



**In re Estate of Iraya Kabaiko (Deceased) (Succession Cause
130 of 2008) [2023] KEHC 17761 (KLR) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 130 OF 2008
RN NYAKUNDI, J
MAY 17, 2023
IN THE MATTER OF THE ESTATE OF IRAYA KABAIKO (DECEASED)**

BETWEEN

LUCY WANGUI KABAIKO APPLICANT

AND

JANE WANGARI KABAIKO 1ST RESPONDENT

JOSEPH WAINAINA KABAIKO 2ND RESPONDENT

GRACE WAMBUI KABAIKO 3RD RESPONDENT

AND

HILLARY KIMUTAI KOSGEI INTERESTED PARTY

RULING

1. By a Notice of motion dated May 4, 2022 the applicant seeks the following orders:-
 1. Spent.
 2. That the order issued on October 28, 2014 transferring the property known as Eldoret Municipality Block 6/103 to the Interested Party be and is hereby reviewed or set aside.
 3. That the transfer of the property known as Eldoret Municipality Block 6/103 to the interested party be and hereby declared as null and void ab intio
2. The application is premised on the grounds therein and it is further supported by the affidavit sworn by Lucy Wangui Kabaiko, on May 4, 2022.



The Applicant's Case

3. The applicant deposed that she the daughter of the deceased herein. the applicant together with her sister one Alice Wangui Kabaiko, filed for an application seeking the revocation of grant herein which grant was revoked.
4. The Applicant maintains that the grant herein which was confirmed on July 20, 2009 was revoked by this Honourable Court on October 28, 2014.
5. The Applicant further deposed that the court herein went further to order that the transfer of parcel of land known as Eldoret Municipality Block 6/103 to a third party was proper whereas the grant which was the basis of the said transfer had been revoked thereby rendering the transfer null and void.
6. The Applicant contends that the transfer of the property of the estate of the deceased to a third party who was not a beneficiary of the estate cannot be sustained where the grant supporting such process of transfer is revoked.
7. The Applicant further maintains that the claim by the Interested Party herein is a civil claim and thus cannot be sustained in these instant proceedings but rather in the Environment and Land Court.
8. In light of the foregoing, the Applicant thus urged the Court to review the order upholding the transfer of the deceased's estate comprising of all that parcel of land known as Eldoret Municipality Block 6/103 illegally.
9. The Applicant wants the deceased's estate already transferred to the Interested Party herein to revert to the deceased's estate for proper administration and distribution.
10. The Applicant is eager and keen to administer the estate of the deceased herein. According to the Applicant the estate of the deceased was fraudulently distributed and thus leave her out of her share of the inheritance.

The Interested Party's Case

11. The application is opposed by the Interested Party herein, Hillary Kimutai Kosgei vide is affidavit dated May 20, 2022.
12. The Interested Party's deposed that the issue of the transfer of the property known as Eldoret Municipality Block 6/103 was raised by the Applicant herein in the summons for revocation of grant.
13. The Interested Party maintains that the Court gave a detailed and well-reasoned judgment on October 28, 2014 upholding the transfer and invoked section 93 of the *Law Succession Act*.
14. The Interested Party further maintains that the issue of jurisdiction of the Succession Court in the matter was raised and the judge therein considered it and made a finding that he had the requisite jurisdiction by dint of section 47 of the *Law of Succession Act*, cap 160.
15. The Interested party contends that the aforementioned conclusions on the transfer of the suit property and the jurisdiction of the Court were matters of law and thus cannot be subject of application for review.
16. The interested party contends that if the applicant was aggrieved with the said judgment then she ought to have preferred an appeal to the court of appeal within the stipulated timelines.



17. The interested party maintains that the applicant has not established the error apparent on the face of the record to warrant a review. Further that no important matters have been brought before the Court nor no sufficient cause has been established to warrant a review.
18. The interested party contends that this instant application has been brought after unreasonable delay being over (7) years.
19. According to the Interested Party the Court is now functus officio.
20. The application was canvassed vide written submissions. On 1 October 4, 2022 the Applicant through her Advocate, Messrs B.M Ouma & Co. filed submissions dated September 20, 2022 whereas the Interested Party through his Advocate, Messrs Wambua Kigamwa & Co. filed submissions dated October 31, 2022.

Determination

21. I have considered the application, the supporting affidavit, the response thereto and the written submissions by the respective parties and I find that the issue for determination is whether the applicant is entitled to the orders sought.
22. Section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules* provides as follows: -

Section 80. Review

“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, rule 1.] Application for review of decree or order.

1.

- (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”

23. In *Nyamogo & Nyamogo v Kogo* [2001] EA 174 while discussing what constitutes an error on the face of the record, the court rendered itself as follows: -

An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the 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 a long drawn process of reasoning 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 apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

24. From the above provisions it is clear that while section 80 of the *Civil Procedure Act* gives the court the power to make orders for review, order 45 sets out the conditions to be met in a review. That is to say that a review is limited to:

- (a) discovery of a 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 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
- (d) an application for review on any of the above grounds must be made without unreasonable delay.

25. In the present case, the applicant seeks to review the order of this Court emanating from the Judgment that was delivered on October 28, 2014 that upheld the transfer of the property known as Eldoret Municipality Block 6/103 to the interested party herein. The Applicants main contention is that the said transfer cannot stand as the grant dated July 20, 2009 was revoked. The applicant argues that the said grant was the basis of that transfer and thus cannot stand in view of it being revoked.

26. I have carefully read the judgment that forms the basis of this application and I cannot say that there is was error or omission apparent on the face of the record by Hon. Justice George Kanyi Kimondo. The judge therein made his finding on the issue having heard the respective parties and thus cannot be said to have erred when making his determination regarding the said transfer. To my mind reviewing the said order would only amount to changing the entire substratum of the said judgment or alternatively will be sitting as an appellate court. In my view if the applicant herein was aggrieved by the said order then she ought to have appealed against the said judgment and not seek a review of the same.

27. The upshot is that I find no merit in the applicant’s application dated May 4, 2022 and the same is ordered dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF MAY 2023



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R. NYAKUNDI

JUDGE

