



Josiah v Nyaga (Civil Appeal 34 of 2021) [2023] KEHC 2054 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 34 OF 2021
LN MUGAMBI, J
MARCH 16, 2023**

BETWEEN

HERBERT MBOGO JOSIAH APPELLANT

AND

JOHN NJUE NYAGA RESPONDENT

RULING

1. The appellant/applicant brought an application dated November 14, 2022 under order 45 rule 1 of the *Civil Procedure Rules*, section 3A of the *Civil Procedure Act* and all other enabling provisions of the law seeking for the following orders;
 - a. Spent.
 - b. That pending the interpartes hearing of the application herein there be a stay of implementation of the orders issued on October 3, 2022 and all consequential orders.
 - c. That the Honourable Court be pleased to review and/or set aside the order issued on October 3, 2022 that the summons for confirmation of grant dated September 17, 2019 is allowed, that LR Ngandori/Kiriari/1416 shall be distributed equally to all the children of the deceased herein and all consequential orders.
 - d. That the Honourable Court be pleased to review the order that the beneficiaries will only be children and instead substitute it with an order that beneficiaries of the estate of the deceased including Rita Marigu Nyaga shall be entitled to share the estate of the deceased equally.
 - e. That costs of this application be borne by the respondent.
2. The application was supported by the affidavit deposed by Herbert Mbogo Josiah and the grounds on the face of the application as follows;



- i. That by the Honourable Court allowing summons for confirmation dated September 17, 2019 and making a finding that land parcel No Ngandori/Kiriari/1416 be distributed equally to all the children of the deceased there was a mistake.
 - ii. That the mistake is that the proposed mode of distribution under paragraph 5(1) of the affidavit in support of the summons for confirmation of grant doesn't reflect the honourable court's position that each child of the deceased shares the estate of the deceased equally.
 - iii. That Moses Muchangi Mbogo proposed to inherit 0.10 Ha is not a child of the deceased or even a beneficiary of his estate. That he is proposed to inherit as per the summons for confirmation of grant.
 - iv. That the Honourable Court was also not informed that Rita Marigu Nyaga, a granddaughter of the deceased, was a beneficiary of the estate and also resides on land parcel No Ngandori/Kiriari/1416. That the Honourable Court made an order that only children inherit without knowing that there other beneficiaries of the estate including Rita Marigu Nyaga.
3. The Respondent filed their Replying affidavit dated November 29, 2022 sworn by John Njue Nyaga who deposed the proposed mode of distribution in the summons dated November 17, 2019 provides for both families equally and the same does not discriminate against any beneficiary. He admitted that Moses Muchangi Mbogo is not a beneficiary of the estate of the deceased estate, he is a proposed purchaser of a portion of the estate and the proceeds of the sale are meant to cater for the costs of this cause, subdivision and processing of titles for the beneficiaries herein. He further admitted that Rita Marigu Nyaga is a granddaughter to the deceased but she is not a beneficiary of the estate of the deceased and that the applicant has also not provided for the said Rita and her mother in his proposed mode of distribution and he cannot introduce her at this stage.
4. He continued that the applicant's application raises new issues that were not raised during trial and the same has not been pleaded as a new discovery, this application is therefore an attempt to protract the litigation and deny the Respondents the right to inherit the estate of the deceased. He stated that if the court is inclined to review the orders dated October 3, 2022, he requested that the land be divided into two portions for the benefit of the two families. He also said that the applicant should be ordered to surrender the original title deed to him for ease of sub-division and allocation of the beneficiaries' portions.
5. The appellant/applicant filed a Supplementary Affidavit dated December 16, 2022 and deposed that the inclusion of Moses Muchangi Mbogo as a beneficiary is contrary to the orders of this court issued on October 3, 2022 that LR Ngandori/Kiriari/1416 be equally distributed to all of the children of the deceased. He stated that Rita Marigu Nyaga was brought up by the deceased like her own daughter and she resides in land parcel No Ngandori/Kiriari/1416 and she cannot be left out of the distribution by virtue of her being dependent of the deceased and a beneficiary of his estate. He denied that the 1st family is suffering as they have land where they currently reside which is LR Ngandori/Kirigi/501 and the respondent has land at Gatondo area where he lives therefore none of them is suffering from homelessness. He denied that he has refused to surrender the original title deed but they want the honourable court to clearly pronounce itself on the distribution so that they go to the next stage of implementing the grant. He prayed that this application be allowed as prayed.

The parties agreed to dispense with the hearing of the application by way of written submissions.



Appellant's Submissions

6. The Appellant filed his submissions on December 16, 2022 and submitted that there was error on the face of the Honourable Court's judgment as the summons for confirmation of grant that was allowed does not provide for equal distribution of LR Ngandori/Kiriari/1416 contrary to the judgment of the court delivered on October 3, 2022 that decreed that the land be distributed equally among the children of the deceased. He said that the 1st house of the deceased herein has 5 children while the 2nd house has 9 children. The Respondent in the said summons for confirmation of grant had proposed that the 1st house gets a share of 0.555 Ha and the second house of 9 people to get a share 0.555 Ha jointly. He submitted that the said distribution is not equitable as it has the effect of apportioning children of the 2nd house smaller shares of the subject land compared to the children of the 1st house. He cited that section 40 of the [Law of Succession Act](#) and submitted that by virtue of the said provision and as per the finding of the Honourable Court, the subject land ought to be sub-divided equally among the children as opposed to equally among the two houses.

7. He relied upon the case of [In Re Estate of Kimitei Cherop \(deceased\)](#) (2021) eKLR, where the court in applying section 40 of the [Law of Succession Act](#) stated as follows;

“...I now turn my attention to the final issue, whether the estate should be divided equally between the two houses or equally amongst the 9 children and the surviving widow. It is manifest therefore that, guided by the provisions of section 40(1) of the [Law of Succession Act](#), the estate herein ought to be distributed equally amongst the 9 children of the deceased and the surviving widow, thus making 10 units...”

Further, the court cited the Court of Appeal case of [Mary Rono v Jane Rono & another](#) (2005) eKLR where Hon Omolo, JA stated as follows;

“... If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section [section 40(1)] that the number of children in each house be taken into account...”

8. He submitted that Moses Muchangi Mbogo who is named as a beneficiary is neither a child nor a beneficiary of the estate and should not inherit a portion of the estate as this Honourable Court ordered that the subject land be distributed among the children of the deceased. He cited section 82 of the [Law of Succession Act](#) which prohibits sale of immovable property of the deceased prior to confirmation of grant while section 45 of the [Law of Succession Act](#) makes it illegal to intermeddle with the property of the deceased and bequeathing a share of the estate to the said Moses would be contrary to the said provisions.

9. On the issue of Rita Marigu Nyaga being left out of the distribution, he relied upon the case of [Re Estate of Veronica Njoki Wakagoto \(deceased\)](#) 2013 eKLR, where the court pronounced itself as thus with regards to grandchildren inheriting from their grandparents;

“... grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents...”



He prayed that the honourable court finds that the said Rita Marigu Nyaga is entitled to inherit from estate of the deceased.

Respondent's Submissions

10. The respondent filed his submissions on January 10, 2023 and submitted that the relevant law is order 45 of the Civil Procedure Rules. He stated that an error on the face of the record was described in the case of *Muyodi v Industrial and Commercial Development Corporation & another* (2006) 1 EA 243, quoted with authority in the *Estate of Oliokampai Sarapae Sanguti (deceased)* 2019 eKLR, 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.

11. He stated that the applicant has not established a clear case of an error apparent on the face of the record and in the summons dated September 17, 2019, he has distributed the estate equally among two houses and it would have been an error if the summons did not provide for all the children of the deceased.

12. He further submitted that it is trite that an applicant for review on grounds of an error cannot raise new issues in the application for review and the applicant has introduced new allegations that one of beneficiaries was left out of the distribution of the estate. The alleged Rita Marigu Nyaga was not a party to the proceedings before the lower court and the appeal.

13. Further, she is not a direct beneficiary of the estate of the deceased and the decision whether she is entitled to a share is an issue of evidence.

14. Further, the court was not informed of the said beneficiary and her omission cannot be termed as an error. Parties are bound by their pleadings and the issues raised outside the pleadings should not be considered.

15. He concluded by submitting the application is merely intended to delay the implementation of the grant and to protract this matter unnecessarily.

Analysis and Determination

16. Flowing from the submissions and the affidavits filed, it is clear to me that the issues for determination are:

- a. Whether the issue raised by the applicant is meets the legal threshold of what amounts to an error on the face of record
- b. Whether the Applicant should by way of this review seek provision for an alleged beneficiary who had not participated in the succession proceedings on account of error on the face of the record
- c. Whether a purchaser who is not a child of the deceased should partake a share of deceased estate



- d. Who pays the cost of this Application?
17. Review is provided for in section 80 of the *Civil Procedure Act* and order 45 of the Civil Procedure Rules. It states as follows;

Section 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.”

Order 45:

“1. Any person considering himself aggrieved—

- (1)
 - (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”

18. Courts have the discretion to allow review on three grounds; where there is discovery of new and important matter of evidence, where there is an apparent error on the face of the record and where there is sufficient reason to do so. The application for review must be made without undue delay. The applicant herein has pleaded that there was an error on the face of the record which warrants this court to exercise its discretion and review the orders issued on October 3, 2022.

19. Courts of similar and superior jurisdiction have discussed the several grounds for allowing review. In *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 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.”

20. The supreme court of Uganda in *Edison Kanyabwera v Pastori Tumwebaze* (2005) UGSC 1, provided for what constitutes an error apparent on the face of the record, it stated as follows;

“It is stated that in order that an error maybe 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 maybe one of fact, but it is not limited to matters of fact, and includes also error of law.”

21. The court of appeal in *National Bank of Kenya Limited v Ndungu Njau* (1997) eKLR stated as follows;

“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.”

22. From the above quoted decisions, it is clear that the courts agree that the error or omission must be self-evident without there being a need for additional arguments.

23. In the Judgement delivered by Her Ladyship Justice Njuguna which is the subject of this review application, the Judge at paragraph 20 of the judgment stated:

“...20. Now that the two wives are deceased, all their children are therefore entitled to a share of his net intestate estate equally as provided for by section 40 of the *Law of Succession Act...*”

24. In making the orders pursuant to her findings, she proceeded as follows:

- i. That the property forming part of the estate of the deceased herein is LR Ngandori/Kiriari/1416
- ii. Summons for confirmation of grant dated September 17, 2019 is allowed
- iii. That LR Ngandori/Kiriari/1416 shall be distributed equally to all the children of the deceased herein (emphasis mine)
- iv. Each Party shall bear their own costs

25. I have perused the summons for confirmation dated September 17, 2019 which the judge confirmed in her judgment to see if it conforms with the reasoning and decision she made in this judgment. In the affidavit in support of the summons, the proposed distribution is provided whereby it is indicated that parcel of land in question would be divided into three portions, whereby the 1st five beneficiaries are named and joined/bracketed together and shown they will get 0.555 Ha jointly.

26. The next portion is indicated would go to one individual Moses Muchangi Mbogo who would get 0.10 Ha.



27. The final part is a portion proposed to be 0.555 Ha and in this, 8 beneficiaries have been grouped/ bracketed together and shown they would also be registered jointly in respect of the said parcel.
28. It is patently clear to me that this proposed sub-division is not in tandem with the body of judgment as clearly expressed by the learned Judge at paragraph 20 of the judgment and also in dispositive order three where her emphasis is quite clear that
- ‘...That LR Ngandori/Kiriari/1416 shall be distributed equally to all the children of the deceased herein...’
29. The said summons for confirmation of grant are manifestly not in tandem with the Judgment of the Court and are thus misleading. This is an apparent error on the face of the record that must instantly be corrected. I find that this ground of review has merit. The Court was vividly clear in its pronouncement as demonstrated that the distribution was to be done equally to all the children of the deceased. The distribution in the said summons is obviously not reflective of the position of the court which it expressed clearly.
30. On the second issue, the applicant stated that Rita Marigu Nyaga is the daughter of their deceased sister but was left out in the distribution yet she resides on LR Ngandori/Kiriari/1416.
31. The fact that she is a grand-daughter was not disputed by the Respondent.
32. However, as ably submitted by the Respondent, that issue cannot be an error apparent on the face of the record as is it a matter that would involve proof of several facts, for instance that she was the only daughter of the deceased so as to be entitled to the share in question solely, that indeed the mother is dead and so on. Further, it is not disclosed if she is an adult or a minor who can prosecute the issue on her own self. This would require a proper hearing.
33. On the 3rd issue, it is not dispute that the deceased had two wives with the first house having five children and the second house having 9 children. The affidavit in support of summons for confirmation of grant at page 4 of the Record of Appeal listed out the children of the deceased Nyaga Munyau and in paragraph 3 of the said affidavit, Moses Muchangi Mbogo has been listed out as a dependant and grandson.
34. The Appellant/Applicant and the Respondent have agreed that he is not a grandson of the deceased and therefore not a beneficiary.
35. The Respondent admitted that the said Moses Muchangi Mbogo is a proposed purchaser of a portion of the estate and the proceeds of the sale are meant to cater for the costs of this cause, subdivision and processing of titles for the beneficiaries.
36. The Applicant was aware or must have been aware of this fact all along as he must have known who the children of the deceased were. This therefore cannot be a ground for seeking a review on account of an error on the face of the record. Getting even deeper, I do not even think it can even be raised based on discovery of new evidence as that would require him to demonstrate that the ‘discovery of new and important matter or evidence was not within his knowledge and could have been produced by him even upon exercise of due diligence’ which given the facts, I believe would be a tall order to climb for the Applicant.
37. That said, I nevertheless consider the issue that has been raised and which the Respondent has acknowledged as a fact in my view constitutes a ‘sufficient reason’ that warrants this court to intervene on review.



38. It is thus the finding of this Court there is an error apparent on the face of record in that the summons dated 17/9/19 are at variance with the chain of reasoning in the judgment of the court delivered on October 3, 2022. The mode of distribution in the summons for confirmation of grant dated September 17, 2019 does not distribute the deceased property equally among the children of the deceased, which is what the court ordered.
39. Further, based on the issue raised by the Applicant and admitted by the Respondent regarding the fact that one of the proposed beneficiaries is in fact not a child of the deceased but a purchaser, yet the time of making the decision the Court was misled through the affidavit in support of distribution that the said person was a grandson of the deceased, this in my view constitutes a sufficient reason to review the orders of the court made on the October 3, 2022.
40. In light of the foregoing, I hereby review and set aside the order that allowed Summons for confirmation of grant dated September 17, 2019 and substitute the same with an order that the deceased property shall be distributed to all the children of the deceased in 14 equal units/portions, with each child getting an equal share, whether in the first house that has five children or the second house which has nine children, the respective share per child shall be similar/identical in size. The purchase Moses Muchangi Mbogo shall surrender back the land to the estate for distribution to the children of the deceased. If he had any claim, he should pursue the matter outside this succession proceedings.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 16TH DAY OF MARCH 2023.

L.N MUGAMBI

JUDGE

In presence of:

Appellant- absent

Respondent- absent

Advocate for Appellant- absent

Advocate for Respondent - absent

Court Assistant- Brian

Court

This Judgement be transmitted digitally by the Deputy Registrar to the Advocates for the Parties on Record through their respective email addresses.

L.N MUGAMBI

JUDGE

