In re Estate of Nyaga Musa (Deceased) (Civil Review E015 of 2019)
[2023] KEHC 942 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEHC 942 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL REVIEW E015 OF 2019

LW GITARI, J

FEBRUARY 2, 2023

BETWEEN

ROBERT NJUE NYAGA ..... 1ST APPLICANT

CATHERINE MUKWANJAGI ..... 2ND APPLICANT

AND

MICHENI APHAXARD NYAGA ..... RESPONDENT

RULING

1. The application before thiscourt is the one dated September 15, 2021brought under a certificate of urgency seeking for orders that the judgment and orders issued by this honourable court on July 23, 2021 awarding therespondent Chiamparatia Plot No. 4 and Plot No.1 Mugumo wa Kibura Market and the failure to award a portion of L.R. No. Mwimbi S/ Mugumango/733 where her matrimonial home is situated to the 2nd applicant be reviewed and set aside or vacated.

2. The application is based on the grounds on the face of it and is supported by the affidavit sworn on September 15, 2021by the 1st applicant on his own behalf and on behalf of his co-applicant. The applicant deposes that he is a son of the deceased and therefore a beneficiary of the deceased's estate. That on August 29, 2017, he filed an affidavit of protest in S.R.M.C. Succession Cause no. 36/ of 2016. That the court allowed the protest on the ground that the proposed mode of distribution therein was the most fair. Consequently, the Respondent, who is the 1st's applicant's brother, proffered Civil Appeal No. 29 of 2019 before this court. It is the applicant's contention that the respondent lied to this court and produced fraudulent documents of ownership claiming that the deceased had already bequeathed to him (the respondent) Plot no. 4 Chiampatia and Plot No. 1 Mugumo wa Kibura Market. The applicants attached to the application copies of letters from the County Government of Tharaka Nithi asserting that the same prove that the said plots are still in the name of the deceased and have never been transferred as alleged by the respondent.

3. It is further the applicant's contention that despite this court allocating parcel no. L.R. No. Muthambi/Lower Karimba/344 to him, therespondent has declined to vacate the same and has leased it to third parties, which actions the applicants assert go to prove the respondent's ill intent of disinheriting them of their rightful shares. It is further the applicants' contention that the Administrator has threatened to evict the 2nd applicant (who she incorrectly refers as the 2nd respondent) and her family from Mwimbi S/Migumango/733 where her matrimonial home is situated. It is the applicants case that this court arrived at an erroneous decision by finding that the 2nd applicant's husband, the late Eliphelet Ntwiga Nyaga, was given Mwimbi S./Mugumango/1665 as a gift intervivos with intent of being relocated from Mwimbi S/Migumango/733. That if the court was aware that the 2nd applicant has been living on Mwimbi S/Migumango/733 with her family for more than forty years and that she has developed the land, the court would have arrived at a different finding. The applicants thus urge this court to allow the application in the interest of equity, justice, and fairness.

4. The application is expressed to have been brought under the provisions of Rule 63 of the *Probate and Administration Rules,* section 80 of the *Civil Procedure Act*, and Order 45 of the *Civil Procedure Rules.*

5. The respondent opposed the application vide the replying affidavitsworn on October 14, 2021. He denied leasing land parcel no. 344 to anyone or occupying the applicant's land stating that he lives in Nairobi. He further denied threatening to evict the 2nd applicant as alleged stating that the land of the 2nd applicant's late husband is parcel no. 1665 and that he (the respondent) has built a permanent house on parcel no. 733.

6. Therespondent deposes that if the applicants were aggrieved by the impugned judgment, then they ought to have appealed to the Court of Appeal at Nyeri. He further deposes that there is nothing new that the applicants have discovered to warrant this application to be allowed as he (the respondent) filed in his list of documents two receipts with his name which were issued by the Tharaka Nithi County Government in respect of the two disputed plots and the Applicants never challenged the same. It is the respondent's contention that the letters annexed to the applicants' application must have been fraudulently and corruptly obtained given that they were not availed in the primary cause and are not from the department of lands.

7. The application was canvassed by way of written submissions. The 1st applicant filed his written submissions on October 21, 2022. It is his submission that the application is merited on account of the discovery of fraudulent documents of ownership adduced by the respondent in Appeal no. 29 of 2019 concerning plot no. 4 Chiampatia and Plot No. 1 Mugumo wa Kibura Market, that were used and caused this court to sway the judgment in favour of the respondent. He relied on the case of *Pancras T. Swal v. Kenya Breweries Limited* (2014) eKLR. The 1st applicant further submitted that he filed the present application without unreasonable delay and that he has provided sufficient reasons to warrant this court to allow the application as prayed.

8. On his part, therespondent filed his submission on October 22, 2022. From the onset, he invited this court to note that the averments contained in his replying affidavit remain uncontroverted as the applicants did not seek leave to file a further or supplementary affidavit. The respondent went on to submit that while an application for review or setting aside or vacating an order ought to be made in the same proceedings in which the impugned order was made, the applicants have filed the present application as Review Application No. E015 of 2021 which is a separate and distinct action from Chuka High Court Civil Appeal No. 29 of 2019. The Respondent further submitted that the delay of 2 months from when the impugned judgment was delivered until the fling of the present application is unreasonable and the same has not been explained.

9. The respondent further submitted that the decree or order sought to be reviewed has not been extracted and annexed to the application as required by law. He relied on the cases of *Executive Committee Chelimo Plot Owners Welfare Group & 288 others v. Langat Joel & 4 others (Sued as the management committee of Chelimo Squatters Group)* [2018] eKLR and *Wilson Saina v. Joshua Cherutich Trading as Cherutich & Company Limited* [2003] eKLR to buttress this position.

10. The respondent finally submitted that the review order being sought by the applicants is vague to the extent that it does not vividly or expressly state who should be awarded the two plots namely plot no. 4 Chiampatia and Plot No. 1 Mugumo wa Kibura Market and/or what portion of land should be awareded to the 2nd respondent out of the named L.R. No. Mwimbi/S-Mugumango/733. That with such a vague order being sought, implementation of the same will be impossible in the unlikely event that the same is granted.

11. Finally, the respondent submitted that the review order being sought is an appeal in disguise which should not be allowed as the proper forum for an appeal would be theCourt of Appeal at Nyeri. The respondent thus urged this court that the applicants' application dated September 15, 2021is devoid of merit and dismiss the same with costs to the respondent.

Analysis

12. From the onset, I wish to point out that prayers no. 3 and 4 in the application seeking inhibitory and injunctive orders respective are spent at this stage as the same were sought as interim reliefs. The applicant was seeking to have the orders granted pending the hearing and determination of this application. The orders were not granted in the interim. The only prayers left to be determined in prayer no. 2 seeking review orders and prayer no. 5 on costs of the Application.

13. This court is empowered to review any of its judgment, but such power must be exercised within the framework of section 80 of *Civil Procedure Act* (cap 21 of the Laws of Kenya) and Order 45 Rule 1 of the *Civil Procedure Rules 2010*. Section 80 of the *Civil Procedure Act* provides as follows:-

> " Any person who considers himself aggrieved-
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (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."

14. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows:-

> " Any person considering himself aggrieved-
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> (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

15. From the above provisions, it is clear that section 80 of the *Civil Procedure Act* gives this court power of making review orders while Order 45 of the *Civil Procedure Rules* sets out the rules. The rules essentially set down the jurisdiction as well as restrict the scope of review. Grounds for review are limited to the following grounds:

    a. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

    b. on account of some mistake or error apparent on the face of the record, or

    c. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

16. In the case of *Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & another* (2018)eKLR the Court of Appeal was categorical that where an applicant in an application for review sought to rely on the ground that there was discovery of new and important evidence, one had to strictly prove the same. In the same case, the Court of Appeal further went on to state as follows:

> " We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation."

17. The applicants' application is grounded upon possession of a letter dated August 4, 2021from the County Government of Tharaka Nithi which he has attached to the application. The letter is referenced as "Proof of Ownership for Plot No. 4 Champaratia Market" and authored by one Adiel Mutwiri, the sub-county administrator of Mwimbi sub-county. In summary, the contents of the said letter infer that Plot No. 4 in Champaratia Market is owned by the late Nyaga Musa. The said letter does not mention Plot No. 1 Mugumo wa Kibura Market which is also in issue in the present application. That notwithstanding, it is my view that said letter does not suffice as proof of ownership. I am guided by section 26 of the *Land Registration Act* (No 3 of 2012) which provides that a certificate of title is the conclusive proof of ownership. The said section states:

> " The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
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> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
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> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."
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> Secondly where a party alleges discovery of a new and important matter of evidence, he must demonstrate that after exercise of due diligence was not within his knowledge and could not be produced by him at the time when the decree was passed or made. The discovery must relate to new evidence or facts. The threshold for a material to qualify to be new and

important evidence it must of such a nature that it could not have been discovered even if the applicant exercised due diligence. It is such material, which is a new matter and was not available in court or to the applicant. The respondent had in his affidavit annexed receipts on the two plots issue by Tharaka Nithi County Government which the applicant did not challenge. I also note that applicant had included the two plots in his affidavit of protest had alleged that the respondent had left out the two plots. The applicant had not proposed a mode of distribution of the two plots in his affidavit of protest. The two plots were therefore available in court when it passed the Judgment. The applicant did not exercise due diligence. The existence of the two plots were part of the evidence presented to the court. This is not new material and does not qualify to be new and important matter of evidence. The ownership of the two plots is a matter which the applicant could have established upon exercise of due diligence.

Finally in an application for review, the party must demonstrate that there is a mistake or apparent error on the face of the Judgment. The applicant has not alleged that there was an error on the face of the Judgment and I will therefore not make a finding on that ground safe to say that there was no error apparent on the face of the Judgment.

18. The other consideration is whether there are sufficient reasons to warrant the court to allow the application. In his submissions the applicant states that sufficient reasons are analogous or 'ejusdem generis' to the aforementioned reasons of discovery of new matter. In *Sadar Mohamed v Charan Signh and another* (1963) EA 55 it was held that any other sufficient reason for the purpose of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter).

I am also guided by the case of *Tokesi Mambile and others v Simon Litsaya* (2004) eKLR where the court stated that-

> " An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason."
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> "where the application is based on sufficient reason, it is for the court to exercise its discretion."

The applicant has not alleged that there is an error or mistake on the face of the Judgment. The applicant has not stated who should be awarded the two plots in the event that the court orders a review. Court orders are not issued in vain. An erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal see *Origo & another v Mungala* (2005) 2KLR

A mistake or an error means a mistake or an error which is *prima facie* visible and does not require any detailed examination.

From the foregoing, I find that there are no sufficient reasons disclosed by the applicant to warrant me to order a review of the Judgment. Guided by the law on review which I have analysed above I find that the applicants have not cited sufficient grounds upon which this court can order a review. There was a delay in bringing this application.

19. It is therefore my view that no new evidence has arisen to necessitate this court to review the impugned judgment. As such the present application is devoid of merits.

I order that the application be dismissed with costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 2ND DAY OF FEBRUARY 2023.

L.W. GITARI

JUDGE