



**in re Estate of Richard Churko Stephen alias Richard Churko Guyo (Deceased)
(Succession Cause 8 of 2018) [2023] KEHC 19190 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
SUCCESSION CAUSE 8 OF 2018**

**JN NJAGI, J
JUNE 22, 2023**

**IN THE ESTATE OF RICHARD CHURKO STEPHEN ALIAS
RICHARD CHURKO GUYO (DECEASED)**

BETWEEN

**NANCY SHALLO CHURKO 1ST OBJECTOR
COLLINS GUYO STEPHEN 2ND OBJECTOR
GRACE WAMBUI NGUGI 3RD OBJECTOR**

AND

FATUMA GALAGALO GUYO PETITIONER

AND

**ZAKARIA GUYO GUMI INTERESTED PARTY
HUSSEIN SODA WALLABO INTERESTED PARTY
AMINA SODE INTERESTED PARTY**

RULING

1. The 2nd and 3rd interested parties/applicants have filed an application dated December 19, 2022 seeking for orders that:
 - (a) Spent
 - (b) Spent
 - (c) Spent



- (d) That the court be pleased to review its orders, issued on September 24, 2019 and set aside its orders entirely because there's a mistake apparent on the face of the record, to the effect that, the applicants' protest on record was not heard, mentioned and or dealt with, and neither did the court refer to the same in its judgment and or determination read on September 14, 2019, therefore the judgment is skewed and unfair to the applicants.
- (e) That the court be pleased to issue any other relief, in the interest of justice.
- (f) That the respondents do bear the costs of this application.
2. The application is based on grounds stated on the face of the application and supported by the affidavit of the 2nd interested party/applicant, Hussein Sode. The deponent says that he and the 3rd interested party are children of the late Sode Wallabo. That their late father died on the April 23, 2021. That before he died he had on the September 7, 2020 filed an affidavit of protest in this matter. That despite the protest being duly filed Justice Chitembwe in his judgment delivered on September 14, 2019 (the actual date is September 24, 2019) did not refer to the same in the judgment. That the applicants are thereby aggrieved by the judgment of Justice Chitembwe.
3. The applicants further said that the judgment of Justice Chitembwe suggested that further final orders would be made at a later stage. That the honourable judge did not order valuation of plot No 213 Marsabit when he ordered valuation of the other property. That this court in its orders of November 3, 2022 ordered valuation of plot No 213 Marsabit, an indication that the said plot will be sold. That the applicants are similarly aggrieved by the said order.
4. The applicants state that after the inclusion of the said property, the 2nd applicant and his father filed a case at the Environment and Land Court, No 9 of 2020, over the said plot which case is pending hearing at the said court.
5. The deponent further deposed that there is a mistake apparent on the face of the record in that the protest filed in court as stated above was not heard before the orders of September 24, 2019 and subsequent orders of November 3, 2022 were made.
6. The application was strongly opposed by the objectors in this succession cause *vide* the replying affidavit of Grace Wambui Ngugi. The deponent deposes that neither the objectors nor their advocates have ever been served with the affidavit of protest filed in court on September 7, 2020. That the applicants did not appear in court during the hearing of the succession cause. However, that their late father was a witness for the petitioner in the matter and testified as DW2 before Justice Chitembwe. That in his judgment Justice Chitembwe declared plot No 213 as part of the estate of the deceased in this matter. That the applicants have not sought for review of the judgment nor have they appealed against it.
7. The objectors further state that the affidavit of protest was intended to aid the petitioner in this matter in her application for stay of execution which application was dismissed by this court on October 14, 2021. That the orders made by this court on November 3, 2022 were founded on the findings of Hon Justice Chitembwe who heard and determined the protest filed by the objectors. That in the premises the applicants have no *locus standi* to seek for review or stay of execution in proceedings that they did not participate in. That the instant application is intended to assist the petitioner's quest for stay of execution and is therefore an abuse of the court process.
8. The application was canvassed by way of written submissions. The applicants through their advocates, Leonard K. Ondari & Co Advocates, submitted that this court being a probate court is bestowed with jurisdiction to determine any dispute in relation to the estate of a deceased person. Further that the



court has inherent powers to make orders for the ends of justice or to prevent abuse of the court process. Counsel for the applicants cited the *Halsbury's Laws of England*, 4th Ed vo 37 par 14 where it is stated that:

.....This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice.

9. Counsel submitted that the application was based on that there was an error on the face of the record. Counsel cited the case of *Muyodi v Industrial & Commercial Development Corporation & another* (2006) 1EA 243 where 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.

10. Counsel submitted that the applicants will suffer serious prejudice if the orders for review are not granted.
11. The advocates for the objectors, Kinyanjui & Njau Advocates submitted that one of the requirements to be met in an application for review is that the application be made without unreasonable delay. That the judgment sought to be reviewed was made on September 24, 2019 and the application in issue was filed on December 19, 2022, which is three years later. That there is no explanation for the delay of three years yet the father to the applicants who filed the protest was all along aware of the court's judgment.
12. It was submitted that the 2nd applicant, Hussein Sode, testified as DW4 in the proceedings having been called by the petitioner before Justice Chitembwe. Therefore, the applicants were aware of the judgment that was delivered on September 24, 2019. That the delay in filing the application for review is unreasonable.
13. Counsel submitted that the applicants did not seek to be enjoined in the proceedings and have never appeared in court since they filed the protest which means that they are not interested in prosecuting the protest.
14. It was submitted that the protest was filed almost a year later after the judgment was delivered on September 24, 2019. Therefore, that there was no basis upon which the court would have found that there was an error on the face of the record.
15. Counsel submitted that failure to refer to the affidavit of protest constitutes an error that can only be corrected in an appeal and not review.
16. It was submitted that the application is brought for the purpose of securing a stay of proceedings in favour of the Petitioner, Fatuma Galgalo, yet her application for stay of execution was dismissed by this



court. In addition, her application for stay of execution and proceedings pending appeal was dismissed by the Court of Appeal at Nyeri. Therefore, that the application is an abuse of the process of the court intended to secure stay of proceedings through the back door. That there is no case made out for review and the application should be dismissed with costs to the objectors.

Analysis and Determination

17. I have considered the grounds in support of the application dated December 19, 2019, the grounds in opposition thereto and the submissions by the respective advocates for the parties. The applicants are asking the court to review the orders of the court issued on September 24, 2019 by Justice Chitembwe on the ground that there is a mistake apparent on the face of the record in that when the orders were made there was a pending application of protest on record which was not heard, mentioned and or dealt with and neither did the court refer to the same in its judgment delivered on September 24, 2019. Therefore, that the judgment is skewed and unfair to the applicants.
18. The application for review is made pursuant to the provisions of order 45 rule 1 of the [Civil Procedure Rules, 2010](#). Which provides as follows:
 1. Application for review of decree or order
 - (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.
19. It is therefore the requirement of the law that an application for review should be made without unreasonable delay. The judgment sought to be reviewed herein was delivered on September 24, 2019. The instant application was filed on or about December 19, 2022 which was more than three years after the delivery of the judgment. There was therefore inordinate delay in filing the application. The applicants have not given any explanation for the delay. The requirement that an application for review be filed without unreasonable delay has thereby not been complied with.
20. The applicants fault Justice Chitembwe of not having considered the affidavit of protest in his judgment yet the protest was filed a year later after the honourable judge had delivered the judgment. How then could the Judge have considered the protest when the same had not been filed when the judgment was delivered?
21. The applicants contend that there was an apparent error on the face of the record when the judgment was delivered. An error apparent on the face of the record is one that is evident and should not require an elaborate argument to be established. It cannot be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Similarly, misconstruing a statute or provision of the law cannot be a ground of review – see [National Bank of Kenya Ltd v Ndungu Njau](#) (1997) eKLR.



22. The application herein is based on non-existent facts. There is no evident error on the face of the record that needs to be corrected by review. If at all the trial judge erred in his exposition of the law that should be a ground of appeal and not for review. I therefore do not find any substance in the submission that there is an error apparent on the face of the record.
23. This court was faulted for making some orders in regard to plot No 213, Marsabit. I do not think that there is any justification in this fault finding. This is because Justice Chitembwe found that the said plot forms part of the estate of the deceased in this succession cause. Justice Chitembwe is no longer available to continue with the case. It is for this court to make such orders as it deems appropriate so as to conclude the case.
24. There is no dispute that there is an appeal pending at the Court of Appeal at Nyeri over Justice Chitembwe's judgment. The 2nd applicant herein was a witness for the petitioner when the matter was heard before Justice Chitembwe. His late father who is later said to have filed a protest after the delivery of the judgment was also a witness in the case before Justice Chitembwe. The applicants must therefore have been aware of the delivery of the judgment and the appeal. There is no reason why they did not file the application for review within reasonable time after the delivery of the judgment. It is too late in the day for them to come to this court for review of the judgment. It is most likely, as submitted by the objectors, that the application is meant to assist the petitioner after she failed to get a stay of execution at the Court of Appeal. Since the said court declined to grant the petitioner a stay of execution and proceedings, it would be highly irregular for this court to issue stay orders in the matter. That would be tantamount to overturning the orders of the Court of Appeal through the back door. In my view the applicants should ventilate their grievance before the Court of Appeal and not before this court. The only pending thing before this court is for this court to issue final orders as ordered by Justice Chitembwe in his judgment.
25. In view of the foregoing, I do not find any merit in the application dated December 19, 2022. The same is dismissed with costs to the objectors.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 22ND JUNE 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Behailu HB for Mr. Ondari

for 2nd and 3rd Interested parties/Applicants

Mr. Kinyanjui for Objectors

Mr. Momanyi for Petitioner

