



**Kimathi v Thiuru & another (Succession Cause 23 of 2005)
[2023] KEHC 2538 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 23 OF 2005
TW CHERERE, J
MARCH 23, 2023
N THE MATTER OF APPLICATION FOR REVIEW DATED 25TH
OCTOBER, 2022
BETWEEN
REBECCA NAITORE M'TIRIMANIA
.....BENEFICIARY/1ST APPLICANT
RAEL MWARI JASON.....
BENEFICIARY/2ND APPLICANT
JOYCE KANANU
KABURIA.....BENEFICIARY/3RD
APPLICANT
AND
JUDAH KIUMBE.....1ST
ADMINISTRATOR/RESPONDENT
AND
IN THE MATTER OF RECTIFICATION OF CERTIFICATE OF
CONFIRMATION OF GRANT DATED 14TH OCTOBER, 2022**

**BETWEEN
CATHERINE NTINYARI KIMATHI APPLICANT
AND
TERESIA KANYUAERA THIURU 1ST ADMINISTRATOR
JUDAH KIUMBE 2ND ADMINISTRATOR**



RULING

1. By an order dated September 29, 2021, Otieno J made the following orders:
 1. Petitioner was adequately provided for in LR No Ntima/igoki/1719 which was a gift inter vivos.
 2. Deceased estate in LR No Kiirua/naari/527 be shared equally between Rebecca Naitore, M'Tirimania, Rael Mwari Jason, Damaris Kanoti Mathiu, Joyce Kananu Kaburia, the estate of Abel Mutua (deceased) and the estate of Benjamin Thiuru (deceased).
2. Rael Mwari Jason Kiumbe (beneficiary/applicant) by summons dated and filed on October 25, 2022 supported by applicant's affidavit sworn on even date seeks review of the ruling delivered on October 19, 2022 on the following grounds:
 - a. The Rebecca Naitore M'Tirimania refers to one and not two beneficiaries as indicated by a comma after the name Naitore
 - b. Kiirua/naari/7017 is already registered in the name of Rebecca Naitore M'Tirimania, Kiirua/naari/7015 in the name of Rael Mwari Jason and Kiirua/naari/7014 in the name of Joyce Kananu Kaburia
 - c. A beneficiary Damaris Kanoti Mathiu is deceased
3. The summons is opposed on the basis of replying affidavits sworn by Judah Kiumbe (1st administrator) on November 14, 2022 who avers that applicant's remedy lies in an appeal.
4. Catherine Ntinyari Kimathi by summons dated February 1, 2023 supported by her affidavit of even dated prays that the estate of her mother Damaris Kanoti Mathiu whose correct name is Martha Kanoti Mathiu be distributed to her estate sine she is deceased. In support of the application is annexed a certificate of death for Martha Kanoti dated December 20, 2021.

Analysis and Determination

5. I have considered the summons in the light of the affidavits on record and submissions and authorities filed on behalf 1st administrator and the issue for determination has been made for review of the ruling dated October 19, 2022.
6. Review of orders is governed by section 80 of the [Civil Procedure Act](#) which provides *inter alia*: -
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.
7. Order 45 rule 1 of the [Civil Procedure Rules](#) on the other hand provides that: -
 - (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.
8. The Court of Appeal in *Anthony Gachara Ayub v Francis Mabinda Thinwa* [2014] eKLR restated the main grounds for review which are discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.
 9. The ruling from which the applicant seeks to review was delivered on October 19, 2022. The application for review was filed timeously on October 25, 2022.
 10. Section 80 of the Act and order 45 rule 1 of rules gives the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, as it has been constantly stated, this discretion should be exercised judiciously and not capriciously.
 11. In *Nyamogo and Nyamogo Advocates v Kogo* [2001] 1 EA 173, the Court of Appeal stated that any alleged error on the face of the record that can only be established by a long-drawn process of reasoning, would not be an error apparent on the face of the record.
 12. Mativo J (as he then was) in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR that:

“The starting point is 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. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review”.
 13. From the ruling dated October 19, 2022, it is apparent that there is an error in that Rebecca Naitore M’Tirimania is one and not two beneficiaries as indicated in the ruling by a comma after the name Naitore. Clearly, this is an error of omission/commission that does not require an elaborate argument to be established and review to correct the name of Rebecca Naitore M’Tirimania is therefore merited.
 14. Concerning the second ground, there is evidence that deceased’s estate in LR No Kiirua/naari/527 was subdivided into six portions namely LR No Kiirua/naari/7014 to 7019. Copies of title deeds have been annexed indicating that LR No Kiirua/naari/7017 is registered in the name of Rebecca Naitore M’Tirimania, KIIRUA/NAARI/7015 in the name of Rael Mwari Jason and Kiirua/naari/7014 in the name of Joyce Kananu Kaburia
 15. Clearly, the cancellation of Kiirua/naari/7014, 7015 and 7017 was made in error for the same had been transmitted in compliance with the court’s order dated September 29, 2021 and review of the order of cancellation dated October 19, 2022 is therefore merited.



16. The failure to transfer LR Kiirua/naari/7016, 7018 and 7019 on account of the beneficiaries having died is satisfactory.
17. The averment that one of the beneficiaries Damaris Kanoti Mathiu is deceased demonstrated by a certificate of her death dated December 20, 2021 and that her share ought to be distributed to her estate is not controverted. The application that her share ought to be distributed to her estate as prayed in the application dated
18. From the foregoing, I find that the application for review is merited and in order to allow the transmission of the estate to the remaining beneficiaries, it is hereby ordered:
 1. The order dated October 19, 2022 cancelling all the 6 titles issued subsequent to subdivision of LR No Kiirua/naari/527 namely LR No Kiirua/naari/7014; LR No Kiirua/naari/7015, LR No kiirua/naari/7016, LR No Kiirua/naari/7017, LR No Kiirua/naari/7018 and LR Kiirua/naarI/ 7019 is hereby set aside it its entirety
 2. The orders of inhibition on LR NoKiirua/naari/7014; LR No Kiirua/naari/7015, LR No Kiirua/naari/7016, LR No Kiirua/naari/7017, LR No Kiirua/naari/7018 and LR Kiirua/naari/ 7019 are lifted
 3. The certificate of confirmation of grant dated October 14, 2022 shall be rectified to the effect that LR Kiirua/naari/7016 be transmitted to the estate of Martha Kanoti Mathiu in place of Damaris Kanoti Mathiu
 4. The administrators are directed to within 45 days from today's date effect transmission of LR Kiirua/naari/7016 to the estate of Martha Kanoti Mathiu (deceased); LR Kiirua/naari/7018 to the estate of Benjamin Thiuru (deceased) and LR Kiirua/naari/7019 to the estate of Abel Mutua (deceased)
 5. Mention on July 20, 2023 to confirm compliance

Dated and Delivered in Meru this 23rd DAY OF March 2023



WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Applicant in 1st Application - Mr. Kaimenyi for Kaimenyi Kithinji & Co. Advocates

For 1st Respondent in 1st Application - Ms. Njoki for Muthoga Gaturu & Co. Advocates

For 2nd Respondenti n 1st Application - N/A

For Applicant in 2nd Application - Mr. Kithinji for Kithinji Kirigiah & Co. Advocates

