



**In re Estate of Gathiongoi Muchunu (Deceased) (Succession Cause  
1105 of 2006) [2023] KEHC 24378 (KLR) (Family) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24378 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 1105 OF 2006  
MA ODERO, J  
OCTOBER 19, 2023**

**BETWEEN**

**SAMUEL NDUNGU KIHARA ..... APPLICANT**

**AND**

**MONICAH NJERI NDUNGU ..... 1<sup>ST</sup> RESPONDENT**

**TERESIA NJOKI PALOSOI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this Court is the Notice of Motion dated 17<sup>th</sup> June 2022 by which the Applicant Samuel Ndungu Kihara seeks the following orders:-
  - “1. Spent.
  2. That this Honourable Court be pleased to review and vacate the Ruling and orders granted on 26<sup>th</sup> April 2017 cancelling the Applicants Title deed for all that property known as LR Dagoretti/Rithimiti/T.33.
  3. That costs of this application be provided for.”
2. The application was premised upon Section 47 *law of Succession Act*, Rule 63 *Probate and Administration Rules*, Order 45 *Civil Procedure Rules* 2010, Sections 26, 53 and 80 *Land Registration Act* 2012, Article 50 of *the Constitution* of Kenya 2010 and all enabling provisions of law and was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent Monica Njeri Ndungu and Teresia Njoki Parlosoi who are the Administrators of the estate of the Deceased did not file any reply to the Application. However, one Micheal Gitau Ndungu who described himself as a ‘future administrator’ filed a Replying Affidavit dated 21<sup>st</sup> February 2023.



4. The application was canvassed by way of written submissions. The applicant filed the written submissions dated 21<sup>st</sup> February 2023, whilst the Administrators relied upon their written submissions dated 27<sup>th</sup> February 2023.

## **Background**

5. This Succession Cause relates to the estate of the late Gathiongoi Muchunu (hereinafter the Deceased') who died intestate on 4<sup>th</sup> June 1970. Following the demise of the Deceased Grant of letters of Administration Intestate were on 23<sup>rd</sup> November 2009 issued to Monica Njeri Ndungu, Teresia Njoki Parsoloi and Alice Waithira Gitau. The Grant was duly confirmed on 26<sup>th</sup> April 2017.
6. On 26<sup>th</sup> April 2017 Hon. Lady Justice Achode (as she then was) delivered a ruling in which she made *inter alia* the following orders:-
  - “ i) The grant confirmed on 28<sup>th</sup> September, 2015 is hereby rectified to remove the name of Alice Waithira Gitau.
  - ii) The property that is Dagoretti/Ruthimitu/T33 is hereby included in the list of the deceased assets. Any transfer with regard to this parcel of land after the death of the deceased herein is hereby revoked and cancelled.
  - iii) The two properties Dagoretti/Ruthimitu/42 and Dagoretti/Rithimiti/T.33 will devolve to the two houses in equal share and will be distributed in accordance with the proposal of Monica Njeri Ndungu.
  - iv) Jane Wanjiku Machuku shall together with the other children of Alice Njeri Ndungu partake in equal share due to their mother. [own emphasis]
7. By this order the court directed that the property known as Dagoretti/Rithimiti/T.33 (hereinafter ‘the suit land’) forms part of the estate of the Deceased. The court went on to ‘revoke’ and cancel the transfer of this suit land to any third party after the death of the Deceased.
8. The Applicant avers that by virtue of a sale Agreement dated 18<sup>th</sup> August 2009 which he entered into with one Alice Waithira Gitau who at the time was the Administrator of the estate, for the sale to himself of the suit land. That since the other Administrators were aware of that sale Agreement, the same was binding.
9. The Applicant goes on to state that Alice Waithira Gitau passed away on 8th December, 2015. That he later learnt that the 1<sup>st</sup> Respondent had placed an inhibition on the suit land in 2019. The 1<sup>st</sup> Respondent later filed the application dated 25<sup>th</sup> February 2016 alleging that “Alice” had illegally sold and transferred the suit land to the Applicant. The court ruled on this application on 26<sup>th</sup> April 2017 restoring the suit land to the estate of the Deceased.
10. Being aggrieved by the ruling of the High Court the Applicant filed this application seeking review of that particular order.
11. In opposing the application the Respondents aver that he has always dealt with this matter on behalf of his mother who is ailing. The Respondent states that Alice Waithira entered into the sale Agreement dated 18<sup>th</sup> August 2009 in her personal capacity and not as an Administrator of the estate. That the said “Alice” did not have the authority/consent of the other beneficiaries to sell the land in question.



12. The Respondents state that in the circumstances “Alice” had no capacity to sell and the transfer of the suit land to Samuel Ndung’u Kihara is illegal and null and void.

### **Analysis and Determination**

13. I have carefully considered the application before this court, the Reply filed thereto as well as the written submissions filed by both parties.

14. The Applicant seeks a review of the ruling delivered on 26<sup>th</sup> April 2017. Review of orders made in a Succession Matter are governed by Order 45 of the Civil Procedure Rules 2010. In the case of Jobro Mundia Njoroge & 9 Others – vs- Cecilia Muthoni Njoroge & Another [2016] e KLR the court stated as follows:-

“As stated above the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by Rule 63 of the probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules.”

15. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-

“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 review of judgement to the court which passed the decree or made order without unreasonable delay.”

16. In the case of Republic v Advocates Disciplinary Tribunal Ex-Parte Apollo Mboya (2019) eKLR, Mativo J. held that:-

“A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review 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.”

17. The first ground upon which a judgement /ruling may be reviewed is the discovery of new and important evidence. The Applicant has not alleged that he has discovered new or important evidence which was not within his knowledge at the time when the application dated 25<sup>th</sup> February 2016 was being canvassed.
18. The second ground for review is an error apparent on the face of the record. Such an error must be obvious from the face of the record. It must not be matter of argument, conjective, allegation or implied.
19. The Applicant has not demonstrated to the satisfaction of this court any such error apparent on the face of the record.
20. The Applicant claims that he is seeking a review on grounds that he was not granted an opportunity to be heard before the court delivered its ruling.
21. Firstly, I note that the application was filed in June 2022 almost five (5) years after the ruling in question was delivered.
22. With Regard to delay in seeking review, the court, in Stephen Gathua Kimani vs. Nancy Wanjira Waruigi t/a Providene Auctioneers stated:-

“One thing is clear in this application. The delay of one year has not been explained. Perhaps, it’s important to recall the last sentence of Order 45 Rule 1 (1) (b) which reads “... may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.” The logical question that follows is, was the present application made without unreasonable delay” Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant one year to file an application in court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay such a long delay must be sufficiently explained.” [own emphasis]

23. There has been no explanation from the Applicant as to why he took this long to file an application for review. In my opinion the delay in filing this application is inordinate.
24. Furthermore, this application for review seeks to reinstate to the Applicant title which the High Court already found to have been illegally obtained/acquired. In paragraph 21 of the Ruling dated 26<sup>th</sup> April 2017 the Hon. Judge stated as follows:-

“The property known as Dagoretti/Rithimiti/T.33 is shown by Annexure “MNN 2” belong to the deceased as at 22<sup>nd</sup> August 2003. The Deceased died on 4<sup>th</sup> June 1970 and to date the Grant of letters of Administration have not been confirmed. If indeed Alice sold it then that was an illegal transaction for which the purchaser has recourse against the estate of Alice and not the estate of Gathiongoi Muchunu for reasons that Alice had no authority to engage in an activity whose effect was to disinherit the other beneficiaries.” [own emphasis]

25. The above is a finding of fact made by a court of competent jurisdiction. The only remedy available to the Applicant is to appeal against that finding not to seek a review.



26. Finally, if the Applicant still believes that he has a valid claim over the suit land then the appropriate forum for him to seek redress is the Environment and Land Court (ELC) which by virtue of Article 162 (2) (b) *Constitution of Kenya* 2010 is the only court empowered to decide on issues of ownership, use, and occupation of land.
27. In conclusion I find no merit in the present application. The Notice of Motion dated 17<sup>th</sup> June 2022 is hereby dismissed in its entirety. Costs will be met by the Applicant.

**DATED IN NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

.....

**MAUREEN A. ODERO**

**JUDGE**

