In re Estate of Eliud Macharia Muriu alias Eliud Macharia Mureu Gakau (Deceased) (Succession Cause 563 of 2008) [2023] KEHC 18509 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18509 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION CAUSE 563 OF 2008

FN MUCHEMI, J

JUNE 15, 2023

BETWEEN

MARY NYAGUTHII ..... PETITIONER

AND

KENNEDY KAGUNDA ..... 1ST PROTESTOR

GRACE THUGURI ..... 2ND PROTESTOR

ANNAH WAMAITHA ..... 3RD PROTESTOR

AND

LYDIA WANGUI MUNDIA ..... INTERESTED PARTY

TABITHA WAKONYU MUNDIA ..... INTERESTED PARTY

RULING

1. The application dated 2nd October 2021 seeks for orders of review and setting aside of the judgment delivered on 23rd August 2013 As well as the Certificate of Confirmation of grant.

2. The 1st respondent and the Interested Parties opposed the application through their Replying Affidavits sworn on 16th November 2021 and on 16th February 2023 respectively.

The Applicant's Case

3. The applicant states that judgment was delivered on 23rd August 2013 whereby the court distributed the estate and apportioned 6.5 acres of L.R No. Iriaini/Kaguyu/514 to the 1st respondent, after considering that the deceased had given the land to him during his lifetime. The applicant argues that the court on that basis, apportioned to the 1st respondent a larger portion of the estate compared to other beneficiaries. The applicant further argues that the court did not take into consideration that

other beneficiaries had equally benefited from L.R No. Iriaini/Kaguyu/97 measuring 4.5 acres. The applicant contends that the respondent concealed that information and had the court been made aware of the correct position, it would have arrived at a different determination. Consequently, the applicant prays that the judgment be reviewed to allow for a just distribution of the estate.

The 1st Respondent's Case

4. The 1st respondent states that the applicant fully participated in the proceedings and is estopped from reneging on the outcome of the matter. Moreover, the 1st respondent argues that the judgment dated 23/8/2013 is subject of an appeal and thus cannot be reviewed.

5. The 1st respondent further states that the court considered gifts given to beneficiaries during the lifetime of the deceased and that is why his brother's family was only given 2 acres out of L.R. No. Iriaini/Kaguyu/514. Furthermore, the 1st respondent states that the applicant is a confirmed heir of 1/3 of L.R No. Iriaini/Kaguyu/649 as per the deceased's wishes and thus she ought to be satisfied accordingly.

6. The 1st respondent states that he has extensively developed the entire L.R. No. Iriaini/Kaguyu/514 where he was awarded 6.5 acres and he argues that it is only fair and just that transmission be complete without further delay. The 1st respondent further avers that he has taken the initiative to execute the judgment of the court but the applicant and the petitioner have frustrated his efforts by filing frivolous applications.

The Interested Parties' Case

7. The interested parties argue that the application is an abuse of the court process as the applicant has filed an appeal in regard to the mode of distribution in the Court of Appeal. This application is seeking for related orders as the appeal. The interested parties state that the issues have been addressed by the Court of Appeal and thus cannot be re-opened before this court.

8. The applicant filed a Further Affidavit on 16th September 2022 where she states that there was no oral or written will left behind by the deceased. Furthermore, the applicant states that the court erred in relying on the affidavit sworn by Jospeh Mukua Konyera. No meeting was held on 24/8/1992 as alleged by the deponent in his affidavit. The applicant argues that the 1st respondent failed in proving that the deceased made any oral will. The purported oral will was not witnessed by a minimum of two competent witnesses and it was made 1 year and 3 months after the death of the deceased.

9. The applicant states that the mode of distribution adopted by the court resulted in a wide disparity as it awarded some of the beneficiaries who had obtained gifts *inter vivos* a large part of the deceased's estate while denying other beneficiaries a share. Particularly, the applicant states that the wives of Michael Mundia (deceased) were allocated 2.5 acres jointly in addition to the gift inter vivos whereas Juliana Wachuka was not allocated any additional acreage to the gift of 1.05 acres.

10. Parties disposed of the application by way of submissions.

The Applicant's Submissions

11. The applicant relies on the cases of *Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya* [2019] eKLR and *Muyodi v Industrial & Commercial Development Corporation & Another* [2006] 1 EA 243 and submits that the court made an error on the face of the record by finding that the deceased had expressed his wishes on how the property was to be sub divided. The applicant further argues that there was no cogent evidence produced by the respondents to show that the portions of land given

to them by the deceased were gifts. Furthermore, the applicant submits that the affidavit by Joseph Mokua Kanyora which the court relied on to establish the deceased's wishes was fabricated and was a scheme by the 1st respondent to delude the court.

12. The applicant argues that there was no evidence of the meeting of 24th August 1992 and no copy of minutes of the meeting was ever produced. Furthermore, the meeting is said to have taken place over 20 years ago and the said Joseph Mukua Kanyora who is not a beneficiary neither a family member purports to recall all what was said in details even to include the sizes of portions each beneficiary was to get.

13. The applicant further submitted that there is sufficient cause to warrant the court to exercise its discretion and review the judgment as the beneficiaries are dissatisfied by the outcome of the distribution. The applicant further relies on Article 27(3) of the *Constitution of Kenya* 2010 and the case of *In the Matter of the Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased)* [2017] eKLR and submits that the mode of the distribution proposed by the 1st respondent and adopted by the court was discriminative against the female beneficiaries.

The 1st Respondent's Submissions

14. The 1st respondent submits that the application is incompetent and an abuse of the court process as the petitioner filed an appeal in the Court of Appeal on 10th March 2016. The 1st respondent further submits that the applicant teamed up with the petitioner during the hearing of the cause as she did not file an independent protest but supported the petitioner's mode of distribution of the estate. As such, the 1st respondent argues that the applicant cannot be allowed to abandon the appeal and seek review of the judgment.

15. It is further submitted that the applicant has not provided any grounds to warrant an application for review. The fact that one of the children, Michael Mundia Macharia had been given L.R. No. Iriaini/Kaguyu/92 was duly considered and this informed the court in awarding his widows Tabitha Wakonyo and Lydia Wagui only 2.5 acres so as to bring his total benefit to 6.5 acres. Thus the 1st respondent argues that it is misleading to allege that the gifts given by the deceased during his lifetime were disregarded.

Whether the application is merited.

16. The 1st respondent and the interested parties challenged the jurisdiction of this court in hearing and determining this application arguing that the applicant seeks to have the mode of distribution altered through the present application yet the petitioner filed an appeal in the Court of Appeal. The record shows that the petitioner filed an application in the Court of Appeal been Civil Application No. 1 of 2017 in which she sought for an extension of time to file the notice of appeal and record of appeal out of time. The court rendered its decision on 23rd September 2022 and dismissed the application on the grounds that the applicant did not demonstrate sufficient reasons to warrant the orders sought. Thus, there was no appeal filed in the Court of Appeal as alleged by the respondent. As such, I am of the considered view that this court has jurisdiction to entertain this application.

17. Order 45 of the *Civil Procedure Code* sets out the parameters for an application for review as follows:-

    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 order made 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 which he applies for the review.

18. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been 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. Secondly, the applicant must demonstrate to the court that there has some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

19. The applicant has essentially grounded her application on the premise that there is an error on the face of the record. In the case of *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:-

> In Nyamogo & Nyamogo v Kogo [2001] EA 174 this Court said that an error 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 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 long drawn process of reasoning or on points where there may be 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.

20. Similarly in *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR the court stated:

> 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 provisions of law cannot be a ground for review.

21. The court went on to say:-

> The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation of the facts or the legal position. If an error is not self-evident and detection

> thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/ decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.

22. Evidently, from the above, it is clear that the error if any, ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. The applicant in the instant application attributes the error apparent on the face of the record to the fact that the deceased had not expressed his wishes on how the estate was to be distributed in his lifetime as the court was made to believe. Consequently, the court took into account the deceased's wishes when distributing the estate which resulted in placing the applicant at a disadvantage in getting a lesser share in the estate. The error on record as purported by the applicant does not fall within the ambit of an error which is apparent on the face of the record. The applicant argues that the court made an error by considering that the deceased had given to some of the beneficiaries parcels of land during his lifetime. The contentions raised by the applicant require a long drawn out process of arguments by the differing parties for the court to make a final decision. Therefore, these are contentions, which would require the court to re-appraise the entire evidence and come to a conclusion. If the orders sought were to be allowed, the mode of distribution would be altered. As such, the purported error on the face of the record does not exist.

23. The applicant has also raised the ground of 'for any other sufficient reason'. The phrase 'any other sufficient reason' was illuminated in the case of *Re Estate of Simoto Omwenje Isaka (Deceased)* [2020] eKLR when the court relied on the decision of *Republic vs Cabinet Secretary for Interior and Co-ordination of National Government ex parte Abullahi Said* [2019] eKLR:-

> A court can review a judgment for any other sufficient reason. In the case of Sadar Mohammed v Charan Singh & Another {1963} EA 557 it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter.) Mulla in the Code of Civil Procedure (writing on Order 47 Rule 1 of the Civil Procedure Code of India), the equivalent of our Order 45 Rule 1, states that the expression, 'any other sufficient reason' means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out.....would amount to an abuse of the liberty given to the tribunal under the Act to review its judgment.

I also find useful guidance in *Tokesi Mombili & Others vs Simion Litsanga* [2004] eKLR where the Court of Appeal held as follows:-

> In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

Where the application is based on sufficient reason it is for the court to exercise its discretion.

24. Considering the contents of the court record and relying on the foregoing decision, it is my considered view that the applicant has not demonstrated any error on the face of the record nor has she shown any discovery of new and important matters. Further, no sufficient reason to warrant a review of the judgement has been given herein.

25. It is noted that the judgement sought to be reviewed was delivered nine (9) years ago. The applicant has not explained the delay in filing this application. In my considered view, the delay of almost ten years is inordinate and should not be entertained in an application for review.

26. In my considered view, the applicant has failed to establish any of the requirements for review under Order 45 Rule 1 of the *Civil Procedure rules*.

27. I find no merit in this application dated 2nd October 2021 and it is accordingly dismissed.

28. Each party to meet its own costs

29. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 15 DAY OF JUNE, 2023.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 15TH DAY OF JUNE 2023.