cannot be corrected in the guise of exercise of the power of review

Final Orders

53. Thus, I must, regrettably, dismiss the application before me. I do so with a heavy heart as the Applicant appears to have purchased the property without knowledge of the conflict between family members and in good faith.

54. Parties will bear their/his respective costs.

Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF OCTOBER 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Karina, for the Applicant;

Mrs Chengo, for the Applicants/Respondents;

No appearance for the Respondents; and

Arthur - Court Assistant.

