



Nyota & 2 others v Thumbi & another; Wairu & another (Proposed Interested Parties) (Civil Case 25 of 2016) [2023] KEHC 17249 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17249 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE 25 OF 2016
SM GITHINJI, J
MAY 11, 2023**

BETWEEN

**EMMANUEL JULIUS NYOTA 1ST APPLICANT
WILBERT NJUKI THUMBI 2ND APPLICANT
MARGARET THUMBI KONA 3RD APPLICANT**

AND

**AUGUSTA RWAMBA THUMBI 1ST RESPONDENT
JOAKIM IRERI THUMBI 2ND RESPONDENT**

AND

**PETER WAWERU WAIRU ALIAS PETER WAWERU THUMBI ... PROPOSED
INTERESTED PARTY
HELLEN WANJIRU PROPOSED INTERESTED PARTY**

RULING

1. The applicants herein were objectors in the main suit involving the estate of the late Lucila Wairu Waweru (the deceased). The main suit was heard and determined by this court on June 25, 2020. The Applicants have now moved the court vide a Notice of Motion dated February 2, 2022 and premised under article 40 of *the Constitution* of Kenya; section 80, 1A, and 1B of the *Civil Procedure Act*; orders 9 rule 10, 45 rule 1 and 2 of the *Civil Procedure Rules*; rule 84 of the *Judicature (Court of Appeal Rules) Directions*; and rule 63 of the *Probate and Administration Rules*.

The Applicants seek the following orders; -



1. That the honourable court be pleased to review, vary and/or set aside its decree and directions made in respect to land parcel number MN/III/8103 as set out in clause (f) of the judgment issued on 25/6/2020.
 2. That the honourable court issues a declaration that all that parcel of land known as MN/III/8103 measuring approximately 0.0188 hectares does not form part of the free properties forming part of the estate of the deceased herein.
 3. That the interested parties be enjoined in this matter.
 4. That upon grant of prayer (2), the court be pleased to order the execution of the said judgment.
 5. That costs for application be provided for.
2. The application is premised on the grounds on the face of the motion and supported by the affidavits all sworn on 2nd February 2022 by the Applicants and the Proposed Interested Parties. According to the Applicants, the court erroneously included plot no. MN/III/8103 (the suit property) in the distribution of the deceased's estate. That the suit property had prior to the deceased's demise been sold and transferred to Emmanuel Julius Nyota and a certificate of title issued. The Applicants averred that the suit property was carved out of plot MN/III/2960 which was subdivided into two portions, the other being MN/III/8104. The Applicants want the court to review the said judgment to include plot 8104 which was not included in the Will, and exclude the suit property. To them that was an error apparent on the face of the record.
3. In response to the application, the 1st Respondent raised a preliminary objection dated 14th February 2022 on the following grounds; -
1. The notice of motion dated February 2, 2022 is incompetent frivolous and bad in law and the Honourable Court cannot grant the prayers sought therein.
 2. The costs of the withdrawn Notice of Motion dated August 9, 2021 have not been paid and the Applicants cannot institute this motion without the payment of costs of the withdrawn motion dated August 9, 2021.
 3. The Notice of Motion dated February 2, 2022 is an abuse of the court process and vexatious.
4. The application and preliminary objection were canvassed by way of written submission. Notably, as at the time of writing this ruling, only the Applicants had filed submissions which I have well considered. The issues that arise for determination are; -
- i. Whether the preliminary objection raises pure points of law.
 - ii. Whether the Applicants have made out a proper case for review.
 - iii. Whether the proposed interested parties should be joined to these proceedings.

Whether the preliminary objection raises pure points of law.

5. The law on Preliminary objections is now settled. That they should be on pure points of law and cannot be raised if any facts have to be ascertained. The ingredients of preliminary objections were stated in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, where it was held that:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose



of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

6. It is obvious that the objection as raised does meet the above requirements. Firstly, because there is no law stated to have been infringed and secondly, the issues raised are clearly issues of facts that need to be ascertained. In other words, to determine whether or not the Applicants paid costs for the previous application, this court will have to look at some evidence. For these reasons, I find no merit in the preliminary objection and is hereby dismissed.

Whether the Applicants have made out a proper case for review.

7. It is a general principle of law that a court after passing judgment becomes functus officio and cannot revisit that judgment for reconsideration on merits. However, there are certain instances where the court may be called upon to review its decision. These instances are pegged under the following provisions-

Section 80 of the [Civil Procedure Act](#) cap 21 which provides that: -

“ 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 of the [Civil Procedure Rules](#), 2010 provides as follows:

“ 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.”

8. In *Republic -v- Public Procurement Administrative Review Board & 2 others* [2018] eKLR it was held: -

“The rules lay down the jurisdiction and scope of review limiting it 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 unreasonable delay.”

9. The Applicants in the present case rely on the second ground that there is an error apparent on the face of the record. It is pertinent therefore that I discuss the scope and meaning of an error apparent on the face of the record.

Matavo J. in *Republic -v- Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR explained as follows; -

“...

- 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...
- 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.”

10. The court further cited the case of *Nyamogo & Nyamogo -v- Kogo* [2001] EA 170 where it was held that; -

“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.”

11. To understand whether or not there was an error apparent on the face of the record in this case, I will have to go back to the facts raised and analysis of the court in the main suit. A perusal of the record shows that the Applicants raised the issue of subdivision of the plot MN/III/2960. Their contention in the main suit was that the Will was invalid on the basis that the deceased was of unsound mind at the time of making the Will, as she had no proper recollection of her assets; that she included a land that had



already been subdivided. In his analysis, the Learned Hon. Nyakundi J. observed that the Applicants failed to prove the deceased's mental incapacity and proceeded to uphold the Will's validity.

12. Another clear observation is that the learned judge failed to directly mention the issue of whether or not the plot MN/III/2960 was actually subdivided. He however stated in his disposition that; -

“That certificate of title comprised of and subdivided parcel of land transferred in the name Emmanuel Julius Nyota surveyed subdivision referred as 8103 shall be transmitted under the grant of probate to the rightful owner.”
13. My interpretation of the above disposition as read with the judgment as a whole, is that the learned judge did acknowledge that the said parcel had been subdivided and ordered transmission. From the evidence submitted by the applicants marked as ‘EJN3’ which is a letter by the County Council of Kilifi is the approval for the subdivision of Plot No. 2960/III/MN with the resultant subdivisions being plot Nos. 8103- 8104/MN/III. Further to it, is the Certificate of Title C.R 27400 being the transfer of subdivision No. 8103 (Original Number 2960/7) of Section III which was transferred by the deceased to Emmanuel Julius Nyota.
14. In my view, the ground relied upon by the Applicants fits the description as it was elaborated in the Nyamogo case [supra].
15. Given the above reasons, I do find that the land parcel number MN/III/8103 which was transferred on June 11, 2012 during the lifetime of the deceased does not form part of the estate of the deceased. Notably, is that the 1st respondent even having raised a P.O did not oppose the averments contained in the Notice of Motion in respect of this said plot. This to me is a mistake on the record and a regrettable error that deserves correction. Plot MN/111/8104 is the one which should be included in the will.
16. The upshot is that the notice of motion dated February 2, 2022 is to the said extent allowed. This being a succession matter, each party shall bear its own costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 11TH DAY OF MAY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Okesa holding brief for Mr Otieno for the Applicant.
2. Mr Ireri for the Respondent (absent).

